26/79

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v JENSEN and WARD

Young CJ, McInerney and Newton JJ

6 November 1975 — [1980] VicRp 24; [1980] VR 194

CRIMINAL LAW – DEFENDANTS CHARGED WITH OFFENCES INCLUDING CAUSING AN EXPLOSION LIKELY TO ENDANGER LIFE OR PROPERTY – ACTING IN CONCERT – MEANING OF – MATTERS TO BE TAKEN INTO ACCOUNT.

J. and W. were charged with offences including causing an explosion likely to endanger life or property. The charges arose out of the explosion of a hand grenade outside the Kent Hotel in North Carlton. The principal case for the Crown was that a hand grenade was thrown by a third person, referred to as "Frank" and that J. and W. were present at the time and each were acting in concert with Frank. Both were found guilty and imprisoned for substantial periods. Upon appeal —

HELD: The directions given by the presiding Judge were deficient in material respects.

THE COURT: *[After setting out the nature of the charges, the facts and the results, the Court continued]* … The circumstances of the case called for clear and precise directions from the learned Judge in his charge as to the elements of each of the crimes with which Ward and Jensen were charged, and as to the relevant law regarding acting in concert. But, as will later be seen, the directions which the learned Judge in fact gave to the jury upon these matters were in our opinion deficient in material respects.

The substance of the directions which the learned Judge ought to have given to the jury about these matters was, in opinion as follows:
(1) In the case of each of the crimes with which Ward was charged, he could not be found guilty of that crime unless the jury were satisfied beyond reasonable doubt—
(a) that the crime in question had been committed by the person who threw the hand grenade; and
(b) that Ward had himself thrown the hand grenade; or
(i) had acted in concert with the person who threw the hand grenade, whether that person was Frank or somebody else; or
(ii) had been acting in concert with one or more other persons in a common enterprise, in pursuance of which the hand grenade was thrown by one of the parties to the enterprise and the crime in question was committed: (the jury ought to have been told that if they were satisfied of this, then it would be unnecessary for them to decide whether or not Ward had himself thrown the hand grenade).

(2) The position in relation to Jensen and the crimes with which he was charged was the same as the position in relation to Ward as outlined in (1), except that there was no evidence upon which the jury could be affirmatively satisfied that Jensen had himself thrown the hand grenade, so that (1)(b)(i) was inapplicable:

(3) Accordingly the first question for the jury to decide with respect to each of the crimes with which Ward and Jensen were charged was whether that particular crime had been committed by the person who threw the hand grenade. (We may here refer, to the decision of the Privy Council in *Surujpaul v R* [1958] 3 All ER 300; (1958) 1 WLR 1050, esp at p1053; *Russell on Crime* 12th ed. p128; and *R v Dunn* (1930) 30 SR (NSW) 210 at p213; 47 WN (NSW) 79).

(4)(a) The thrower of the hand grenade would have been guilty of the crime of causing an explosion likely to endanger life or property (Count 1), if the explosion of the grenade was of a nature likely to endanger life or to cause serious injury to property, and if when he threw the grenade he intended thereby to cause an explosion of that nature: or alternatively if when he threw the grenade he foresaw that might thereby cause an explosion of that nature and was indifferent to whether or

not he did cause it. In deciding what was the relevant intention or state of mind of the thrower of the grenade the jury could draw inferences from the evidence regarding all the surrounding circumstances. (We may here say that in our opinion the words "unlawfully and maliciously" in section 317(2) govern the whole of the expression "causes by any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property", and we also consider that the word "maliciously" means in substance "intentionally or recklessly": see *R v Cunningham* (1957) 2 QB 396; and *R v Lovett* [1975] VicRp 49; (1975) VR 488; compare *R v Whitehead* [1960] VicRp 3; (1960) VR 12, where the relevant statutory provision was in very different terms from section 316(2)).

(b) The thrower of the grenade would have been guilty of the crime of wounding Berry with intent to do him grievous bodily harm (Count 2), if the explosion of the grenade caused Berry's injuries (which included and went much beyond a breaking of the skin) and if the intention of the thrower of the grenade was to do really serious bodily harm to Berry or to any one or more of a class of persons of which Berry was in fact one, that is persons in the area at which the grenade was thrown. (As to this latter we may refer to *R v John Fretwell* [1864] EngR 50; (1864) L & C 443; 169 ER 1465; and *Russell on Crime supra* p621). Again in deciding what was the relevant intention of the thrower of the grenade the jury could draw inferences from the evidence regarding all the surrounding circumstances.

