

Case Name:
R. v. McGuire

[1983] O.J. No. 2402

32 C.R. (3d) 381

Essex No. 386/82

Ontario County Court - Essex County

McMahon Co. Ct. J.

Oral judgment: January 24, 1983.

(21 paras.)

Cases cited:

O'Shaughnessy, Ex parte (1904), 13 Que. K.B. 178, 10 R.L.N.S. 38, 8 C.C.C. 136.
R. v. Buzzanga (1979), 49 C.C.C. (2d) 369 (Ont. C.A.).

Statutes cited:

Criminal Code, R.S.C. 1970, c. C-34, ss. 386(1), (2), 402 [am. 1974-75-76, c. 93, s. 35], 613 [am. 1974-75-76, c. 93, s. 75].

APPEAL against conviction for wilfully causing unnecessary injury to animal.

Counsel:

T.R. Porter, for the appellant.
D. Harrison, for the Crown.

1 McMahon Co. Ct. J. (orally):-- This is an appeal from the decision of Nosanchuk Prov. J. of the Provincial Court, Criminal Division, in the county of Essex, made on 12th August 1982, wherein he convicted the appellant of a charge that he on or about 8th March 1982 did wilfully

cause unnecessary injury to an animal, to wit, a dog, by using a firearm to wound it, contrary to s. 402(1)(a) of the Criminal Code of Canada, R.S.C. 1970, c. C-34.

2 This section reads as follows, and I will paraphrase it for our case:

"402.(1) Every one commits an offence who ...

(a) wilfully causes ... unnecessary pain, suffering or injury to an animal or bird".

3 The factual situation in this case is rather a peculiar one. Mr. McGuire was, at the time of the offence, the animal control officer of the township of Maidstone, having been appointed to that position by by-law, as I understand it, some two weeks prior to this occasion.

4 On 3rd March, a woman named Mrs. Meloche found her cat being attacked and torn to shreds by a dog which she described as a German shepherd dog, brown with a black back. This information was, of course, related to her husband. Mr. McGuire attended at the residence and obtained a description of the dog. It was also his understanding at that time that Mrs. Meloche herself alleged that she was attacked by the dog. Sometime later he saw the animal fitting that description and attempted to follow it, as I understand his evidence, it being his belief that he would follow it to its home and advise its owner of what had occurred. He stated that on one occasion he followed it for a distance of five miles, where it entered into a wooded area and did not reappear. On a second occasion he again saw the animal and saw it enter this same wooded area.

5 On 8th March, a Mrs. Taylor, who is a neighbour of the Meloches, was in her home. She owned a poodle, which was chained in the backyard. She heard her dog making cries of pain, she ran out of her home and found it being attacked by the German shepherd. She obviously had heard of the occasion at the Meloches' residence. The area in question is rural in nature, and when I use the term "neighbour" it would mean that there are some two fields between the two residences. It is an open area, completely unfenced. Mrs. Taylor, to use her terminology, swore at the German shepherd, it released her dog and she managed to bring her animal into her home. She stated that at this point the German shepherd growled at her. She testified that she was in a state of hysteria and called Mr. Meloche and advised him of what occurred. Mr. Meloche came to her home and brought with him his shotgun, which at that point was unloaded, although he did have ammunition with him. The dog was not seen at that point, and Mr. Meloche telephoned a member of the township council. On the occasion with his cat he had telephoned the Essex county Humane Society and was advised by them that it was outside of their jurisdiction and he would have to deal with the Maidstone municipal authorities.

