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R. v. Daniels

R.
v.
Chester Archie Daniels

[1994] 3 C.N.L.R. 126

Alberta Provincial Court

Van de Veen Prov. J.

October 5, 1993

A. Channer, for the Crown.
S. Olley, for the accused.

The accused treaty Indian was charged with hunting wildlife during closed season contrary to s.27(1) of the Wildlife Act, S.A. 1984, c.W-9.1. The accused admitted to shooting a deer but maintained that he initially shot and wounded the deer on reserve land and then followed the deer onto privately owned land where he shot and killed the deer. A Department of Fish and Wildlife official testified that deer tracks were located on the reserve land and lead onto the private property. The two issues before the court were (1) whether the accused shot and wounded the animal on the reserve, or whether he fully hunted the animal on private property; and (2) whether the accused was guilty of hunting out of season if it was found that he initially wounded the animal on reserve property and then followed it onto private property where he shot and killed it.

Held: Accused convicted.

1. As there was a possibility that the animal was superficially wounded on reserve property the accused was entitled to the benefit of the doubt on this point.
2. As a treaty Indian the accused was entitled to hunt at any time on unoccupied Crown land or on lands to which he had a right of access, but not on privately owned land out of season.
3. There is no excuse in law to follow a wounded animal onto private property to finish the kill. The finishing of the kill constitutes hunting within the Wildlife Act. In this case the accused was hunting wildlife out of season when he followed the wounded deer onto private property.
4. Although s.446 of the Criminal Code creates a summary offence for wilfully causing

unnecessary pain, suffering or injury to an animal, it does not oblige an accused to follow a wounded animal onto private property without the consent of the landowner in the belief that he was required to complete the kill. The provisions of s.446 cannot be interpreted as a requirement for an accused to commit an offence, or an excuse in law for an accused to commit an offence under the Wildlife Act.

5. To permit individuals to follow wounded animals onto private property to ensure they are humanely disposed of is a direct interference with the rights of private property owners to the enjoyment of their lands and subjects them to danger. Also it would remove the privilege of property owners to permit or not permit hunting on their property and it would undermine the present requirement that hunters must first seek permission to hunt on their property.

VAN DE VEEN PROV. J.:--

The Charge and the Issues

The accused is charged with hunting wildlife during a closed season contrary to s.27(1) of the Wildlife Act, S.A. 1984, c.W-9.1 of Alberta.

The accused is a member of the Stoney Bearspaw Band and is an Indian within the meaning of the Indian Act [R.S.C. 1985, c.I-5] of Canada. As a treaty Indian the accused is entitled to hunt at any time on unoccupied Crown lands or on lands to which he has a right of access. (Cardinal v. Alberta (Attorney General), [1974] S.C.R. 695 [[1973] 6 W.W.R. 205], and Constitution Act, 1930, R.S.C. 1985, App. II.).

The accused admits he shot a deer as alleged on February 23rd, 1993, but he maintains that he initially shot and wounded the animal on the Eden Valley Reserve, being Crown land to which he has a right of access as a treaty Indian. He alleges that he followed it onto privately owned land (described as the Black property in this case), where he shot and killed the animal. There is no dispute that had the deer been shot and killed on the Reserve property, the accused would not be guilty of the offence before the court.

The Crown alleges that the animal was hunted and killed fully upon private property, specifically the Black property, and that the deer was not initially wounded on the Eden Valley Reserve.

The first issue for determination in this case is therefore whether the accused shot and wounded the animal on the Eden Valley Reserve property, or whether he fully hunted the animal on the Black property, in which latter event he would clearly be guilty of the charge before the court.

The second issue in this case is whether the accused is guilty of hunting out of season if I find as a fact that he initially wounded the animal on the Eden Valley Reserve property and followed it onto the Black property where he shot and killed it.

The Evidence and Findings of Fact

The evidence of Barbara Carol Poulsen is that on February 23rd, 1993, she and her husband were lessees of certain property near Longview, Alberta. Mrs. Poulsen testified that on February 23rd, 1993, she was driving home on a gravel access road which lies between her leased property and the Black property. She saw nine deer peacefully grazing on the Black property and states that they were grazing with their heads down, "very, very calm and peacefully". She says she drove particularly slowly past the deer, continued on to her house, and immediately retrieved her binoculars to look

back at the deer she had seen. She saw a dark spot where the nine deer had been grazing and she also saw eight deer running north. She saw an orange-yellow truck and someone getting out of it moving towards the dark spot. She was quite convinced someone had poached a deer and drove back to the location of the dead deer where she confronted the accused, who she found in the process of dragging the deer from the Black property into his truck. She asked him what he was doing and he replied he was gutting out his deer. She also asked him on whose authority he had permission to hunt and he replied that he had been hunting there for the past twenty years and that he intended to continue to do so. The accused refused to give Mrs. Poulsen his name, but he suggested that she look at his licence plate on his vehicle, which she did. She then contacted Fish and Wildlife and reported the incident.

