R. v. Dracea

Collection: Decisions of the Court of Appeal
Date: 2024-05-30
Neutral citation: 2024 ONCA 440
Docket numbers: C67626
Judges: Paciocco, David M.; Thorburn, Julie; Monahan, Patrick J.
Subject: Criminal

WARNING

The President of the panel hearing the appeal directs that the following should be attached to this file:

The publication ban issued by Justice Brian O'Marra on March 12, 2018, pursuant to s. 631(6) of the *Criminal Code*, shall continue. The order prohibits publication or disclosure of the panel lists, the list of jurors selected, or any other information that might tend to identify any of the selected or prospective jurors.

The publication ban issued by Justice Brian O'Marra on March 12, 2018, pursuant to s. 486.5(2) of the *Criminal Code*, shall continue. The order prohibits the publication of any image or description of the police agent that may be filed in evidence or produced during his testimony.

The publication ban and non-disclosure order issued by Justice Brian O'Marra on April 9, 2018, pursuant to ss. 11, 11.5(4) and 11.5(5) of the *Witness Protection Program Act* and s. 486.5(2) of the *Criminal Code*, shall continue. The order prohibits dissemination and communication of the new name and place of residence of the police agent to anyone other than the parties to the litigation except for the purpose of making full answer and defence. It also prevents the publication of the police agent's new name, or any information that could tend to identify the location of his place of residence or his status as a current or former participant in the witness protection program.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Dracea, 2024 ONCA 440
DATE: 20240530

DOCKET: C67626

Paciocco, Thorburn and Monahan JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Cosmin Dracea

Appellant

R. Craig Bottomley and Janelle Belton, for the appellant

Lisa Mathews and Aaron Shachter, for the respondent

Heard: May 21, 2024

On appeal from the convictions entered by Justice Brian P. O'Marra of the Superior Court of Justice, sitting with a jury, on April 27, 2018.

REASONS FOR DECISION

OVERVIEW

[1] The appellant, Cosmin Dracea, was jointly tried by jury with Giuseppe Ursino on narcotics related charges.

[2] Mr. Dracea pled guilty to trafficking cocaine between December 3, 2014, and December 5, 2014, and to a related charge of possessing the proceeds of that crime and was found guilty of those offences. He was acquitted of engaging in that trafficking offence in association with a criminal organization, to wit, the "'Ndrangheta". Mr. Dracea was convicted after trial of conspiring to import narcotics between May 7, 2014, and May 23, 2015, and of doing so in association with that same criminal organization, the 'Ndrangheta.

[3] His co-accused, Mr. Ursino, an alleged “boss” in the ‘Ndrangheta, was convicted of all five of the offences he was charged with, arising out of the same transactions.[1]

[4] During the trial, the Crown sought to invoke the co-conspirator’s exception to the hearsay rule to use intercepted hearsay statements made by Mr. Ursino and the unindicted co-conspirator, Richard Avanes, as evidence of Mr. Dracea’s guilt. The trial judge therefore had to direct the jury on the analytical framework for the co-conspirator’s exception set out in *R. v. Carter*, [1982] 1 S.C.R. 938.

[5] Mr. Dracea argues that the trial judge committed two distinct, prejudicial errors in directing the jury on the *Carter* analysis, requiring a new trial. He also argues that the verdict against him of conspiring to import narcotics in association with the ‘Ndrangheta is unreasonable and must be set aside because it is inconsistent with his acquittal of committing the trafficking offence in association with the ‘Ndrangheta.

[6] At the end or the oral hearing, we dismissed Mr. Dracea’s appeal for reasons to follow. These are our reasons.

ANALYSIS

[7] It is necessary to begin by describing the material features of the *Carter* analysis. In the circumstances of this case, in order to use the statements of alleged co-conspirators as hearsay evidence against Mr. Dracea, step one of that analysis would require the Crown to satisfy jurors beyond a reasonable doubt, on all of the evidence, that there was indeed a conspiracy between at least two people to import cocaine: *Carter*, at p. 947. Even with that accomplished, before statements made by alleged co-conspirators could be used against Mr. Dracea, step two would require the Crown to go on and satisfy jurors on the balance of probabilities, based solely on the evidence of Mr. Dracea’s own acts and words, that he was a member of that conspiracy: *Carter*, at p. 947. Only if the Crown satisfied steps one and two could jurors then go on, at step three, to consider statements made in furtherance of the conspiracy by other probable members of that conspiracy in deciding whether the Crown had

proved beyond a reasonable doubt that Mr. Dracea was a member of that conspiracy: *Carter*, at p. 947.

