



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Riesberry, 2015 SCC 65

**DATE:** 20151218

**DOCKET:** 36179

**BETWEEN:**

**Derek Riesberry**  
Appellant  
and  
**Her Majesty The Queen**  
Respondent

**CORAM:** Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

**REASONS FOR JUDGMENT:** Cromwell J. (Moldaver, Karakatsanis, Wagner, Gascon,  
(paras. 1 to 34) Côté and Brown JJ. concurring)

**APPEAL HEARD AND JUDGMENT RENDERED:** October 13, 2015

**REASONS DELIVERED: DECEMBER 18, 2015**

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R. v. RIESBERRY

**Derek Riesberry**

*Appellant*

v.

**Her Majesty The Queen**

*Respondent*

**Indexed as: R. v. Riesberry**

**2015 SCC 65**

File No.: 36179.

Hearing and judgment: October 13, 2015.

Reasons delivered: December 18, 2015.

Present: Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Criminal law — Offences — Elements of offence — Cheating at play — Fraud — Accused attempted to rig horse races by drugging horses — Whether horse race constituted a game for purposes of offence of cheating at play — Whether accused's conduct constituted cheating at play or fraud — Criminal Code, R.S.C. 1985, c. C-46, ss. 197(1) "game", 209, 380(1).*

R tried to rig two horse races. He was caught drugging one horse and trying to sneak syringes with drugs into the track for the purpose of doing the same thing to another. Bets in excess of \$5,000 had been placed on both races. R was charged with cheating while playing a game, defrauding the public, and attempting to commit the same offences. At trial, he was acquitted. The Court of Appeal allowed an appeal and set aside the acquittals. It ordered a new trial on the cheating counts and entered convictions on the fraud counts.

*Held:* The appeal should be dismissed.

The Court of Appeal was correct to order a new trial on the charges of cheating while playing a game. "Game" is defined as "a game of chance or mixed chance and skill" in s. 197(1) of the *Criminal Code*. The Crown had to establish that a horse race is a game with a systematic resort to chance to determine outcomes. There was evidence that post position is determined at random and that certain post positions are more advantageous than others. The trial judge failed to consider this evidence upon which a trier of fact could find that there was systematic resort to chance which made the race a game of mixed chance and skill. Whether the evidence actually establishes this will be for the trier of fact at the new trial to determine.

Fraud consists of dishonest conduct that results in at least a risk of deprivation to the victim. Fraudulent conduct for the purposes of a fraud prosecution is not limited to deception, such as misrepresentations of fact. Rather, fraud requires proof of deceit, falsehood or other fraudulent means. The term "other fraudulent

means” encompasses all other means which can properly be stigmatized as dishonest. Where the alleged fraudulent act is not in the nature of deceit or falsehood, the causal link between the dishonest conduct and the deprivation may not depend on showing that the victim relied on or was induced to act by the fraudulent act. R’s conduct constituted other fraudulent means because it can properly be stigmatized as dishonest conduct that caused a risk of deprivation to the betting public. There is a direct causal relationship between R’s conduct and a risk of financial deprivation to the betting public. The trial judge erred in law by finding that the betting public was not put at risk of deprivation and that any risk of deprivation was too remote.

The trial judge made the necessary findings of fact to support the fraud convictions entered by the Court of Appeal, including in relation to both required aspects of the required *mens rea* of fraud. The trial judge found that R knew that his acts were dishonest and, in the context of the cheating while playing a game charges, that he knew that his dishonest conduct put bettors at risk of deprivation. That, after all, is what cheating is.

### **Cases Cited**

**Distinguished:** *Harless v. United States*, 1 Morris 169 (1843); **referred to:** *Ross, Banks and Dyson v. The Queen*, [1968] S.C.R. 786; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Théroux*, [1993] 2 S.C.R. 5; *R. v. Zlatic*, [1993] 2 S.C.R. 29; *R. v. Olan*, [1978] 2 S.C.R. 1175; *Scott v. Metropolitan Police*

*Commissioner*, [1975] A.C. 819; *Vézina and Côté v. The Queen*, [1986] 1 S.C.R. 2; *R. v. Cassidy*, [1989] 2 S.C.R. 345.

### **Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 197(1) “game”, 209, 380(1).

### **Authors Cited**

Ontario. Racing Commission. *Rules of Standardbred Racing, 2008*, r. 10.01.

APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Rouleau and Tulloch J.J.A.), 2014 ONCA 744, 122 O.R. (3d) 594, 316 C.C.C. (3d) 527, 325 O.A.C. 351, [2014] O.J. No. 5094 (QL), 2014 CarswellOnt 14907 (WL Can.), setting aside the accused’s acquittals and ordering a new trial. Appeal dismissed.

