Case Name:

Regina v. Breau

[1959] N.B.J. No. 8

45 M.P.R. 367

125 C.C.C. 84

32 C.R. 13

NEW BRUNSWICK SUPREME COURT

West J.

Judgment: 15 September 1959

(22 paras.)

Counsel:

W. L. Hoyt, for accused.

H. W. Hickman, Q.C., for the Crown.

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1 **WEST J.**:--The accused was convicted by Magistrate Morrissey of Northumberland County for that he "did kill a bull moose contrary to s. 22 (*a*) of The Game Act of New Brunswick." The case is before me on review under s. 46 of The Summary Convictions Act, R.S.N.B. 1952, c. 220. Under s. 115 of The Game Act, R.S.N.B. 1952, c. 95 it is my duty to hear and determine the review upon the merits of the case only.

2 The accused admits he killed the moose at the time and place charged, but contends he did so in self-defence. He says he was hunting with two companions near Renous, Northumberland County on 25th October 1958. He separated from his companions and when alone met a bull moose on a woods road. The moose charged him and in self-defence he shot it. Shortly after, his companions rejoined him and helped dress it. The moose had been shot in the breast. The three men then went out to the main highway where they met a truck driver who happened to be passing and told him they had shot a moose and asked where they might find a game warden. They were informed if they waited around one would probably be along. Shortly afterwards a game warden arrived and the accused told him he had shot a moose in self-defence and went with the warden to show him the carcass. The story of the accused was corroborated in many important details by the evidence of the game warden and the truck driver.

3 The relevant sections of The Game Act are ss. 22 (a) and 106 (1) which read as follows:

> "22. Every one is guilty of an offence who hunts, takes, hurts, injures, shoots, wounds, kills or destroys,
>
> "(*a*) a cow moose, calf moose, bull moose, cow caribou or calf caribou, at any time or season."
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> "106. (1) Where on the prosecution of an offence under this Act it is proven that the person charged with such offence had in his possession the game or fur bearing animal or any part thereof in respect to which he is charged, the onus shall be on the person charged to prove that he did not commit the offence charged."

4 The submission of the accused is that the finding of the magistrate is contrary to the evidence, and that he was justified in shooting the moose in self-defence. His solicitor further contends that s. 106(1) does not apply in the circumstances of this case, and relies on the principle enunciated by Duff C.J. in the case of *Richler v. The King*, [1939] S.C.R. 101 at 103, 72 C.C.C. 399, [1939] 4 D.L.R. 281, 3 Abr. Con. (2nd) 402, as follows:

> "The question, therefore, to which it was the duty of the learned trial judge to apply his mind was not whether he was convinced that the explanation given was the true explanation, but whether the explanation might reasonably be true; or, to put it in other words, whether the Crown had discharged the onus of satisfying the learned trial judge beyond a reasonable doubt that the explanation of the accused could not be accepted as a reasonable one and that he was guilty."

5 See also *Ungaro v. The King*, 9 C.R. 328, [1950] S.C.R. 430, 96 C.C.C. 245, [1950] 2 D.L.R. 593, 3 Abr. Con. (2nd) 390; *Regina v. Davis* (1954), 108 C.C.C. 257, 5 Abr. Con. (2nd) 587; *Regina v. Mason, Davison and Rispoli*, 22 C.R. 11, [1955] O.W.N. 736, 112 C.C.C. 220, 3 Abr. Con. (2nd) 390; and *Regina v. Chitty* (1959), 124 C.C.C. 45.

6 The principle so expressed was somewhat modified in the *Ungaro* case by Rinfret C.J.C. where, at 330 of the report, he says:

> "I do not understand Chief Justice Duff's statement in *Richler v. The King, supra*, as meaning that if the trial judge does not believe the accused it is, nevertheless, his duty to apply his mind to a consideration as to whether the explanation given by the accused might reasonably be true. If the trial judge does not believe the accused the result is that no explanation at all is left. . . ."