[8] Mr. Dracea does not take issue with the step one direction. In his first ground of appeal, he argues that by attempting to explain the application of the *Carter* analysis to both Mr. Dracea and Mr. Ursino simultaneously, the trial judge gave a charge that was too confusing to sufficiently instruct jurors that, at step two of the *Carter* analysis, they are to consider only Mr. Dracea's own acts and words in deciding whether he was probably a member of the conspiracy. Of most concern to Mr. Dracea is the trial judge's practice of using the phrase "either or both" to alert jurors to the possibility that they may come to identical or different decisions on the application of the *Carter* analysis steps to Mr. Dracea and Mr. Ursino. Mr. Dracea argues that this practice made the already challenging *Carter* direction too confusing to understand, and created the risk that jurors would conclude that they could use the acts or statements of "either or both" of Mr. Dracea and Mr. Ursino in deciding whether Mr. Dracea was probably a member of the conspiracy.

[9] We accept that this is a potentially confusing area of the law and that the charge might have been easier to follow if the trial judge had addressed the application of the law to each accused in turn instead of together. But perfection is not the standard. Functionality is. A charge will be sufficient if, when read in its entirety in the context of the evidence and the trial as a whole, jurors would, in all probability, understand the substance of the direction: *R. v. Goforth*, 2022 SCC 25, 470 D.L.R. (4th) 617, at paras. 20-22. We are persuaded that, in all probability, jurors receiving this charge would have had a functional understanding of their step two obligation and would not have mistakenly believed that the evidence of both co-accused men could be used in deciding whether each of the co-accused was more probably than not involved in the conspiracy.

[10] It is important to appreciate that the trial judge used the phrase "either or both" consistently and repeatedly throughout his charge when describing the different analytical outcomes jurors could reach relating to the two co-accused men on a range of issues. He did

so repeatedly, for example, when describing the range of outcomes that could arise after applying the Crown's burden of proving its case beyond a reasonable doubt. When the trial judge used the "either or both" phrase he left no doubt that those variable possibilities were to be resolved after considering the evidence applicable to each of the accused individually. His pattern of using this phrase in this way was well-established by the time he got to the step two issues. This pattern strongly suggests that when he used the phrase "either or both" in the step two context, jurors would have understood that he was speaking to the range of outcomes they could arrive at with respect to the two co-accused, and not inviting them to use the acts of "either or both" of the co-accused in deciding whether each of them were more probably than not members of the conspiracy.

[11] The heading that introduced the directions on step two of the *Carter* charge would have reinforced this understanding: "Was either or both accused a participant in the conspiracy?" It employs the, by then, familiar phrase "either or both" in referring to individuated determinations.

[12] This section then opens with an admonition to consider the proof that either or both accused was a participant in the conspiracy and not to assume the participation of "any particular person" based on proof that a conspiracy exists. It includes a firm direction that "no accused may be convicted … unless you are satisfied beyond a reasonable doubt that either or both was a participant", again reinforcing the individuated attention that proper analysis requires when considering whether "either or both" men are guilty.

[13] In the passages that follow relating more directly to the step two *Carter* analysis there are repeated directions to jurors to look "only" at "his own" words and actions to decide whether "either or both" of the accused was probably a participant in the conspiracy. The step two direction was followed by this passage: "If you conclude … from the evidence of his own words and conduct, that either or both accused was probably (more likely than not) a participant in the conspiracy to import cocaine, you must go on to [step three of the *Carter* analysis]". There is no possible ambiguity in that direction.