*Gregory Lafontaine*, for the appellant.

*Michael Kelly and Matthew Asma*, for the respondent.

The judgment of the Court was delivered by

CROMWELL J. —

## I. Introduction

[1] This appeal was heard and dismissed, with reasons to follow, on October 13, 2015. These are the reasons.

[2] The appellant, Mr. Riesberry, tried to rig two horse races by drugging two horses. The question at the bottom of this appeal is whether the provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, under which he was charged can apply to this conduct.

[3] Mr. Riesberry, was a licensed trainer of Standardbred horses. He was caught on video drugging one horse, and caught trying to sneak syringes with drugs into the track for the purpose of doing the same thing to another. For the drugging caught on tape, he was charged with cheating while playing a game (a horse race) with the intent to defraud the public wagering money on its outcome (s. 209 of the *Criminal Code*) and with defrauding the public of money wagered on the outcome of a horse race (s. 380(1)). For trying to sneak the drugs into the track, he was charged with attempting to commit the same offences. At trial, he was acquitted. However, the Ontario Court of Appeal allowed the Crown's appeal, set aside the acquittals on all four counts, ordered a new trial on the cheating and attempted cheating counts ("cheating counts") and entered convictions on the fraud and attempted fraud counts ("fraud counts"): 2014 ONCA 744, 122 O.R. (3d) 594.

[4] Mr. Riesberry appeals the fraud convictions as of right and the order for a new trial by leave of the Court. There are four main issues before us, two concern the cheating counts and two the fraud counts.

[5] With respect to the cheating counts, the main questions are (i) whether the trial judge made a legal error in his interpretation of what constitutes a “game”; and (ii) whether there was any evidence that could establish that a horse race is a “game” as defined in s. 197 of the *Criminal Code* for these offences. I agree with the Court of Appeal that the trial judge erred in this respect and that there was evidence that could establish that a horse race is a game as defined for these offences.

[6] The two issues in relation to the fraud convictions are (i) whether the Court of Appeal was wrong to reverse the trial judge’s finding that the betting public was not put at risk by his conduct; and (ii) whether, even if the trial judge made that error, the Court of Appeal was wrong to have entered convictions rather than ordering a new trial. I also agree with the Court of Appeal’s disposition of these issues.

## II. Analysis

### A. *Brief Overview of the Facts*

[7] At trial, the judge found that, before a race, Mr. Riesberry injected a horse, “Everyone’s Fantasy”, with epinephrine and/or clenbuterol for the purpose of enhancing the horse’s performance in the race. The horse participated in the race and

finished sixth. The trial judge also found that, on a later occasion, Mr. Riesberry tried to bring a syringe loaded with prohibited drugs onto raceway property at which another horse, “Good Long Life”, was to race later that day. Mr. Riesberry was arrested and the horse was scratched from the race. The trial judge found that Mr. Riesberry, as a licensed trainer, was bound by rules barring possession of syringes and use of the drugs in question in order to enhance performance: Ontario Racing Commission, *Rules of Standardbred Racing, 2008*, r. 10.01(a) and (b). The trial judge also found that, in both instances, Mr. Riesberry had breached those rules and attempted to create an unfair advantage for the horses in the race. Nonetheless, the trial judge acquitted on all charges.

[8] It was undisputed on appeal that bets in excess of \$5,000 had been placed on both races and that the trial judge erred in saying otherwise: Court of Appeal reasons, at para. 18.

#### B. *The Cheating at Play Convictions*

[9] With respect to the cheating while playing a game charges, the trial judge concluded that a horse race is not a game as defined in the *Criminal Code* and therefore the charges were not made out. The first issue is whether the trial judge erred in law in his legal interpretation of what constitutes a “game” for the purposes of this offence.

[10] The charges against Mr. Riesberry arise under s. 209 of the *Criminal Code* which provides that everyone is guilty of an offence who, “with intent to defraud any person, cheats while playing a game”. “Game” is defined as “a game of chance or mixed chance and skill”: s. 197(1). It follows that the Crown had to establish that a horse race is a game with at least some element of chance. The trial judge relied on the U.S. case of *Harless v. United States*, 1 Morris 169 (Iowa 1843), to conclude that a horse race is a game of pure skill.

[11] It is somewhat unclear to what extent the trial judge relied on this authority as stating the law in Canada. However, to the extent that he did so, he made a legal error. The statute considered by the U.S. court divided games into only two categories, games of chance and games of skill. That case, therefore, did not address a point that must be addressed under the *Criminal Code*. That point is whether horse racing is a game of *mixed* chance and skill. The applicable Canadian law on this point is found in *Ross, Banks and Dyson v. The Queen*, [1968] S.C.R. 786. There must be a “systematic resort to chance” to determine outcomes, not merely the “unpredictables that may occasionally defeat skill”: p. 791.

