CITATION: R. v. Decaire, 2024 ONSC 4713
COURT FILE NO.: 22-11400492-AP
DATE: 2024/08/26

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HIS MAJESTY THE KING	)	Don Courturier and John Wright, for the Crown
	)	
– and –	)	
	)	
Christine Decaire	)	Diane Magas, for the Respondent
	)	
Respondent	)	
	)	
	)	
	)	**HEARD:** April 10, 2024

DECISION RE SUMMARY CONVICTION APPEAL ON ACQUITTAL FOR MISCHIEF

SOMJI J.

Overview

[1] The Crown appeals the decision of Boxall J of the Ontario Court of Justice acquitting Christine Decaire of the criminal charge of mischief. The Crown argues that Ms. Decaire's presence on Nicholas Street on the morning of February 18, 2022, and her proximity to vehicles parked there in support of the Freedom Convoy at a time when police were clearing vehicles and protestors is sufficient evidence to find her guilty of mischief as principal or party.

[2] The Crown does not take issue with Boxall J's finding of facts, but argues that he erred in one, the application of principal and party liability by overlooking binding authority of how these principles apply in protest cases; and two, the application of the *R v Villaroman*, 2016 SCC 33 principles concerning inferential reasoning from circumstantial evidence.

[3] Defence argues that the Crown is relitigating the same issues considered and decided at trial. Boxall J heard submissions on the essential elements required to prove mischief as a principal or party (either as an aider or abettor) pursuant to s. 21(1) or 21(2) the *Criminal Code.* Most of the caselaw presented on appeal was referred to at trial, and the trial judge actively participated during submissions. However, the trial judge concluded based on his findings of facts, which the Crown accepts are binding, that while Ms. Decaire was present at the scene, there was no evidence that she engaged in any overt acts of mischief or formed a common intention with others to engage in unlawful purpose to block the streets thereby causing mischief.

[4] For the reasons that follow, the Crown's appeal is dismissed. All legislative references are to the *Criminal Code*, R.S.C. 1985, c. C-46, unless otherwise stated.

Standard of Review

[5] In reviewing trial decisions, appellate courts must show deference to a trial judge's findings of fact. An appeal is not a retrial but rather a determination of whether there has been an error of law or findings of facts which are unsustainable.

[6] In this case, the Crown accepts Boxall J's findings of fact, but argues that he misapplied the law with respect to aiding and abetting a mischief. The Crown posits that the appeal involves a mistake of law and therefore, the applicable standard of review is correctness.

[7] The standard of review for errors of law is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para 8. The application of a legal standard to the facts of a case is a question of law and subject to a standard of review for correctness: *R v Shepher*d, 2009 SCC 35, [2009] 2 S.C.R. 527, at para 20.

The trial judge's findings of fact and reasons for acquittal

[8] At the outset of his trial ruling, Boxall J explained the context of the Freedom Convoy. Between January 28 and February 18, 2022, individuals from across Canada arrived in Ottawa to

protest public health measures taken in response to COVID-19. An assortment of commercial and passenger vehicles, including trucks and tractor trailers, blocked the roads in the downtown core of Ottawa. Boxall J found that it was "indisputable that the Freedom Convoy obstructed, interrupted, and interfered, with the lawful enjoyment of or use of property of thousands of residents" and described the resulting harm to individuals, small businesses, and the economy. However, as Boxall J explained, his task was not to decide if the Freedom Convoy resulted in a mischief at large, but whether the Crown had proven beyond a reasonable doubt that Ms. Decaire committed mischief as principal or party or obstructed Constable Croft in the lawful execution of his duties. He found she did neither.

[9] Boxall J found that on February 18, 2022, the police commenced an operation to clear areas occupied by the Freedom Convoy. Constable Croft was assigned to clear Nicholas Street. While walking northbound on the Nicholas, Cst. Croft observed a person on the west side of the road subsequently identified as Ms. Decaire. He told her she needed to leave or she would be arrested for mischief. She initially replied that she would leave but then said no. He arrested her for mischief and transferred her to an Ottawa police unit. She was cooperative with the arrest.

[10] Cst. Croft's dealings with Ms. Decaire occurred around 8:00 am. Boxall J accepted there was sufficient blockage on Nicholas Street to amount to mischief. However, he found based on the evidence before him, that the blockage at this time was largely caused by vehicles and not persons. Furthermore, he found there was no evidence of "any other civilians or protestors near Ms. Decaire" and no evidence connecting Ms. Decaire to any vehicles.