[14] In this context, it is most unlikely that any jurors would have concluded that they should proceed by examining the words and acts of one accused, in deciding whether the other accused was probably a member of the conspiracy. If this kind of cross-pollinating reasoning were permissible, why would the trial judge be explicit in speaking about the use of evidence of each accused's "own" words or conduct? Why would he not speak about using "their" words and conduct? Ultimately, we must proceed on the basis that jurors would give rational meaning to a jury charge. They would not have given the words the unnatural meaning Mr. Dracea apprehends.

[15] It is also noteworthy that jurors were given a copy of the charge, and therefore had the opportunity to consider the instructions carefully, and at a pace that was comfortable to them. They were entirely equipped to sort out any ambiguity the language used might have initially suggested, an ambiguity that would disappear on brief reflection. Finally, Mr. Dracea's trial counsel, who had access to draft charges, never suggested that the charge was confusing, and never suggested clarifications.

[16] For these reasons, we did not accept this ground of appeal.

[17] Mr. Dracea's second ground of appeal arising from the charge relates to the step three analysis. Even where steps one and two have been satisfied, a hearsay statement is not admissible at step three of the *Carter* analysis (as evidence proving the guilt of the accused beyond a reasonable doubt) unless that hearsay statement has been made in furtherance of the conspiracy by a probable member of the conspiracy. Many of the intercepted statements that were played before the jury were made by a paid police agent who had no intention of actually joining the conspiracy, and therefore was not a member of the conspiracy. For this reason, his statements could not properly be admitted against Mr. Dracea as co- conspirator statements. Mr. Dracea argues that in these circumstances the trial judge was required to direct jurors when addressing step three of the co- conspirator exception to the hearsay rule that they could not use this man's hearsay statements as evidence of Mr. Dracea's guilt, but he failed to give this direction.

[18] We did not give effect to this ground of appeal, either. Earlier in his charge, the trial judge directed jurors in the clearest of terms that, "[a]s a matter of law", the paid police agent "cannot be a party to [a conspiracy]". Although the trial judge gave this charge when instructing jurors about the step one inquiry into whether the Crown has proved a conspiracy between at least two people, the message was clear and simple: "do not treat this man as a party to the conspiracy". When the trial judge later instructed jurors that if they were satisfied as to step one and step two, they could consider the acts and words of "others who were probably participants of the conspiracy', they would have understood that the trial judge was not referring to the acts and words of the paid police agent, given that he was not a party to the conspiracy. It was not an error for the trial judge to fail to repeat a point he had already made with clarity.

[19] Finally, Mr. Dracea argues that the verdict against him of conspiring to import narcotics in association with the 'Ndrangheta is an unreasonable verdict because it is inconsistent with his acquittal of committing the trafficking offence in association with the 'Ndrangheta, given that those verdicts cannot be reconciled on any rational or logical basis. We disagree. Although both alleged offences included the same known actors and the trafficking incident occurred during the period of the alleged conspiracy, both the allegations and the evidence were distinct. Evidence at trial supported the theory that Mr. Dracea engaged in a discrete $60,000, 1- kilogram trafficking transaction for his own purpose, and that the $1,000 payment Mr. Ursino, a 'Ndrangheta member, received from the purchaser was in return for linking Mr. Dracea to the purchaser. In contrast, the conspiracy case against Mr. Dracea involved an alleged joint venture between Mr. Dracea and Mr. Ursino and others to use the 'Ndrangheta network to import narcotics, while sharing the proceeds. The disparate verdicts are entirely intelligible.

[20] Nor are these distinct verdicts made unintelligible by the fact that Mr. Ursino was convicted of being a party to the $60,000, 1-kilogram trafficking transaction in association with the 'Ndrangheta. Unlike Mr. Dracea, there was evidence that Mr. Ursino was a member of

‘Ndrangheta, leaving it open to the jury to find that, unlike Mr. Dracea, who was free to traffic for his own purpose, Mr. Ursino carried out his criminal activity in association with the ‘Ndrangheta.

[21] We therefore dismissed the appeal.

“David M. Paciocco J.A.”

“Thorburn J.A.”

“P.J. Monahan J.A.”

---

[1] The criminal proceeds that Mr. Ursino was convicted of possessing arising from the drug trafficking transaction consisted of a smaller sum and different funds than Mr. Dracea was convicted of possessing.