1995 CarswellOnt 3916
Ontario Court of Appeal

R. v. S. (D.J.)

1995 CarswellOnt 3916, [1995] O.J. No. 847, 26 W.C.B. (2d) 578

Re: Her Majesty the Queen, (Respondent [On Conviction] (Applicant/Appellant) [On Disposition]) v. D.J.S. (Y.O.A.), (Appellant [On Conviction] (Respondent) [On Disposition])

Doherty J.A., Galligan J.A., Morden A.C.J.O.

Heard: March 9, 1995
Judgment: March 9, 1995
Docket: CA C16077, C16097

Counsel: *David Midanik*, for Appellant.
Elizabeth Rennie, for Respondent.

Subject: Criminal; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Criminal law --- Wilful and forbidden acts in respect of certain property — Arson — General offence — Miscellaneous issues

Per Curiam:

1 The appellant, a young person as defined in the *Young Offenders Act*, R.S.C. 1985, c. Y.1, was found guilty of arson as defined in s. 433(a) of the *Criminal Code*. He appeals from the finding of guilt and the Crown seeks leave to appeal the disposition imposed at trial. There are two grounds of appeal advanced by the appellant. It is submitted that:

- The verdict is unreasonable within the meaning of s. 686(1)(a)(i) of the *Criminal Code*.

- The appellant's right to make full answer and defence was infringed by the investigator's failure to preserve certain material found at the scene of the fire.

2 The appellant was fifteen years old at the time of the fire. He and the deceased lived in the same apartment building. The deceased was 58 years of age and lived alone in an apartment on the 10th floor. He was an alcoholic and by all indications his life was not a happy one. He was often depressed and spoke of suicide on the very day of the fire. The appellant was with the deceased in his apartment on the evening of the fire. It was not unusual for the appellant to be in the deceased's apartment. The deceased was drunk that evening.

3 The appellant had known the deceased for some time. He ran errands for the deceased and often kept him company. The deceased could be argumentative, particularly when he had been drinking, and from time to time had argued with many people in the apartment building, including the appellant. About two weeks before the fire, the appellant and the deceased argued. In the course of the argument the appellant said words to the effect "I am going to get that old bastard". After this argument the appellant and the deceased appeared to resume their previous friendly relationship. The person who heard the argument did

not regard the threat as serious. The Crown relied on this threat as evidence of an ongoing animus toward the deceased which the Crown contended supplied the motive for the appellant starting the fire. The Crown also suggested that the appellant may have started the fire as a prank. There was some evidence that the appellant had played tricks on the deceased in the past such as ordering pizzas that the deceased had not wanted. None of these prior incidents, however, involved any risk to the person or to property.

4 The fire started in a chair located in the living room of the deceased's apartment. The deceased was found alive, but unconscious, lying on the floor in his bedroom. The deceased died several days later. There was evidence that the deceased suffered medical complications not related to the fire, and the trial judge was not satisfied that his death was caused by smoke inhalation. Subsequent tests indicated that the deceased had a blood alcohol level of .376 at the time he was taken from the apartment.

5 Expert evidence led by the Crown indicated that the fire was a fast burning one and was started by the application of an open flame to the seat of the chair. Tests showed that a lit match dropped on the seat could have caused the fire. A lighter could have also been used to start the fire. A functioning lighter was found at the scene. There was no evidence that any matches were found on the scene although the clothing of the deceased was not searched. The Crown expert testified that if a match had been used to start the fire it would have been consumed by the fire. The deceased was a heavy smoker and had been supplied with cigarettes by a neighbour very shortly before the fire.

6 The appellant left the deceased's apartment between 10:30 p.m. and 10:45 p.m. and returned to the apartment with a friend at about 11:10 p.m. or 11:15 p.m. To the extent that the expert evidence could assist in determining when the fire started, it suggested that the fire was started at about 11:00 p.m. On the Crown expert's evidence it was not likely that the fire was started before 10:45 p.m. or after 11:10 p.m.

7 As indicated above, the appellant left the deceased's apartment between 10:30 and 10:45 p.m. He and a friend went to a donut shop, purchased some food for a security guard at the apartment, and returned to the apartment. While at the donut shop, the appellant tried to call the deceased but received no answer. When the appellant and his friend arrived back at the apartment building the appellant told his friend that he wanted to check on the deceased as he was concerned about the deceased who had been drinking and taking pills earlier in the evening. The appellant and his friend took the elevator to the 10th floor. When they arrived there they saw a great deal of smoke. They did not get off the elevator but, instead, went to the apartment of an acquaintance on the 5th floor and called 911. The appellant and his friend then went immediately to the ground floor, alerted the security guard, and returned to the 10th floor. The appellant pulled the fire alarm. Fire personnel arrived about 11:27 p.m. and pulled the deceased from his apartment.

8 Two factual issues were raised by the evidence. Was the fire deliberately set, and if it was deliberately set, did the appellant set it? In finding the appellant guilty, the trial judge determined that the Crown had proved beyond a reasonable doubt that the fire was deliberately set and that the appellant had set the fire.

9 We recognize our limited jurisdiction in considering the reasonableness of these two conclusions. We are satisfied, however, on a consideration of the totality of the evidence, that these findings cannot be sustained. The trial judge accepted the expert opinion evidence that the fire was deliberately set. In our view, that opinion had no basis in the evidence. The experiments performed by the experts certainly supported the conclusion that the fire was started by an open flame as opposed to, for example, by a cigarette butt. The evidence did not, however, support the further conclusion that an open flame was deliberately applied to the chair. According to the Crown expert, the open flame could have come from a lit match dropped on the seat of the chair or from a lighter. Nothing in the evidence provided any basis for a reasonable inference that the fire was started by a lighter and not by a match. On the expert evidence, either was equally possible. If the fire was started with a lit match, then it was very likely that the deceased, a heavy smoker, had, in his drunken state, dropped a match on to the chair after lighting the cigarette and thereby started the fire.

10 In our view, the expert evidence considered alone or in combination with the other evidence could not reasonably support the conclusion that the fire was started deliberately as opposed to accidentally by the deceased. Consequently, no reasonable trier of fact could have concluded that the fire was deliberately set.

11 Even if the finding that the fire was deliberately set was reasonable, we regard the further finding that the appellant set the fire as unreasonable. The evidence of motive was so weak as to be next to non-existent. The evidence of opportunity was far from evidence of exclusive opportunity. The Crown expert evidence tended to support the contention that the fire was started when the appellant was not in the building. The evidence of the appellant's conduct when he returned to the apartment does not permit a reasonable adverse inference against the appellant. His conduct was consistent with that of a fifteen year old boy who had discovered a fire on the 10th floor of his apartment building. The combined effect of the evidence of motive, opportunity, and the appellant's conduct does not provide a basis for reasonable inference that the appellant set the fire.

12 In our view, the verdict is unreasonable within the meaning of s. 686(1)(a)(i) of the *Criminal Code*. The appeal must be allowed, the finding of guilt set aside, and the charge dismissed.

13 In view of our conclusion on the first ground of appeal, we do not reach the second issue. The Crown's application for leave to appeal the disposition imposed at trial becomes moot and is dismissed.

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