7 The Crown submits the principle of the *Richler* case does not apply. The magistrate in his judgment said:

> "In a recent case *Regina v. Mason, supra*, it was held as to defences of this kind, that it is not the reasonableness of the accused's explanation, but whether his explanation might reasonably be true under the circumstances that the jury must consider. I am not commenting further on the facts in the case. In this case, I find the accused guilty of the offence as charged. . . ."

8 Bridges J.A. in *Regina v. Davis, supra*, referring to s. 106(1) of The Game Act, has this to say at 259:

> "The effect of subs. (1) is to shift the burden of proof. If the Crown proves the accused to have had in his possession the game or fur bearing animal in respect to which the accused has been charged, the latter must prove his innocence by a preponderance of evidence. If he fails to satisfy the magistrate that he is not guilty, the magistrate must convict as in cases under the Intoxicating Liquor Act ... There can be no question but from the wording of subs. (1) that the defence of a reasonable doubt cannot apply to cases where an accused has been found in posssession of the game or fur bearing animal in respect to which he has been charged."

9 Whether or not s. 106(1) of the Act applies is of little consequence. If the story of the accused is true he has proved by a preponderance of evidence that he shot the moose in self-defence and, if self-defence is available to him as a defence, has satisfied any onus placed on him by the section. If it is accepted that the section does not apply and that the case should be considered under the principle of the *Richler* case, as apparently was done by the magistrate, the same test of whether the story of the accused was true applies. Under either principle, if the magistrate does not believe the accused he should find him guilty although under the latter he must give him the benefit of a reasonable doubt.

10 There is little in the judgment under review to indicate what the magistrate thought of the testimony of the accused. He gave no reasons for finding him guilty. He is not required to do so under the law: *Regina v. Davis, supra*, at 261. He did say, however:

> "I hope I don't go out on a limb too far but the sentence seems to me to be a very severe one under the circumstances. I don't say that I have done anything to help you, but it may be that I may be able to help if enquiries are made from a higher authority. I certainly will do that."

11 This statement indicates to me the magistrate believed the accused, but felt he had to find him guilty because the plea of self-defence was not open to him. I have come to the conclusion that the account given by the accused as to the shooting must be accepted as true. The only question remaining is whether, under The Game Act, self-defence is available as a justification or excuse for shooting a moose. In the recent case of *Regina v. Vickers* which was before the Chief Justice of the Queen's Bench Division on review the learned judge states "self-defence is not open as an excuse or as a defence" to anyone who violates the provisions of s. 22 (a) of the Act. Such was the view of an able judge whose opinions are entitled to great respect. However, it must be considered as *obiter* as the case was decided on other grounds.

12 Apart from the *Vickers* case I have been unable to find any authority directly in point. It becomes necessary, therefore, to rely on certain fundamental legal doctrines. It has long been a principle of the common law that a person may with impunity kill another in self-defence. It is recognized that in certain circumstances an individual may through necessity employ self help for his protection and preservation rather than wait for the protection of the law, which may come too late.

13 Sir William Blackstone in his Commentaries on the Laws of England, Vol. III, p. 3, says:

> "But as there are certain injuries of such a nature that some of them furnish and others require a more speedy remedy than can be had in the ordinary forms of justice, there is allowed in those cases an extrajudicial or eccentrical kind of remedy; of which I shall first of all treat, before I consider the several remedies by suit; and, to that end, shall distribute the redress of private wrongs into three several species: first, that which is obtained by the mere act of the parties themselves ...
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> "And first, of that redress of private injuries which is obtained by the mere act of the parties. This is of two sorts first, that which arises from the act of the injured party only ...
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> "Of the first sort, or that which arises from the sole act of the party, is
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> "1. The defence of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in his person or property it is lawful for him to repel force by force; and the breach of the peace which happens is chargeable upon him only who began the affray. For the law in this case respects the passions of the human mind, and (when

> external violence is offered to a man himself, or those to whom he bears a near connection) makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future processes of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried unless it were permitted a man immediately to oppose one violence with another. Self-defence, therefore as it is justly called the primary law of nature, so it is not, neither can it be, in fact, taken away by the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay, even for homicide itself ..."