[11] Boxall J accepted the Court of Appeal found in *R v Mammolita,* (1983), 9 C.C.C. (3d) 85 (Ont. C.A.) that the act of standing shoulder to shoulder with other persons to form a human barricade without saying or doing anything further may be an act that constitutes obstruction. I would add that the Court of Appeal requires that one must then go on to consider whether the obstruction was willfully done to find mischief: at para 13. However, Boxall J found that there was no evidence presented that Ms. Decaire was standing shoulder to shoulder with anyone or that there were civilians or protestors around her.

[12] Boxall J then went on to consider the Crown theory that Ms. Decaire was guilty of mischief as an aider or abettor pursuant to s. 21(1) or by forming an intention to carry out an unlawful purpose under s. 21(2).

[13] With respect to s. 21(1), there was no evidence that Ms. Decaire had engaged in any overt acts that encouraged, incited, or assisted another person to commit mischief.

[14] With respect to s. 21(2), Boxall J reviewed the elements the Crown must prove to establish a common intention to carry out an unlawful purpose and the Crown theory with respect to how each element was met in his reasons as follows:

a. Element: the accused's participation with a principle in the original unlawful purpose

   - Crown alleged that Ms. Decaire's intention was to participate with others in the unlawful purpose of blocking the streets.

b. Element: commission of the incidental crime by the principal in the course of carrying out the common unlawful purpose

   - Crown alleged that the incidental crime in this case is a larger mischief to obstruct committed by persons substantially involved in the Convoy.

c. Element: degree of foresight of likelihood that the incidental crime would be committed

   - Crown alleged that it would have been reasonably foreseeable that blocking of streets would have prevented people from accessing their place of work or homes or causing delay.

[15] After reviewing the requisite elements of party liability based on unlawful common purpose, Boxall J concluded that the Crown's theory was not supported in the evidence before him which indicated that Ms. Decaire was observed standing in the street for minutes on a particular day with no other persons about and in proximity to vehicles to which she was

unconnected. Consequently, the Crown had not shown that Ms. Deciare was on Nicholas Street for the purpose of blocking the street, and there were other reasonable non-speculative possibilities for her attendance, including curiosity or to passively indicate her disapproval of the COVID-19 restrictions.

[16] The trial judge provided his decision from the bench without calling upon defence to make closing submissions. He found that the Crown had failed to prove beyond a reasonable doubt that Ms. Decaire engaged in mischief either as principal or party.

Issue 1: Did the trial judge err in the application of principle and party liability for mischief?

[17] The Crown argues that the trial judge's approach to principle and party liable was legally flawed because there is binding Court of Appeal authority, as per *Mammolita,* that a protestor at the fringe of a group committing mischief may be liable for mischief provided the person is part of the group. The Crown posits in its factum that Ms. Decaire was on the street in the "thick of the obstruction" and while her actions as a single person may be ineffective in isolation, the "obstruction is effectuated and the actus reus made out when coordinated with other persons."

[18] I find the trial judge committed no error in his analysis or application of law on mischief.

[19] The trial judge was fully aware of the elements to be proven to establish mischief either as principal or party. He referred to the elements required to establish mischief as well as the cases relied on by the Crown including *Mammolita*. He was alive to the fact that the Court of Appeal found in *Mammolita* that persons standing on the fringe of a group blocking the roadway could be liable for mischief if their presence prevented others from bypassing the group.

[20] However, the trial judge found that there was no evidence that Ms. Decaire was standing on the fringe of any group. In fact, the trial judge found there was no evidence of any persons around Ms. Decaire that could constitute a group and certainly no evidence of her engaging in acts in concert with any group. The facts in *Mammolita*, as the trial judge found, were entirely distinguishable from the facts in this case.

[21] The Crown argues that even in the absence of a group persons, Ms. Decaire is liable for mischief because she was in the middle of the street in proximity to Freedom Convoy vehicles that were engaged in a collective mischief to obstruct the streets. When pressed on appeal what precisely Crown counsel meant by this, Crown counsel submitted that Ms. Decaire was effectively "shoulder to bumper" with the Freedom Convoy vehicles obstructing the roadway and thereby a party to the mischief.

[22] This same argument was addressed at trial. Boxall J questioned the Crown as to how the facts were comparable to *Mammolita* if there was no evidence that Ms. Decaire was standing shoulder to shoulder with anyone. Crown counsel submitted that Ms. Decaire's presence in the middle of the road and in proximity to vehicles blocking the road made her liable to mischief.

[23] However, Boxall J rejected this argument on the grounds that while Ms. Decaire was on the street that was blocked by vehicles, there was no evidence that she was connected to these vehicles and consequently, he was left with a reasonable doubt that her purpose in attending was to block the street.

