IN THE COURT OF APPEAL [1994] QCA 074

SUPREME COURT OF QUEENSLAND

Brisbane

[R. v. Webb]

C.A. No. 222 of 1993

T H E Q U E E N

v.

WILLIAM PHILLIPS WEBB Appellant

DAVIES J.A.
PINCUS J.A.
LEE J.

Judgment delivered 29/03/1994

REASONS FOR JUDGMENT - THE COURT

ANSWER THE QUESTIONS IN THE CASE STATED AS FOLLOWS:

"1.Can an indictment alleging an offence, against section 539 of the Criminal Code, of attempting to procure another to wilfully and unlawfully damage property also allege that such damage was to be done in circumstances which would constitute a circumstance of aggravation specified in section 469 of the Criminal Code?

Yes.

2.If so, is an offender convicted of an offence under section 539 of the Criminal Code, of attempting to procure another to wilfully and unlawfully damage a vessel with the circumstance that the damage was to be caused by the explosion of an explosive substance when several persons would be in the said vessel, liable to imprisonment for seven years?"

Yes.

CATCHWORDS:CRIMINAL LAW - Attempt to procure commission of criminal acts - whether indictment can allege attempt to procure another to commit an offence with circumstances of aggravation - whether offender liable to punishment for attempting to procure commission of aggravated form of the offence.

Criminal Code, ss. 469, 539

Counsel:Mr S. Herbert Q.C. with him Mr J. Wagner for the Appellant (appearing amici curiae)
Mr D. Bullock for the Respondent

Solicitors:Robertson O'Gorman for the Appellant
Director of Prosecutions for the Respondent

Date(s) of Hearing:23 July 1993

REASONS FOR JUDGMENT - THE COURT

Judgment delivered 29/03/1994

The Case Stated

At the same time as the appeal against conviction was heard, this Court also heard argument on a case stated to this Court by the learned trial judge under s. 668B Criminal Code. The case stated arose out of the proceedings against the appellant below, but comes to this Court by way of a separate reference. The circumstances leading to the trial judge's stating the case were as follows. At the close of the Crown case at trial, defence counsel submitted that the circumstances of aggravation alleged in the indictment were not properly charged. The indictment had originally alleged:

> "That on the 21st day of August 1991 at Brisbane in the State of Queensland you attempted to procure one Peter Charles Scanlan to wilfully and unlawfully damage a vessel namely the 'Queen of the Isles' in the waters between Cairns and Thursday Island in Queensland or outside of Queensland which act if it had been done by the said Peter Charles Scanlan would have been an offence under the laws of Queensland
>
> AND THAT you intended thereby to destroy or render useless the said vessel
>
> AND FURTHER THAT the said damage was to be caused by the explosion of an explosive substance when several persons would be in the said vessel"

After hearing argument on the question, the learned trial judge ruled that:

> "... the act which is referred to in section 539 is the act of malicious damage, that section 539 itself creates no circumstance of aggravation and since section 539 is the offence created section, they may not be charged."

The Crown prosecutor was given leave to amend the indictment accordingly by deleting the two circumstances of aggravation alleged. The learned trial judge then stated a case to this Court in the following terms:

"1.Can an indictment alleging an offence, against section 539 of the Criminal Code, of attempting to procure another to wilfully and unlawfully damage property also allege that such damage was to be done in circumstances which would constitute a circumstance of aggravation specified in section 469 of the Criminal Code?

2.If so, is an offender convicted of an offence under section 539 of the Criminal Code, of attempting to procure another to wilfully and unlawfully damage a vessel with the circumstance that the damage was to be caused by the explosion of an explosive substance when several persons would be in the said vessel, liable to imprisonment for seven years?"

There appear to be no cases, reported or unreported, which have considered the construction of s. 539 or either of its Australian analogues, s. 556 Criminal Code (W.A.) and s. 280 Criminal Code (N.T.). Nor does the original Draft Queensland Criminal Code assist in this regard.

