Case Name:
R. v. ALLEN

[1974] N.B.J. No. 44

8 N.B.R. (2d) 131

17 C.C.C. (2d) 549

New Brunswick Supreme Court
Appeal Division

Hughes, C.J.N.B., Limerick and Ryan, JJ.A.

April 29, 1974

(5 pages) (16 paras.)

CASES JUDICIALLY NOTICED:

Ibrahim v. The King, [1914] A.C. 599, folld. [para. 4].
[*page132]

COUNSEL:

DAVID G. BARRY, for the accused appellant
ROBERT A MURRAY, for the Crown respondent

This case was heard by the Appeal Division on April 9, 1974. Judgment was delivered on April 29, 1974.

The judgment of the court was delivered by **LIMERICK, J.A.**

1 The appellant was convicted by a judge of the County Court without a jury for that on or about the 15th day of September, A.D., 1973, at or near Hammondvale, in the County of Kings, Province of New Brunswick, he did wilfully kill cattle to wit: one heifer, the property of George Sherwood, contrary to section 400(a) of the Criminal Code of Canada and amendments thereto and for such offence was sentenced to a term of two years in penitentiary.

2 He has appealed his conviction and sentence on the following grounds:

1. Statements made by the appellant to George Sherwood, Marlene Johnson and Cyrus Johnson were admitted without a "voir dire" being held when requested by counsel for the accused.
2. There was no evidence
(a) that a "heifer" was within the meaning of "cattle" as defined by section 2 of the Code.
(b) That the accused committed the offence or "wilfully" committed the offence.
(c) That the appellant was a party to the offence pursuant to the provisions of section 21 of the Code.

3. The sentence was unreasonable and excessive.

3 The objections to the statements made by the accused particularly to George Sherwood, the owner of the animals killed, is not based on the contention that the owner was a person in authority, but that as it was made after the police had interviewed the accused and after an intention to charge him was formed by the police, the statement may not have been voluntary in that it was induced by some hope of favour held out by the police who were persons in authority. The contention would seem to [*page133] have some merit; if the police, for example, suggested to the accused that if he went to Sherwood and offered to pay for the cattle Sherwood might be prepared to withdraw or not press the charges against the accused. The accused requested a voir dire for the purpose of establishing the statement was not voluntary. The trial judge refused to hold a voir dire thereby depriving the accused of the right to go on the stand and testify as to voluntariness of the statement under conditions which would have protected him from having his testimony on the voir dire being used against him on the merits of the offence.

4 In Ibrahim v. The King, [1914] A.C. 599, at p. 609, Lord Sumner said:

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale . . . ."

5 As counsel for the accused questioned the voluntary nature of the statement and requested a voir dire the trial judge should have held a voir dire before admitting the statement.

6 Counsel for the appellant also contends the statement made by the accused did not admit the commission of the offence but that he was present only when the offence was committed and that apart from the statement to Sherwood the only evidence was circumstantial and was not inconsistent with any other rational conclusion than the guilt of the accused.

7 The trial judge held a "voir dire" in relation to a statement given by the accused to the police and admitted everything said by the accused to the police down to the time the investigating officer informed the accused his wife had told him everything including the names of the others implicated, but the trial judge refused to admit a written statement given by the accused after the officer stated the accused's wife had made a statement, as well as any conversation by the accused after the officer so informed him. The trial judge in refusing to admit the written statement expressed the opinion that the informing of the accused that his wife had made a statement was an inducement which resulted in the statement given thereafter not being voluntary. [*page134]

8 The trial judge erred in his reasoning for excluding the statement. There can be no question that the statement by the police officer that the accused's wife had made a statement of the entire facts including the names of the others involved "induced" the accused to make a written statement. The word "inducement" when used in relation to whether a statement is voluntary or not has a more restricted meaning than the broad meaning of "leading to" or "causing". In the more restricted context referable to statements, which must be shown to have been made voluntarily, "inducement" connotes "attraction", "expectation of favour or hope", or, contrarywise, "threat or fear". The test is as set out in Ibrahim v. The King (supra).

9 In the portion of the statement admitted by the trial judge and the admissibility of which is not questioned on this appeal, the accused is alleged by the investigating officer to have said ". . . he would admit to the offence but he did not want to implicate anyone else". He also stated, he would take the rap himself.

10 The accused called no witnesses and did not go on the stand to explain or deny the statement allegedly made by him "he would admit to the offence".

11 The trial judge erred in refusing to hold a voir dire as to the statement alleged to have been made to the owner of the cattle, but there has been no miscarriage of justice occasioned thereby. That statement did not admit the offence, merely his presence at the time of the offence. The admission of the offence to the police was sufficient evidence combined with the other evidence on which the trial judge could convict.

12 There is no merit in the objection that a "heifer" is not included in the word "cattle" as used in the charging section of the Code. "Cattle" is defined in section 2 of the Code as "neat cattle or an animal of the bovine species by whatever technical or familiar name it is known". The dictionary meaning of "heifer" is a "young cow that has not had calf". "Cow" is defined as the female of any bovine animal; a heifer is therefore a familiar name of a bovine species.

13 In view of the admission of the accused it is unnecessary to deal with grounds (b) and (c) of the appeal. [*page135]

14 The sentence of two years seems unduly harsh if we equate the offence to breaking and entering and stealing $ 425, the value of the animal killed.

15 There has been a prevalence of cattle thefts since the increase in the price of food especially beef. The farmer must put his cattle to pasture and has not the facilities to guard them every night. The deterrent effect of sentencing must be given a greater emphasis in this type of crime than ordinary theft. The accused has no previous conviction and was intoxicated. I would reduce the sentence to six months imprisonment.

16 The appeal against conviction is dismissed. The appeal against sentence is allowed and the sentence is reduced to six months imprisonment in gaol.

Appeal allowed in part.