CA013130

Vancouver Registry

Court of Appeal for British Columbia

ORAL REASONS FOR JUDGMENT:

Before:

The Honourable Mr. Justice Lambert March 22, 1991

The Honourable Mr. Justice Macdonald

The Honourable Mr. Justice Cumming Vancouver, B.C.

BETWEEN:

R E G I N A

RESPONDENT

AND:

V.T.

(Y.O.A.)

APPELLANT

A. Thiele and appearing for the Appellant

T. Delaney

C. Baird appearing for the (Crown) Respondent

MACDONALD, J.A.: This is an appeal from the judgment of His Honour Judge Davis, in youth court, of August 15, 1990, finding the young person guilty of mischief, assault, and uttering a threat.

The appeal is only from the conviction of uttering a threat. The appellant, Victoria T. is a young person within the meaning of the ***Young Offenders Act***. At the time of the conduct complained of she was 14 years of age and a resident of the Touchstone Group Home.

The complainant, Louis Larson, was an employee of the Touchstone Family Association, a non-profit society. The Society contracts through the Provincial Government to provide a group home facility and employs child care workers. Pursuant to s.2 of the ***Young Offenders Act***, the complainant was at all material times the parent of the Victoria T.

On December 4, 1989, during supper at the group home the complainant and the appellant being present with other residents, the complainant asked the appellant to stop using obscene language. The appellant became offended and pushed her meal towards the complainant, part of which fell into his lap. Following this episode the complainant tried to discuss Victoria T's behaviour with her but she became verbally abusive and threw things at him. The appellant left the house after threatening to get some of her friends to "Get or beat up" the complainant.

A police constable happened, with respect to other matters, to have been in the residence at the time and the development was the charge against the young person of the three offences I have mentioned.

The complainant's position was that although he would often receive threats from residents of the house, in this case he perceived Victoria T's threat to be serious because she was extremely angry and he believed that she may well have had friends that would have been interested in following up on such a threat.

The judge in convicting felt bound by the decision of a County Court Judge on an appeal from a youth court decision, in ***R. v. Andrew K.***, June 3, 1988, County Court of Vancouver. Before that decision of the County Court Judge on appeal, we are told that the youth court judges favoured, in situations somewhat similar to the case at bar, the approach described by His Honour Judge Collings in the case of***R. v. David L.***, March 29, 1985. There the young person, a boy 13 years of age, was a Ward of the Ministry of Human Resources and living in a similar situation to Victoria T. In his reasons Judge Collins posed the question:

> When is a parent or guardian under a duty to control and discipline its own child and when can he call in the Police and the Courts to do it for him?

He set out the way that he thought the problem should be addressed, saying this in his reasons:

> In minor cases, the root of the matter surely is, should not parents and guardians be disciplining their own children, outside of Court?
>
> I point out that Section 43 of the Code gives them all the leverage they could ask to do this. It specifically JUSTIFIES them in the reasonable force by way of correction, a power of the Court itself doesn't have.
>
> There are several reasons why Court procedure is not appropriate for minor disciplinary infractions. One is that it runs the risk of making barrack-room lawyers out of the young persons. A second is that it decreases respect for the parents or guardians - it makes them look toothless. Another is the delay inherent in Court procedure; Young persons have a different time-frame from layers and judges and for them the penalty must follow closely on the offence or the point is lost.
>
> I am happy to note that Section 3 of the Young Offenders Act has addressed this problem. That is the Declaration of Policy section, and I extract from it the following:
>
> (a) ....young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviours as adults....
>
> (d) where it is not inconsistent with the protection of society, taking no measures, or taking measures other than judicial proceedings under this Act, should be considered for dealing with young persons who have committed offences.
>
> (f) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of the young person and the interests of their families.
>
> (h) parents have responsibility for the care and supervision of their children...."

All these approaches that are enjoined on us; viz. the departure from strict legal standards in (a), the use of judicial proceedings as a last resort in (d), the minimal intervention principle of (f), and the recognition of the parents' responsibility in (h); all of them convince me that in the cases such as the present it was Parliament's intention that the control and discipline of children should be left where it primarily belongs, in the hands of parents and guardians, and not be made a matter for the Court.

Whether the Court should be involved is of course always a matter of degree it will be appropriate to consider, among other things, the amount of damage or injury, the use of a weapon (perhaps more lethal than a Wellington boot), and the relative powers and positions of the parties. A hefty teen-age boy and a small single mother is one thing: a small teen-age boy and the resources of the state that lie behind the Sunflower Home is another.

To the Sunflower Home, what I am saying in practical terms is: you are in loco parentis to these children, you know you are likely to have problems with their behaviour, it is up to you to hire staff and arrange your operation so you can deal with these matters in house, where they belong. That is what the real parents would have to do, and so do you.

Now,***R. v. Andrew K.***, the case that went on appeal to the County Court Judge also involved rather similar facts. The County Court Judge disposed of an appeal by the Crown in this way:

In his conclusions, the trial judge found that the Respondent had technically assaulted the complainant, and then at the conclusion of his remarks found the respondent not guilty.