Sections 469 and 539 of the Criminal Code relevantly provide:

469. Malicious injuries in general. Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence which, unless otherwise stated, is a misdemeanour, and he is liable, if no other punishment is provided, to imprisonment for two years ...

PUNISHMENT IN SPECIAL CASES

I. Destroying or damaging an inhabited house or a vessel or an aircraft with explosives. If the property in question is a ... vessel ... and the injury is caused by the explosion of any explosive substance, and if -

(a) Any person is in the ... vessel ...;

...

the offender is guilty of a crime, and is liable to imprisonment for life.

...

VII. Other things of special value.

...

(2) If the property in question, being a vessel ... is damaged, and the damage is done with intent to destroy it or render it useless;

...

the offender is guilty of a crime, and is liable to imprisonment for seven years."

539. Attempts to procure commission of criminal acts.

(1) Any person who attempts to procure another -

(a) to do an act or make an omission in Queensland;

...

being an act or omission of such a nature that, if the act were done or the omission made, an offence would thereby be committed -

(c) in the case referred to in provision (a), under the laws of Queensland;

...

whether by himself or by the other person, is guilty of an offence of the same kind and is liable to the same punishment as if he had himself attempted to do the same act or make the same omission in Queensland ... "

Before this Court, both Mr Bullock, who appeared for the Crown, and Mr Herbert QC, who appeared amici curiae with Mr Wagner and addressed argument on the case stated, agreed that the Criminal Code creates more than one kind of aggravated offence. The aggravated form of an offence may itself be a specific offence (e.g., breaking entering and stealing is a specific offence under s. 421 but is an aggravated form of stealing: R v. Tognolini [1983] Qd.R. 99). In some cases, however, the presence of a circumstance of aggravation may simply attract punishment additional to that prescribed for the bare offence. It is unnecessary to consider the question, referred to in argument before us, whether an offence of the latter kind is a different offence from one without a circumstance of

aggravation, as to which see Ross v. R (1979) 141 C.L.R. 431 at 433, 438-9; R v. De Simoni (1981) 147 C.L.R. 383 at 389, 395, 396. Here, the aggravated offence is one of a different kind from that without the circumstance of aggravation; the former is a crime and the latter a misdemeanour.

Mr Herbert appeared to accept that where the aggravated form of an offence is itself a specific offence, a person could be charged under s. 539 with attempting to procure another to commit such an offence. However, he argued that where the circumstance of aggravation did not alter the statutory description of the offence, that circumstance of aggravation cannot be charged under s. 539. Mr Herbert based this argument on two propositions:

(1) On the authority of De Simoni (supra), before such a circumstance of aggravation can be charged it must have actually occurred; it is not sufficient that it may hypothetically have occurred or that the accused intended it to occur.

(2) Because the offence of attempting to procure an offence is created by s. 539 of the Criminal Code, and s. 539 makes no provision for any aggravating circumstance to be charged, such a circumstance of aggravation cannot be alleged in a charge brought under that section.

It is convenient to deal with the validity of each of these propositions separately.

(1) Does the hypothetical character of the circumstances of aggravation preclude their incorporation in a charge under s. 539?

In De Simoni, the appellant had been convicted of robbery with actual violence under s. 391 of the Criminal Code (W.A.). The sentencing judge found that in the course of the robbery he had wounded the complainant. However, this fact was not, although it could have been, charged as a circumstance of aggravation which would have attracted a greater maximum punishment under s. 393. By majority, the High Court held that, in imposing sentence, the sentencing judge was not entitled to take the wounding into account. The ratio of that case is that a judge, in sentencing an offender, cannot rely on a circumstance of aggravation which could have been, but was not, charged in the indictment. That decision lends no support to the argument advanced by Mr Herbert that an indictment alleging an offence under s. 539 cannot allege circumstances of aggravation of the offence constituted by the act (or omission) referred to in that section because those circumstances are hypothetical.