[24] Boxall J's findings were entirely supported by the evidence. Cst. Croft did not offer any evidence as to what Ms. Decaire was doing prior to her arrest. He testified simply that he saw her standing on the road beside a vehicle that was running but did not know if she was associated with the vehicle. He asked her to leave. She said yes but then said she was going to stay at which time he arrested her for mischief. He did not make any notes of what the reason or nature of the mischief was. He arrested her at 7:58 am and turned her over to another police unit at 8:03 am. He was with Cst. Buller who assisted him in the arrest. However, Cst. Buller provided conflicting evidence to Cst. Croft indicating that Ms. Decaire was already in the custody of another officer when he and Cst. Croft were called over to deal with her. Cst. Buller could not offer any evidence as to what she had been doing previously at the scene.

[25] In *Pascal*, a case relied on by the Crown, the BC Court found that the accused's presence dressed in camouflage at a roadblock formed by vehicles following her earlier involvement with the police on the same day at another site waving a Mohawk flag in support of the protest was sufficient evidence to find that she shared a common intention with others engaged in the later

roadblock: 2002 CarswellBC 3838 (P.C.) [WL] at para. 46. Here, unlike in *Pascal*, the officers did not present evidence that Ms. Decaire's conduct either at the time of arrest or earlier would suggest she formed a common intention with those persons whose vehicles were parked on Nicholas Street to obstruct the roadway.

[26] I would also note, as defence counsel pointed out, that Cst. Craft had testified in cross-examination that he vaguely remembered that it was possible that the right lanes might have been open to traffic. In contrast to *Pascal* where evidence was called of a specific roadblock formed by the vehicles and the accused's proximity and connection to it, there was no evidence here about where precisely the blockages were and Ms. Decaire's role, if any, in contributing to it.

[27] In support of its position that Ms. Decaire formed a common intention with others to block the road, the Crown relied on a video taken on an unknown date prior to February 10, 2022, at Coventry Road where Freedom Convoy protestors had previously gathered. Boxall J reviewed the video and found it had minimal value. Boxall J's findings are owed deference on appeal. In addition, the Crown indicated they do not dispute Boxall J's findings of fact and consequently, cannot seek to rely on it on appeal. Finally, upon reviewing the video on appeal, I find it demonstrates little more than Ms. Decaire emptying coffee pots and should be given minimal, if any weight, as indicated by the trial judge, as to her intentions on February 18, 2022.

[28] Similarly, the trial judge placed no significant weight on Cst. Croft's evidence that he told Ms. Decaire to leave. He made this finding because Cst. Croft had not taken any notes of his conversation with Ms. Decaire and his companion, Cst. Buller had no recollection of such a conversation. Consequently, this evidence cannot be relied on as suggested by the Crown to impute a common intention upon Ms. Decaire.

[29] The Crown also relies on the fact that Ms. Decaire's presence on Nicholas Street was on February 18, 2022, just after the police had issued on February 16th a Notice to demonstrators that "You must leave the area now. Anyone blocking streets or assisting others in blocking streets are committing a criminal offence and you may be arrested. You must immediately cease further unlawful activity, or you will face charges."

[30] As defence counsel points out, the Notice did not foreclose people's rights to peacefully assemble. Several notices issued allowed persons to continue to lawfully protest or dissent while also informing the public that the police were undertaking measures to regulate or prohibit travel to, from and within any specified areas of protest.

[31] Citizens have a right to assemble and peacefully protest and short of criminal conduct and true threats to public order, participants should be afforded broad latitude for expression of their political beliefs: *R v Puddy*, 2011 ONCJ 399 at para 43. Even if there had been notices encouraging protestors to clear the area and informing them that they could be criminally charged, the onus remains on the Crown to prove beyond a reasonable doubt that the protestor in question engaged in conduct as party or principal that would constitute mischief. In short, the fact that certain protestors decided to continue to block Nicholas Street with their vehicles with the foreseeable effect that it would interfere with other people's enjoyment of their property or street and could result in criminal charges does not automatically mean that anyone found on that street was either a principal or party to that mischief or that people were not allowed to continue to protest lawfully and peacefully in the area.

[32] Finally, the Crown argues that the recent decisions of *R v Remley,* 2024 ONSC 54*3* and *R v Romlewski,* 2023 ONSC 5571 related to the Freedom Convoy are informative on appeal. Those cases relied on largely the same body of jurisprudence governing the elements of mischief in protest cases. More importantly, the conduct of the accused in those cases was markedly different from Ms. Decaire's conduct, and consequently I find the facts of those cases are entirely distinguishable from the case at hand.