(c) If the jury were not satisfied that the thrower of the grenade was guilty of wounding Berry with intent to do him grievous bodily harm, then they would next have to decide whether the thrower of the grenade would have been guilty of unlawfully and maliciously wounding Berry if the explosion of the grenade caused Berry's injuries and (i) if the intention of the thrower of the grenade (although not amounting to an intention to do really serious bodily injury), was nevertheless, to wound Berry, or any one or more of a class of persons of which Berry was one, of (ii) if the thrower of the grenade foresaw that he might wound Berry, or anyone or more of a class of persons of which Berry was in fact one, that is any persons who were or might be in the area at which the grenade was thrown, and he nevertheless was indifferent whether he did so or not. (We may here again refer to *R v Lovett supra*, and authorities there referred to). And once again in deciding what was the relevant intention or state of mind of the thrower of the grenade, the jury could draw inferences from the evidence regarding all the surrounding circumstances.

(d) The matters explained in (b) and (c) above applied also to the questions whether the thrower of the grenade was guilty of the crimes of wounding with intent to do grievous bodily harm, or alternatively unlawful and malicious wounding, with respect to Turner and King respectively: see Counts 3 and 4.

(5)(a) As to acting in concert, the law says that if two or more persons reach an understanding or arrangement that a criminal act or acts will be committed by them or by one or some of them, and if while that understanding or arrangement is still on foot and has not been called off, a crime is committed by one or more of them of a kind which falls within the scope of the understanding or arrangement, and if they are all present at the scene of that crime then they are all equally guilty of that crime, regardless of what part each played in its commission. In such a case they are said to have been acting in concert in the commission of the crime.

For people to be acting in concert in the commission of a crime, their assent to the understanding or arrangement between them need not be expressed by them in words; their actions may be sufficient to convey the message between them that their minds are at one as to what they shall do. The understanding or arrangement need not be of long standing; it may be reached only just before the doing of the act or acts constituting the crime. In deciding whether any understanding or arrangement existed a jury may draw inferences from all the surrounding circumstances established by the evidence, including the conduct of the persons in question before and after the crime. For the purpose of these rules as to acting in concert a person is present at the scene of the crime even if he remains some distance away, provided that he is there for some purpose designed to facilitate or encourage the actual commission of the crime, for example to assist in the escape of the person or persons who perform the act or acts which constitute the crime.

Although the understanding or arrangement must not have been called off before the

commission of the crime the mere fact that one or more parties to it feel qualms or wish that they had not got themselves involved or wish that it were possible to stop the criminal act or acts agreed upon, will not amount to a calling off of the understanding or arrangement once it has been made. In order to call it off so far as concerns himself, a party must communicate his withdrawal to the other parties, or at all events take some other positive step, such as informing the police. (We may here refer to *R v Lowery and King (No.2)* [1972] VicRp 63; (1972) VR 560; *R v Ryan and Walker* [1966] VicRp 76; (1966) VR 533 at pp565 567; *R v Adams* [1932] VicLawRp 32; (1932) VLR 222; 38 ALR 180; *R v Murray* [1924] VicLawRp 57; (1924) VLR 374; 46 ALT 35; *R v Dunn supra*; *R v Kalinewski* (1930) 31 SR (NSW) 377; (1930) 48 WN (NSW) 97; *R v Surridge* (1942) 42 SR (NSW) 278; *R v McDonald* (1963) 80 WN NSW 1716; *Davies v DPP* (1954) AC 378 esp at p401; [1954] 1 All ER 507; 38 Cr App R 11; (1954) 2 WLR 343; *R v Anderson and Morris* (1966) QB 110; [1966] 2 All ER 644; (1966) 50 Cr App R 216; 130 JP 318; (1966) 2 WLR 1195; *R v Richards* (1974) QB 776; [1974] 3 All ER 696; *Archbold* 36th ed. paras 4124-4126; Smith and Hogan *Criminal Law* 1st ed. pp68-72, 75-78 and 82 83; Howard, *Australian Criminal Law* 1st ed. pp221-231; and Section 323 of the *Crimes Act* 1958; *R v Lovesey* (1970) 1 QB 352; [1969] 2 All ER 1077.)

(b) Accordingly, with respect to each of the crimes which the jury were satisfied had been committed by the thrower of the hand grenade:
(i) If the jury were satisfied that Frank had thrown the grenade, then Ward would also be guilty of that crime, if the jury were satisfied that Ward had been acting in concert with Frank with respect to that crime in the sense explained in (a) above. And likewise as to Jensen.

(ii) If the jury were satisfied that Ward had thrown the grenade, then Jensen would also be guilty of that crime, if the jury were satisfied that Jensen had been acting in concert with Ward with respect to that crime in the sense explained in (a) above.

(iii) If the jury were not affirmatively satisfied as to who was the person who threw the grenade, nevertheless Ward would be guilty of that crime, if the jury were satisfied that the crime was committed by the thrower of the grenade pursuant to a common enterprise by persons acting in concert in the sense explained in (a) above, to which Ward was a party. And likewise as to Jensen.

Wherever we have used the word "satisfied" we mean of course "satisfied beyond reasonable doubt".