Section 539 necessarily contemplates that the act in question, although intended, will not have been done or even attempted. Where it can be proven beyond reasonable doubt that the defendant not only attempted to procure the act to be done, but also attempted to procure the act to be done in a certain manner or in certain circumstances, those circumstances will be no more hypothetical in character than the doing of the act itself. In such a case therefore, the hypothetical nature of those circumstances of aggravation cannot be a valid reason for

precluding their incorporation as part of a charge under s. 539.

This conclusion is supported by the fact that, as Mr Herbert apparently conceded, a person could be charged under s. 539 with attempting to procure another to do an act which, if done, would constitute a specific offence which is itself an aggravated version of another offence. For example, a person could be charged under s. 539 with attempting to procure another to break, enter and steal from premises, because this would, if done, constitute a specific offence under s. 421, even though it would also be an aggravated form of stealing. There would appear to be no valid reason why a person could be charged under s. 539 with attempting to procure an aggravated offence which itself is a specific offence, but could not be charged with attempting to procure an offence with a circumstance of aggravation which attracts additional punishment.

For these reasons, the first suggested proposition is without foundation.

(2) Does the absence from s. 539 of any statement of aggravating circumstances preclude circumstances of aggravation from being alleged in a charge under that section?

It is true that the offence created by s. 539 (of attempting to procure) cannot itself be committed with a circumstance of aggravation. However, where A attempts to procure B to do an act in such circumstances that, if the act were done in those circumstances, an offence would be committed (either by A or B)

with a circumstance of aggravation, a further question remains: does s. 539 render A guilty of and punishable for the aggravated form of that offence, or merely the offence without the circumstance of aggravation? If the former, it would seem that A could be charged under s. 539 with attempting to procure B to do an act in such circumstances that, if the act had been done, an aggravated offence would have been committed. A would then be deemed to be guilty of attempting to commit the aggravated offence, and punishable accordingly.

In ascertaining the meaning of s. 539, it is helpful to consider the Code provisions concerning procuring offences (s. 7) and actual attempts to commit offences (ss. 4, 535, 536 and 537).

The offence of procuring another to commit an offence is created by s. 7 of the Code. That section relevantly provides:

> "**7. Principal offenders.** When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say -
>
> ...
>
> (d) Any person who counsels or procures any other person to commit the offence.
>
> In the fourth case [i.e. para. 7(d)] he may be charged either with himself committing the offence or with counselling or procuring its commission.
>
> A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
>
> Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with himself doing the act or making the omission."

Section 7 therefore applies in two distinct situations. In the first situation, A procures B to commit an offence: that is, B himself or herself commits an offence. In this situation, A can be charged with either committing the offence or with procuring the offence. The same consequences follow in each case.

In the second situation, dealt with by the final paragraph of s. 7, A procures B to do an act or make an omission in such circumstances that B does not commit any offence, even though, had A personally done the act or made the omission, A would have committed an offence. In this situation, A is liable for the same offence and to the same punishment as if he or she had done the act or made the omission. This final paragraph of s. 7 applies in circumstances where A commits an offence by the use of an "innocent agent". B acts as an innocent agent where he or she lacks criminal responsibility (see, for example, White v. Ridley (1978) 140 C.L.R. 342 at 346-7) or where intent is an element of the offence and he or she lacks that intent..

Obviously, when the Code was enacted, it was considered that the reference to an "act or omission" in the final paragraph of s. 7 was necessary to extend s. 7's application to innocent agent situations. Sir Samuel Griffith's note to the final paragraph of s. 8 of the Draft Criminal Code (identical to the present final paragraph of s. 7) confirms this. The note reads:

> "The agent may be innocent. In that case he would not commit an offence, and, no offence having been committed by him, there could not be any accessory before the fact. The distinction is important. I

> believe it is in accordance with the existing law, except, perhaps, as to the extent of punishment."