14 Similar statements are to be found in Stephen's Commentaries on the laws of England, Patterson's Liberty of the Subject, Broom's Commentaries on the Common Law and works of other great writers of the Law. See also Pound, Readings on the History and System of the Common Law, 2nd ed. under the caption Self Help p. 305 and *Regina v. Rose* (1884), 15 Cox C.C. 540 at 541, where Mr. Justice Lopes said:

> "Homicide is excusable if a person takes away the life of another in defending himself, if the fatal blow which takes away life is necessary for his preservation."

15 These principles of the common law are given express statutory recognition in ss. 34 and 35 of The Criminal Code. See Crankshaw's Criminal Code, 7th ed., p. 17 and pp. 83 *et seq.* Such is in keeping with the statement of Blackstone, *supra*:

> "Self-defence, therefore as it is justly called the primary law of nature, so it is not, neither can it be, in fact, taken away by the law of society. . . ."

16 The same rule applies when a person is attacked by an animal. See *Morris v. Nugent* (1836), 7 C. & P. 572, 173 E.R. 252. This was an action in trespass for shooting the plaintiff's dog. Lord Denman C.J. at 252 (E.R.) said:

> "I think it was unnecessary to state in the plea, either that the dog was of a mischievous disposition, or that the plaintiff knew it; for the fact of the dog having attacked the defendant, would be a sufficient justification for shooting him in self-defence whether the dog was of a mischievous disposition or not."

17 The Crown asserts these common law principles have no application to a charge under s. 22 (a) of The Game Act which creates an absolute prohibition to which self-defence affords no justification or excuse. It is contended that one who shoots a moose under any circumstances has violated the statute and must be found guilty. In other words, it is claimed there is no defence for an accused once it is established he has killed or injured a moose.

18 There are cases which may seem to support such contentions. See *Rex v. MacDonnell* (1934), 7 M.P.R. 324, 61 C.C.C. 268, [1934] 3 D.L.R. 146, 20 Can. Abr. 1161, and *Rex v. Marshall* (1948), 91 C.C.C. 344, 5 Abr. Con. (2nd) 585, both Nova Scotia Game Act cases. In the *MacDonnell* case, a cow moose was shot by the defendant when firing at a bull moose, and in the *Marshall* case, a moose was shot by mistake for a deer. There are also the cases of *Regina v. Woodrow* (1846), 15 M. & W. 404, 153 E.R. 907, and *Rex v. Ping Yuen*, [1921] 3 W.W.R. 505, 14 Sask. L.R. 475, 36 C.C.C. 269, 65 D.L.R. 722, 13 Can. Abr. 43, cited in the *Vickers* case. In the *Woodrow* case, a dealer sold adulterated tobacco, although he had purchased it as genuine, and thus violated a statute, and in the *Ping Yuen* case a person engaged in selling soft drinks, innocently sold drinks containing alcohol in violation of the Saskatchewan Temperance Act.

19 In my view, all these cases are distinguishable from the case before me. In both Game Act cases, the court found there was negligence on the part of the accused, and there was no necessity for him to shoot in self-defence. In the *Woodrow* and *Ping Yuen* cases the accused, with sufficient care, could have discovered the contents of the article sold. In each case there was an alternative open to the accused who was under no compelling necessity to do the act

complained of. The rule of self help did not apply. The circumstances of the case before me are far different. The accused had no choice. He must protect himself or perish.

20 The Crown argues the accused voluntarily went into the woods and placed himself in a position where he might be attacked by a moose and, therefore, must accept the consequences. I cannot accept such a submission. The accused was lawfully in the woods and engaged on a lawful mission. Through no fault of his own he found himself in a situation of dire peril from which he could only extricate himself by taking the action he did. In my view his acts were warranted under the principles of the common law above noted.

21 To alter a clearly established principle of the common law a distinct and positive legislative enactment is necessary. Statutes are not presumed to make any alteration in the common law further or otherwise than the Act expressly declares. See Craies on Statute Law, 5th ed. p. 114. There is no specific language in The Game Act taking away the right of self-defence nor is there any language which by necessary implication does so. Hence the defence remains open to the accused.

22 The finding of the magistrate will be set aside and the conviction quashed. There will be no order for costs.