Mr. Black testified that he farmed and managed the Black property for his grandmother for the past several years. He says there are "No Hunting" signs on every corner of the property and on every gate. There is also a "No Trespassing" sign on the gate on the west side of the property which would be adjacent to Highway 22. The Black property was fully fenced at the time of the alleged offence. Mr. Black testified that over the years he had had trouble with people coming onto the land to hunt and he posted the signs to stop this from happening. He had placed new signage on the property in August of 1992. Although he would grant permission to hunters when asked, he had not granted permission to the accused allowing him to hunt on his property on this or any other occasion.

The evidence is clear that the hunting season for deer closed on November 29th, 1992.

The accused gave evidence that he shot and wounded the deer on the Eden Valley Reserve and followed it onto the Black property where he admits he shot, killed and retrieved it. Under cross-examination Ms. Poulsen testified that from the time she first saw the deer to the time she picked up her binoculars at home, approximately two to three minutes had elapsed Her initial observations of the deer grazing peacefully took about 30 seconds. She also admitted that one of the deer may have been superficially wounded, but she thought that possibility remote because of the peaceful nature they displayed as she drove by. In addition, Mr. Isley of the Fish and Wildlife department testified that there were deer tracks located on the Eden Valley Reserve property and leading onto the Black property. The Eden Valley Reserve is located kittycorner to the Black property on Highway 22.

Therefore, although I will not say I believe the accused's explanation concerning the wounding of the animal on the Eden Valley Reserve property, I find there is some doubt in my mind on this matter. Accordingly I give the accused the benefit of the doubt on this point and accept his evidence that he wounded the animal on the Eden Valley Reserve property, followed it onto the Black property, and there he shot and killed it.

The Law

It is argued before me that the Wildlife Act does not directly address the obligation of a hunter who has wounded an animal while legally engaged in hunting nor does it address whether a hunter may pursue wounded game onto private land. It is further argued that since s.446(1)(a) of the Criminal Code dealing with cruelty to animals creates a summary offence for wilfuly causing unnecessary pain, suffering or injury to an animal or bird, the accused was indeed obliged to follow the wounded animal to ensure it was humanely disposed of.

Section 446(1)(a) reads as follows:

> 446.(1) Everyone commits an offence who
>
> (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird.

Defence submits the accused was simply a prudent hunter in this case, ensuring that an animal he had wounded was humanely disposed of.

The decision of R. v. Potts (1991), 84 Alta. L.R. (2d) 326 [[1992] 1 C.N.L.R. 142] (Prov. Ct.), has been cited to me in support of the proposition that not only is a hunter entitled to pursue wounded game upon private land, but a hunter has a positive obligation to prevent undue suffering by animals wounded during a hunt. This is a decision of the Provincial Court of Alberta in which the court described the actions of an accused in following a wounded animal onto private property as "simply finishing a legal hunt". The learned trial judge stated that the actions of the accused amounted to exercising without negligence the diligence required of a hunter to ensure that animals he has wounded are humanely disposed of. This decision was handed down on November 15th, 1991.

With the greatest respect to my brother Judge Ayotte, there are a number of decisions of the Court of Queen's Bench in Alberta and Saskatchewan which have held otherwise. Some of these are unreported decisions and it appears that they were not submitted to my brother Judge, nor considered by him, in the R. v. Potts decision. These decisions were direct appeals from the Provincial Court and accordingly are binding upon me.

The first such decision is that of R. v. Kasprow, Doc. 8804-0038C3A01, an unreported decision of Mr. Justice Forsyth of the Court of Queen's Bench in Alberta rendered in June of 1983. In that case the defence of killing an animal for humanitarian purposes to put a wounded animal out of its misery was considered. This decision was a Crown appeal from a Provincial Court acquittal of an accused charged with the offence of hunting without a licence, contrary to s.18 of the Wildlife Act of Alberta. The circumstances were that the accused had a licence to shoot male elk, but when he saw a wounded female elk he proceeded to shoot and kill the female elk. The Provincial Court trial judge found that killing the wounded female elk on humanitarian grounds was an excuse in law for the offence of hunting without a licence. On appeal Mr. Justice Forsyth held that the learned trial judge had erred in his interpretation of the section. The acquittal was reversed and a conviction was entered. Although the offence of hunting without a licence is somewhat different than the offence before me, the principles applicable in the Kasprow decision and the case before me are in my view indistinguishable.