As with s. 539, it seems that the question whether A could be charged under the final paragraph of s. 7 with procuring B to do an act in certain circumstances which act, if done by A in those circumstances, would have constituted an offence with a circumstance of aggravation (not being itself a specific offence), has not been judicially considered. Yet there is no apparent reason why A could not be so charged. It would be an irrational result if A could be so charged under the final paragraph of s. 7 where the aggravated offence constitutes a specific offence, but not where the circumstance of aggravation is provided for simply by way of increased punishment.

Further, a natural reading of the final paragraph of s. 7 suggests that A would be liable under that paragraph for the latter kind of aggravated offence. In considering whether, if A had done the act or made the omission, he or she would have been liable, it is necessary to consider "the quality of the act, the intention which accompanied it, its consequences or other circumstances" (Stuart v. The Queen (1974) 134 C.L.R. 426 at 440), the relevant intention, in this context, being that of A. This would include any circumstances designated by the Code to be circumstances of aggravation.

Moreover the final paragraph of s. 7 would, in our opinion, apply to make A liable for an offence with a circumstance of aggravation involving a specific intent (such as the second circumstance in s. 469 quoted above) notwithstanding that B is

liable only for the offence simpliciter.

As to attempts, where a person attempts to wilfully damage property, for example, the relevant offence is created by ss. 4 and 535. Section 4 defines when a person is said to "attempt to commit" the offence. Section 535 provides:

> "**535. Attempts to commit offences.** Any person who attempts to commit any indictable offence is guilty of an indictable offence, which, unless otherwise stated, is a misdemeanour..."

The relevant punishment is then provided for by ss. 536 and 537. Those sections provide:

> "**536. Punishment of attempts to commit crimes.** Any person who attempts to commit a crime of such a kind that a person convicted of it is liable to the punishment of imprisonment for life or imprisonment for a term of 14 years or upwards, with or without any other punishment, is liable, if no other punishment is provided, to imprisonment for seven years.
> Any person who attempts to commit a crime of any other kind is liable, if no other punishment is provided, to a punishment equal to one-half of the greatest punishment to which an offender convicted of the crime which he attempted to commit is liable.
>
> **537. Punishment of attempts to commit misdemeanours.** Any person who attempts to commit a misdemeanour is liable, if no other punishment is provided, to a punishment equal to one-half of the greatest punishment to which an offender convicted of the offence which he attempted to commit is liable."

Mr Herbert did not concede that a person could be charged with attempting to commit an offence with a circumstance of aggravation where that circumstance of aggravation merely attracts additional punishment (rather than altering the statutory description of the offence). In our opinion a person can be so charged. It is true that s. 535 is the section which creates the relevant offence, and that this refers only to an

attempt to "commit any indictable offence", without mentioning any circumstance of aggravation. However, an attempt, for example, to wilfully and unlawfully destroy by explosives a vessel containing people would equally meet the description "attempt to commit an indictable offence" as would an attempt to wilfully and unlawfully damage other property in circumstances not involving a circumstance of aggravation, and would therefore equally constitute an offence under s. 535. Further, the words "crime" and "misdemeanour" used in ss. 536 and 537 are apt to refer not only to a bare offence, but also to the aggravated form of that offence. Indeed in many cases (including the example just given), the presence of a circumstance of aggravation will transform what would otherwise have been a misdemeanour into a crime.

There do not appear to be any cases where this question has been authoritatively decided. However, in Carroll v. Richardson (Unreported, Supreme Court of Western Australia, 27 October 1989), Franklyn J. held that a complaint which alleged the offence of attempting to steal in circumstances which constituted a circumstance of aggravation under 378(7) of the Criminal Code (W.A.) properly disclosed an offence under s. 552 of the Criminal Code (the equivalent of s. 535 of the Queensland Code). In reaching this conclusion, his Honour necessarily assumed that the view which we have taken was correct.