[33] I find the trial judge did not err in the application of the law on mischief and this ground of appeal is accordingly dismissed.

Issue 2: Did the trial judge err in the application of the *Villaroman*, principles concerning inferential reasoning from circumstantial evidence?

[34] The Crown argues that the trial judge erred in finding that Ms. Decaire did not form a common intention to commit mischief pursuant to s. 21(2) by suggesting that there were other reasonable inferences such as she was there out of curiosity or to passively manifest her

disapproval of the COVID-19 restrictions. The Crown argues the trial judge engaged in theoretical and speculative explanations that were unreasonable. The Crown takes the position that based on the following circumstantial evidence presented at trial, the only available inference was that Ms. Decaire was there to contribute to the ongoing mischief:

1. As early as February 12, there was provincial legislation in place declaring it unlawful to block highways under the *Highway Traffic Act*, R.S.O. 1990, c H.8.

2. Protestors received ample and repeated notice to leave the area leading up to February 18th and were warned that arrest would follow if they did not leave.

3. The entirety of the protest activity on Nicholas Street on February 18th constituted a large-scale act of mischief.

4. Nicholas Street was occupied by both vehicles and persons living in and camping out in vehicles.

5. The Respondent was present on Nicholas Street at an "early hour" of the morning.

6. The Respondent was given an opportunity to leave and warned that she would face arrest if she did not. She declined to leave.

7. As per video evidence, the Respondent was identified two weeks prior at Coventry Road participating in protest activities.

[35] In assessing whether the Crown has met its burden to prove the essential elements, trial judges are required to consider "other plausible theories" inconsistent with guilt. The Crown may need to negative these other reasonable possibilities, but it does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused. Other plausible theories must be based on logic and experience applied to the evidence or the absence of evidence, and not on speculation:" *Villaroman* at para 37.

[36] A trial judge's assessment of the evidence and his/her determination of the inferences to be drawn from circumstantial evidence attract considerable deference on appeal: *R v Abdelrahman*, 2022 ONCA 798 at para 6.

[37] I find the trial judge committed no error in the exercise of the *Villaroman* principles when assessing the circumstantial evidence before him.

[38] First, the trial judge considered the circumstantial evidence that the Crown refers to above, but in several instances found it was of little, if any, weight. As explained earlier, the trial judge gave no weight to the video evidence and Cst. Croft's direction to Ms. Decaire to leave (points 6 and 7). Accordingly, he properly did not consider them nor should they be considered.

[39] Second, the trial judge did consider the context of the Freedom Convoy, its disruption to the public, and the police operations to manage and bring it to an end (points 1 and 2). He considered the legislation and the timing of the events as part of the judicial notice he granted on these issues. As already discussed, the fact that notices were issued directing people to clear areas or warning people they could be charged if they obstruct the police are not in and of themselves a basis upon which one can impute an intention on the part of a bystander to obstruct the police or cause mischief. People have the right to lawful assembly. There may be a myriad reasons why persons could have been in the area including residents or commuters going to work notwithstanding that notices had been issued for people to clear certain zones. Furthermore, 8 am is not necessarily an "early hour" and is commonly a time when people commence their day (point 5).

[40] Third, the trial judge did consider and found that the entirety of the protect activity on Nicholas Street on February 18, 2022 constituted a large-scale mischief (point 3). This did not persuade him beyond a reasonable doubt that Ms. Decaire had herself committed mischief.

[41] Fourth, the accused is not required to testify unless there is a case to answer based on the Crown's evidence: *R v George-Nurse* 2018 ONCA 515 at paras 33-34. Here, there were no inculpatory facts presented as part of the Crown's case that would have compelled Ms. Decaire to take the stand and explain why she was there or what she was doing. I agree with defence counsel that to suggest that Ms. Decaire needed to testify in the circumstances of this case would be to invite a reversal of the burden of proof onto her and result in an error of law.

[42] Finally, the trial judge's suggestion that Ms. Decaire could have been there to passively protest or out of curiosity were reasonable theories. There was at this time a large-scale protest in Ottawa. Many citizens went to various protest to sites to observe, to peacefully protest, or in some cases, to passively support those who were protesting. That the trial judge suggested that Ms. Decaire might be one of those persons is not a speculative proposition but rather reasonable one and in accordance with the evidence before him regarding the Freedom Convoy.

[43] For all these reasons, I find the trial judge made no error in his application of *Villaroman*.

[44] The Crown appeal is dismissed.

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Somji J.

Released: August 26, 2024

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HIS MAJESTY THE KING

– and –

Christine Decaire

Respondent

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Somji J.

Released: August 26, 2024