[12] Even if we were to accept that the trial judge was alive to this difference between the law as set out in *Harless* and Canadian law, he nonetheless erred by failing to consider evidence in the record upon which a trier of fact could find that there was systematic resort to chance which made the race a game of mixed chance

and skill. I therefore conclude that the trial judge erred in law on this aspect of the case.

[13] The Court of Appeal's finding of a legal error at trial does not, on its own, justify setting aside the acquittals and ordering a new trial. A new trial may be ordered only if the Crown satisfies the appellate court that the "error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal": *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14, per Fish J. for the majority. Whether the Crown has satisfied this burden is the second issue. The answer depends in this case on whether there is in the trial record any evidence which could support a finding that horse racing has a sufficient element of chance to be considered a game of mixed chance and skill. Mr. Riesberry claims that there is not while the Crown says that there is.

[14] I agree with the Court of Appeal that the record at trial contains evidence upon which horse racing, in the present circumstances, could be found to involve a systematic resort to chance. There was evidence that post position is determined by a computerized random post position generator and that certain post positions are more advantageous than others: Court of Appeal reasons, at para. 41. It follows that the Court of Appeal was correct to order a new trial on these charges. Of course, whether the evidence actually establishes this will be for the trier of fact at the new trial to determine.

[15] Like the Court of Appeal, I would not address on appeal the Crown's highly fact-driven alternative position that Mr. Riesberry's conduct converted what would otherwise be a game of pure skill into one of mixed chance and skill.

[16] To conclude on the cheating counts, the Court of Appeal correctly ordered a new trial on these charges.

### C. *The Fraud Charges*

[17] Fraud consists of dishonest conduct that results in at least a risk of deprivation to the victim. The trial judge found that the Crown had failed to prove that the betting public was at risk of deprivation due to Mr. Riesberry's conduct. The trial judge also found that, even if the Crown had proved deprivation, there was no proof of any causal connection between Mr. Riesberry's actions and any risk of loss of the money wagered by the betting public.

[18] The Court of Appeal allowed the Crown's appeal from the acquittals. On the fraud charges, the court identified a number of legal errors such that the acquittals had to be set aside. The court also concluded that if the trial judge had not made these legal errors, he would have convicted Mr. Riesberry of both fraud counts.

[19] Mr. Riesberry submits first that his conduct did not put the betting public at risk of deprivation and that any risk of deprivation was too remote. His second submission is that, even if the trial judge was wrong about this, the Court of Appeal

should not have entered convictions on the fraud charges, but ought instead to have ordered a new trial. I will address these points in turn.

(1) Did Mr. Riesberry's Fraudulent Acts Cause a Risk of Deprivation That Was Not Too Remote?

[20] Like virtually all offences, fraud consists of two main components, the prohibited act (*actus reus*) and the required state of mind (*mens rea*). Mr. Riesberry's submission focuses on one of the two aspects of the *actus reus*. Those two aspects are:

1. . . . an act of deceit, a falsehood, or some other fraudulent means; and
2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.

(*R. v. Théroux*, [1993] 2 S.C.R. 5, at p. 20; *R. v. Zlatic*, [1993] 2 S.C.R. 29, at p. 43)

[21] The issue here concerns the aspect of deprivation. Mr. Riesberry contends that there was no evidence that his fraudulent conduct caused any risk of deprivation or that at least any such risk was too remote from his conduct. He submits that the Crown did not establish that anyone betting on the race had been induced to bet by, or would not have bet but for, his fraudulent conduct.

[22] I cannot accept this position. Contrary to Mr. Riesberry's contention, proof of fraud does not always depend on showing that the alleged victim *relied* on the fraudulent conduct or was *induced* by it to act to his or her detriment. What is

required in all cases is proof that there is a sufficient causal connection between the fraudulent act and the victim's risk of deprivation. In some cases, this causal link may be established by showing that the victim of the fraud acted to his or her detriment as a result of relying on or being induced to act by the accused's fraudulent conduct. But this is not the only way the causal link may be established.