On the assumption that that was the correct view, Mr Herbert suggested that the difference between the wording of ss. 4, 535,

536 and 537 on the one hand and s. 539 on the other was significant. The former sections speak of a person having attempted to commit an "offence", a "crime" or a "misdemeanour" whereas s. 539 speaks of a person attempting to procure another to "do an act or make an omission". Mr Herbert submitted that the use of the latter expression indicated that the legislature intended that s. 539 was not to be concerned with circumstances of aggravation, but merely with the basic act or omission constituting the bare offence in question. However, an examination of the relationship between ss. 7 and 539 of the Code suggests another, more compelling reason for the difference in wording.

Rather than including separate paragraphs dealing with, on the one hand, attempts by A to procure B to commit an offence and, on the other hand, attempts by A to commit an offence by using B, s. 539 was worded in such a way as to cover both situations simultaneously. This was achieved by referring not to offences, but to acts or omissions, and by including the words "whether by himself or by the other person" in stating by whom the offence would have been committed. In our opinion, the legislature's intention to provide in the one section for attempts to commit all s. 7 procuring offences was the sole reason for the difference in wording between s. 539 on the one hand and ss. 4, 535, 536 and 537 on the other.

The terms of s. 539(1) making the offender guilty of an offence "of the same kind ... as if he had himself attempted to do the

same act" provide additional support for the conclusion which we have reached that circumstances of aggravation under s. 469 may be alleged in an indictment for an offence against s. 539(1). To make the person liable under that section guilty only of a misdemeanour, as would be the case if a circumstance of aggravation under s. 469 could not be alleged, whereas the person attempted to be procured would be guilty of a crime because that circumstance of aggravation could be alleged against him, would seem to infringe the stipulation that the s. 539(1) offence and that hypothesised in the words just quoted are of the same kind.

Would the indictment as originally framed have failed in any event?

One final point raised by counsel for the appellant in oral argument before this Court was that, in the form it took prior to amendment, the indictment in the present case would have failed in any event. In Mr Herbert's submission, the indictment improperly charged the circumstances of aggravation as aggravating the s. 539 offence rather than the intended s. 469 offence. The simple answer is that the issue does not arise, since neither question reserved under s. 668B requires that the Court consider the terms of the particular indictment presented below. But since the matter was argued, we should perhaps express an opinion about it.

It is sufficient to consider the circumstance of aggravation charged "AND THAT you intended thereby to destroy or render

useless the said vessel". This is an allegation that it was the appellant, not the person he attempted to procure, who intended to destroy or render useless the vessel in question. As we have explained above in discussing Mr Herbert's second proposition, the offence created by s. 539 cannot itself be committed with a circumstance of aggravation. Section 539(1) allows the offender to be found guilty of an offence of the same kind as if he himself had attempted to do the act he has attempted to procure, and the nature of that act includes any circumstance of aggravation attaching to it. Here, what the appellant tried to get Scanlan to do was to damage the vessel in circumstances falling within para. VII(2) of s. 469 - i.e. to damage it with intent to destroy it or render it useless.

Therefore we agree with Mr Herbert's submission about the indictment in its original form, insofar as it attributes the s. 469 intention to the appellant rather than to Scanlan. What should have been alleged was that the appellant attempted to procure Scanlan to damage the vessel with intent (on the part of Scanlan) to destroy it or render it useless. However, this conclusion does not affect the answer to either question which has been reserved.

Conclusion

In our opinion, therefore, an indictment alleging an offence under s. 539 of attempting to procure another to wilfully and unlawfully damage property can also allege that such damage was to be done in circumstances which would have constituted a

circumstance of aggravation specified in s. 469. An offender convicted of the offence of attempting to procure another to wilfully and unlawfully damage a vessel with the circumstance that the damage was to be caused by the explosion of an explosive substance when several persons would be in the vessel would, under s. 539, be liable to imprisonment for a period of seven years. Both questions in the case stated should therefore be answered "yes".