In the decision of Alberta (Attorney General) v. Gelsinger (March 24, 1975), (Doc. C/683) Peace River, Alberta, an appeal was taken from a Provincial Court acquittal in circumstances where an accused was charged with hunting upon occupied land without the consent of the owner, contrary to s.20(2) of the Wildlife Act of Alberta. The facts in the case were that the accused and his father were hunting for moose in a farming area north of Fairview, Alberta. They observed a moose between the road and some bush, which was unoccupied Crown lands. They followed the moose a short distance into the bush and shot, causing the moose to be wounded. From this point the moose travelled approximately half a mile in a northeasterly direction, then crossed a north-south district road and went into a fenced field on the farm of Mr. Wilmer Retzler. In order to complete the kill the accused also went into the field and fired more shots from his rifle. The accused was honestly convinced that the moose was wounded and therefore, according to the game regulations, he was required to successfully complete the kill. The area to the west of the location where the moose was killed was unoccupied lands. Farm buildings were located approximately one mile east of the point where the moose finally collapsed. "No Trespass" signs were posted although not seen by the accused. Consent to hunt had not been obtained from the owner. In this decision the court considered Alberta Reg.161/74 which stated as follows:

> 38.(1) No person shall allow the edible parts of any big game or game bird to be wasted, destroyed or spoiled.

The court considered whether there had been an error in law in the acquittal of an accused who had followed wounded game onto occupied lands without the consent of the owner and in the belief that he was required to successfully complete the kill.

The court held that the regulation prohibiting a person from allowing game to be wasted, destroyed or spoiled does not require an accused to commit an offence in order to escape conviction. The court stated that while a reasonable effort should be made by any hunter to prevent wounded game from escaping, after a reasonable effort is made, no prosecution under the regulation could possibly result in a conviction.

The court stated the following:

> The reasonable effort in every case would be a question of fact but never in my opinion would such reasonable effort allow the hunter to break the law much less require him to do so. I am satisfied that even a broad interpretation of the regulation does not compel a hunter to follow wounded game onto occupied lands without first seeking permission to enter upon the lands from the owner or occupant thereof. If such permission is sought and refused, and as a result wounded game perishes on the occupied land, the hunter would have a full defence to any charge under the regulation.

The court held that the acquittal by the Provincial Court Judge had in essence ruled that the accused was under a legal duty to break the law, and accordingly the Court of Queen's Bench set aside the acquittal, finding the appellant guilty of the offence.

Once again, the decision does not deal with s.446 of the Criminal Code of Canada, but the principles in my view are indistinguishable. The provisions of s.446 of the Criminal Code cannot be interpreted as a requirement for an accused to commit an offence, or an excuse in law for an accused to commit an offence under the Wildlife Act.

In the decision of R. v. Kronberger (1982), 18 Sask. R. 95 (Prov. Ct.), the accused was charged with hunting wildlife on land that was posted "No Hunting" contrary to s.38(1) of the Wildlife Act. In this case a hunter pursued a wounded deer onto posted land and the hunter alleged he was justified in going onto the posted land by the Wildlife Act regulations which require hunters to retrieve wounded game. This was a Saskatchewan decision and the regulation considered read as follows [at p. 97]:

> A person who kills or injures any game shall make every reasonable effort to retrieve the game and include it in his lawful limit.

Similar to the Gelsinger case, the court held that the intent of the legislature in enacting s.38(1) of the Act was to provide protection to land owners who felt that damage was being done to them by hunters.

The court held that if the regulation were interpreted to mean that a hunter must follow a wounded animal onto posted land without the consent of the owner, there would be a serious and substantial exception to the right extended to the land owner by s.38(1) of the Act. It would mean that the land owner must now, in a common hunting situation, have hunters come on his land and risk fences being broken, gates being left open and his animals shot. The court found this was not what the legislature intended, stating that if it did, it would have amended s.38(1) accordingly. The court concluded further that the term "reasonable effort" means an effort to retrieve but does not extend to a breach of s.38(1) of the Act.

Applying all of the foregoing decisions to the case before me, I am of the view that it is no excuse in law to follow a wounded animal onto private property and finish the kill. The finishing of the kill constitutes hunting within the definition of the Wildlife Act, and the accused before me was hunting wildlife out of season when he followed the wounded deer onto private property. This view of the law seems particularly reasonable to me when the consequences of permitting a hunter to follow wounded game onto private land out of season are considered. The land owner would not be safe on his own land. Through his lack of knowledge of the hunter shooting live ammunition on his property, he himself may inadvertently be in the area of the hunt, a dangerous and unacceptable position for the owner of private property to be placed into on an account of a desire to humanely dispose of a wounded animal.

In addition the result of permitting individuals to follow wounded game onto private property to ensure they are humanely disposed of would also be a direct interference with the rights of private property owners to quiet enjoyment of their land. The results would be far reaching if an individual could legally finish the hunt by shooting live ammunition onto private property. Essentially, to permit an accused to follow wounded game onto private property without the consent of the owner removes the important privilege of an owner to permit or not permit hunting on his

property. An owner would not be able to prevent hunters on his land, and this would seemingly undermine the present requirement that hunters must first seek and receive the permission of owners to hunt upon their property.

For the foregoing reasons I find the accused guilty as charged.

d/lls