[23] We should first be clear about what Mr. Riesberry's fraudulent conduct was before turning to the question of whether it caused a risk of deprivation. Fraudulent conduct for the purposes of a fraud prosecution is not limited to deception, such as deception by misrepresentations of fact. Rather, fraud requires proof of "deceit, falsehood or other fraudulent means": s. 380(1). The term "other fraudulent means" encompasses "all other means which can properly be stigmatized as dishonest." *R. v. Olan*, [1978] 2 S.C.R. 1175, at p. 1180. The House of Lords made the same point in *Scott v. Metropolitan Police Commissioner*, [1975] A.C. 819, a case approved by the Court in *Olan* (p. 1181). Fraud, according to Viscount Dilhorne in *Scott*, may consist of depriving "a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled": p. 839. And as Lord Diplock said, the fraudulent means "need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit": *ibid.*, at p. 841.

[24] It follows that where the alleged fraudulent act is not in the nature of deceit or falsehood, such as a misrepresentation of fact, the causal link between the

dishonest conduct and the deprivation may not depend on showing that the victim relied on or was induced to act by the fraudulent act. This is such a case.

[25] Mr. Riesberry injected and attempted to inject the racehorses with performance enhancing substances. The use of such drugs is prohibited and trainers such as Mr. Riesberry are prohibited even from possessing loaded syringes at a racetrack. This conduct constituted “other fraudulent means” because in the highly regulated setting in which he acted, that conduct can “properly be stigmatized as dishonest”: *Olan*, at p. 1180. He carried out these dishonest acts for the purpose of affecting the outcome of two horse races on which members of the public placed bets. His dishonest acts, therefore, were intended to and in one case actually did result in the possibility that a horse that might otherwise have won would not. The conduct therefore caused a risk of deprivation to the betting public: it created the risk of betting on a horse that, but for Mr. Riesberry’s dishonest acts, might have won and led to a payout to the persons betting on that horse. To return to Viscount Dilhorne’s words in *Scott*, Mr. Riesberry’s dishonest conduct created a risk that bettors would be deprived dishonestly of something which, but for the dishonest act, they might have obtained.

[26] There is a direct causal relationship between Mr. Riesberry’s dishonest acts and the risk of financial deprivation to the betting public. Simply put, a rigged race creates a risk of prejudice to the economic interests of bettors. Provided that a causal link exists, the absence of inducement or reliance is irrelevant. I agree with the

Court of Appeal that Mr. Riesberry's reliance on *Vézina and Côté v. The Queen*, [1986] 1 S.C.R. 2, is misplaced. That case made it clear that

[f]raud consists of being dishonest for the purpose of obtaining an advantage and which results in prejudice or a risk of prejudice to someone's 'property, money or valuable security'. There is no need to target a victim . . . and the victim may not be ascertained. [p. 19]

[27] This statement covers what Mr. Riesberry did.

[28] I conclude that the trial judge erred in law by finding that the betting public was not put at risk of deprivation by Mr. Riesberry's dishonest acts and that any risk of deprivation was too remote.

(2) Was the Court of Appeal Wrong to Enter Convictions Rather Than Order a New Trial?

[29] Mr. Riesberry submits that the Court of Appeal erred by entering convictions because the trial judge had not made all of the necessary findings of fact to support those convictions: see *R. v. Cassidy*, [1989] 2 S.C.R. 345, at pp. 354-55. These submissions focus on what Mr. Riesberry contends is the absence of the necessary findings of fact in relation to the mental element or *mens rea* of fraud.

[30] The mental element of fraud consists of two states of mind:

1. subjective knowledge of the prohibited act; and

2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

(*Théroux*, at p. 20; *Zlatic*, at p. 43)

[31] Mr. Riesberry's position is that the trial judge, having dismissed the fraud charges on the basis of no proof of the *actus reus*, did not go on to make findings in relation to these two aspects of the required *mens rea*. However, I agree with the Court of Appeal that the trial judge in fact did make the necessary findings.

[32] There can be no doubt that the trial judge found that Mr. Riesberry knew that his acts were dishonest, which is the first aspect of the *mens rea*. The trial judge found that his conduct was for the purpose of enhancing his horses' performances, not for any legitimate medical purpose. As for the second aspect, the trial judge held, in his analysis of the same record in the context of the cheating while playing a game charges, that Mr. Riesberry's conduct amounted to cheating. In other words, he intended to create an unfair advantage for his horses in their races. This is a finding of fact that Mr. Riesberry knew that his dishonest conduct put bettors at risk of deprivation. That, after all, is what cheating is.

### (3) Conclusion

[33] In my view, Mr. Riesberry's submissions in relation to the fraud charges cannot be accepted.

III. Disposition

[34] As announced at the conclusion of the hearing of the appeal, the appeal is dismissed.

*Appeal dismissed.*

*Solicitors for the appellant: Lafontaine & Associates, Toronto.*

*Solicitor for the respondent: Attorney General of Ontario, Toronto.*