6 Mr. McGuire attended a short time later at the home. He was without any equipment, although there was a rifle in his pick-up truck, but he was without any equipment that one might normally expect to be used in capturing and impounding a stray animal. He took the report from Mrs. Taylor and as he left the home he found the German shepherd in the driveway. He attempted to call to the animal, which at that point was located between he and his truck, and the animal growled and snarled at him. He stated he attempted to get closer and the snarling was louder. He therefore returned into the Taylor residence, asked Mr. Meloche for his shotgun and a round of ammunition. There was another dog owned by a neighbour in the vicinity next to the dog which was at large. Mr. McGuire testified that he attempted to shoot the one animal without endangering the other and was unsuccessful in the first shot, although he was satisfied that he hit it. It seemed to have no effect. He

then returned to the house, obtained another round of ammunition, went back and shot the dog again, at which time the dog left the area. He and Mr. Meloche followed the dog to a neighbour's garage, and by using his rifle Mr. McGuire killed the dog in the garage.

7 It is my view, from the wording of the information, that the Crown is charging Mr. McGuire with the shot that took place in the driveway, wherein he used the shotgun for the purpose of wounding the animal.

8 Just dealing first with the section itself, counsel for the appellant has argued that the term "wilfully causes unnecessary pain" should be defined to mean "intentionally with an evil intent to cause unnecessary pain", based on a decision in the case of *Ex parte O'Shaughnessy* (1904), 13 Que. K.B. 178, 10 R.L.N.S. 38, 8 C.C.C. 136. In that case, Wurtele J. defined "wilfully" in the following terms on p. 139. He stated:

"Wilfully means not merely to commit an act voluntarily but to commit it purposely with an evil intention, or in other words it means to do so deliberately, intentionally and corruptly and without any justifiable excuse."

9 It is my view that this is not the proper definition to be applied in the case before me.

10 Section 386(1) of the Code states as follows:

"386.(1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event."

11 This, of course, applies to Pt. IX, in which s. 402 [am. 1974-75-76, c. 93, s. 35] is found.

12 There is then the rather lengthy dissertation on the definition of "wilful" to be found in the case of *R. v. Buzzanga* (1979), 49 C.C.C. (2d) 369, a decision of Martin J.A. in the Court of Appeal in the province of Ontario. Martin J.A. reviewed the many variant definitions which have been applied to the term "wilfully" in various statutory contexts. It is my view, based on that decision and the definition contained in s. 386, that the term "wilfully" as used in s. 402 means "deliberately" to cause unnecessary pain, suffering or injury to an animal.

13 Now, there is no question that in this case the accused did wilfully shoot the dog, and on his own evidence he attempted to wound the animal on this first occurrence so that he might chase it away from the other animal and then be in a situation where he could dispose of it. So with reference to the law itself he wilfully, in my view, as found by Nosanchuk Prov. J., did the act that was prohibited.

14 However, the court must also consider s. 386(2) of the Code. This section provides that:

"(2) No person shall be convicted of an offence under sections 387 to 402 where he proves that he acted with legal justification or excuse and with colour of right."

15 It is the submission of the appellant that the accused, Mr. McGuire, was the animal control officer in the township of Maidstone and that it was inherent in his duties to protect the citizenry and animals in the municipality. However, the by-law appointing Mr. McGuire as animal control officer authorized him to, in a sense, capture and impound any stray animals in the municipality. It did not authorize him, by implication of statutory authority, to kill or destroy an animal before or after impoundment, as I understand the section related to me by counsel of the by-law itself. So there was no legislative authority authorizing the accused, by reason of his position, to kill an animal merely as a result of his own judgment as the animal control officer.

16 However, the court must also determine whether, apart from his position or authority imposed upon him by by-law, in this instance whether or not he has proven he acted with legal justification or excuse or with colour of right. The submission of the appellant receives a certain degree of sympathy with this court. He was called to the home in question; he had some prior experience with the animal in question. It is submitted on his behalf that he acted with legal justification, in the sense that he acted reasonably in the circumstances in which he found himself, that the only other option that was open to him was to frighten the animal away, which would leave the animal free to become: (a) a danger to other animals in the municipality; and (b) possibly a danger to other persons in the municipality; or alternatively he might have made further attempts to capture the animal. As I understand Mr. McGuire's evidence, he merely went out and called to the dog; when the dog snarled at him he, I believe, attempted to get somewhat closer; when it snarled louder, he went back into the house and immediately got the gun and took the necessary steps to destroy it.