In arriving at this conclusion, he found that the complainant was In Loco Parentis and, as such, he should have dealt with the matter in an in-house situation, applying the proper corrective disciplinary matters, as a thoughtful and considerate parent would have done.

In support of his conclusions, he followed a decision of the Provincial Court, namely, R. v. David Lands.

With deference, it is my view that both these decisions are wrong. Inherent in these decisions is the implication that because of the declarations in Section 3 of the Young Offenders Act, the youth court has the discretion to declare a crime not to be a crime.

Conduct of a young person which amounts to a crime, when brought before a youth court, must be determined on that basis. The finding of guilty in no way, in my view, precludes the operation of the principles enunciated in Section 3 of the Act. It is not our function as judges to involve or to engage ourselves in philosophical considerations as to what constitutes crime in its broadest sense. The fact is that certain conduct has been declared to be a crime, and this, in my view, is the datum point. What the trial judge feels the child-care worker should have done or could have done, or his impressions of the governmental department, are not the issue. It may very well be that certain antisocial behaviour or certain conduct which might constitute a crime could and should be dealt with as suggested, in an in-house situation. However, once the matter has been considered as behaviour constituting a crime by the child-care worker, and a charge laid, and the prosecution undertaken by the State, then it falls upon the youth court judge, no matter how unpleasant or, indeed, how unnecessary it may see to him, to deal with it, and moreover, to make a decision in law or on the facts which he finds to have been proven. That is the plain duty of any judge, whether or not he may be in philosophical agreement with the procedure of the nature of the charge.

It seems to me that the words of Mr. Justice Berger in R. v. Laurie W., Unreported, decided on February 10th, 1981, Vancouver Registry

Number CC801080, are indeed appropriate. At Page 3, His Lordship says:

"No doubt there is a discretion which must be exercised as to whether a juvenile should be charged in these cases. But if a charge is laid an approved, the court must accept the burden of holding the juvenile responsible at law."

In the matter before me, the youth court judge found that there was indeed an assault, and there was ample jurisdiction for such a conclusion. Having made such a conclusion, I must say that I am at a loss to understand how he then can dismiss the case. surely a person cannot be guilty and not guilty of the same offence.

The appeal is accordingly allowed, and a conviction for assault as charged will be entered. The matter will be remitted to the Provincial Court for the imposition of the appropriate penalty under the Young Offenders Act.

In this case the appellant raises these issues:

1. When there is a conflict between the Criminal Code and the Young Offenders Act, which statute prevails?

2. In the circumstances of this case was the criminal conviction of the Appellant inconsistent with the Declaration of Principles under the Young Offenders Act?

3. If the conviction of the Appellant was inconsistent with the Young Offenders Act was it open to the trial judge to dismiss or stay the case?

4. Was the County Court decision in R. v. Andrew K. either distinguishable or wrongly decided?

5. Alternatively, does the maxim "de minimis non curat lex" apply to the circumstances of this case?

Turning to the statute, Section 3 is headed "Declaration of Principle" and then "Policy for Canada with Respect to Young Offender". Section 3(1) "It is hereby recognized and declared that" and there follow nine statements of principle. Of those the ones that are (a), (d), (f), and (h), have been set out in the reasons of Judge Collings in***R. v. David L.*** which I have quoted. They are all important in this case but in my view the most important is (d) and I repeat it:

(d) where it is not inconsistent with the protection of society, taking no measures, or taking measures other than judicial proceedings under this Act, should be considered for dealing with young persons who have committed offences.

Then s.3(2) says:

(2) This Act shall be liberally construed to the end that the young persons will be dealt with in accordance with the principles set out in subsection (1).

Finally, I refer to s.51 which provides:

51. Except to the extent that they are inconsistent with or excluded by this Act, all the provisions of the *Criminal Code* apply, with such modifications as the circumstances require, in respect of offences alleged to

have been committed by young persons.

With all respect, it is my view that ***R. v. Andrew K.*** was wrongly decided. The prosecuting authorities are required before they lay charges against young persons to act under the guidance of s.3(1)(d). If they fail to do so the youth court judges who have the ultimate responsibility for application of the ***Young Offenders Act*** are not, in my view, helplessly bound to convict every time all elements of an offence are proved. The contention that they are so bound does not give the statute and particularly s.3(1)(d) the liberal construction required by s.3(2). If a judge dismisses a charge on the basis that it should never have been laid, having in mind s.3(1)(d), the result is not as stated in ***R. v. Andrew K.*** to declare a crime not to be a crime. An offence has been proved but nevertheless the judge may decline to register a conviction. He or she may dismiss the charge.

Coming back to the case at bar, I would not express an opinion upon the facts of this case. Crown Counsels says that they are more aggravated than indicated in the appellant's factum and uttering a threat can be in some circumstances a serious matter. But as I read the reasons of Judge Davis I conclude that he only convicted because he was bound by ***R. v. Andrew K.***

That being so, I would allow the appeal and direct a verdict of acquittal.

LAMBERT, J.A.: I agree.

CUMMING, J.A.: I agree.

LAMBERT, J.A.: The appeal is allowed and an acquittal is entered.

The Honourable Mr. Justice Macdonald