17 The question of fact that was to be determined by the trial judge was whether in the context of the circumstances of this case the accused acted with legal justification, in the sense that he acted properly and reasonably, with an implied duty upon him to protect the various residents in the area, or he acted with colour of right.

18 As part of the evidence adduced before His Honour, there were certain statements alleged to have been made by the accused person to members of council at the time that he was hired. The accused, in his evidence, stated that he made these statements in jest and they were accepted by members of the council in that light, and I am merely mentioning it because those statements were referred to in Nosanchuk Prov. J.'s judgment. It was, however, clear in Nosanchuk Prov. J.'s judgment that what was uppermost in the mind of the accused at the time that this act was done was his desire to satisfy two residents and two taxpayers of the municipality, as opposed to his obligation as animal control officer to take whatever steps were open to him to properly enforce his obligations, and, if I might read from His Honour's judgment, he states:

"The court has come to the conclusion that in the circumstances it has not been established by Mr. McGuire at all that what he did was with legal justification or excuse and with colour of right. I can understand that Mr. McGuire was under some pressure; he had the citizens there; they were quite upset. The gun was being provided there to be handed to him, but he is the animal control officer. He is not a person who simply goes around to execute stray dogs who growl; he is a person who is charged with the responsibility of being the animal control officer, seizing and impounding animals. He can not simply respond to the desires of particular individuals who are upset, as much as one can sympathize or empathize with their upset. He has to use some judgment; what was exercised

there was not really any degree of measured judgment; it was simply a response to the concerns, as understandable as they were, a response to the concerns of two residents of the township. In the court's view, there was no proper basis upon which Mr. McGuire could have come to the conclusion that he was really in imminent danger as a result of that dog simply growling and from the information that he had. He did not, the court finds, have a reasonable basis, given all the circumstances, to feel that he was in imminent danger at the particular time. What he was doing was simply responding in a very summary way and in an easy way, taking the easy way out in terms of these irate citizens, and using what one of the citizens, Mr. Meloche, had provided to him readily; he just simply did that, and that in the court's view is not a reasonable exercise of the position of the animal control officer."

19 Now, I have read the transcript, and certainly in the transcript itself there was an allegation or evidence to the extent that Mr. McGuire believed that Mrs. Meloche had been attacked. There was no evidence that Mr. McGuire was going around indiscriminately shooting dogs in the municipality. However, this court is bound by the provisions of s. 613 [am. 1974-75-76, c. 93, s. 75] of the Criminal Code of Canada. I am sitting in the position of the appellate judge. I have not had the opportunity of hearing or observing the persons who testified before Nosanchuk Prov. J., and therefore I am bound by the following provisions:

"613.(1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand his trial, or against a special verdict of not guilty on account of insanity, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice".

20 Now, first, I could not find any error of law made by Nosanchuk Prov. J. in the determination of the evidence that was before him. The verdict must, therefore, if it is to be set aside, "be set aside on the ground that it is unreasonable or cannot be supported by the evidence". That, of course, is determined by what view of the evidence one takes. In other words, what was the reason which motivated the actions of the accused person? Nosanchuk Prov. J. found that the reason that motivated the accused was, in essence, to satisfy the feelings of two citizens and ratepayers of the municipality, and was not for the purpose (a) of protecting himself from imminent danger, or (b) protecting other people or other animals from imminent danger. Nosanchuk Prov. J. arrived at this determination after having been in the position of making determinations of credibility and observing the persons who have testified before him. I might point out that on the transcript as set forth, and in read-

ing the transcript, I might very properly have come to a very different conclusion; however, I am bound by the provisions of the section relating to appeals; I am not the trial judge. In order for me to set aside his decision, I must make a finding that he erred in law, which I cannot do, or a finding that his decision was entirely unreasonable and not supported by the evidence, and that I also cannot do.

21 The appeal from conviction will therefore be marked "dismissed".

qp/s/qlkam/qlqs

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