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R. v. Martens

Between
Her Majesty the Queen
and
Vincent Patrick Martens, Accused

[1986] M.J. No. 76

39 Man.R. (2d) 249

16 W.C.B. 14

Suit No. 33/85

Manitoba Court of Queen's Bench
Brandon Centre

Oliphant J.

February 7, 1986

Mens rea -- Offences requiring specific intent -- Unlawful and wilful injury of cattle was offence requiring general intent -- Drunkenness no defence to offences requiring general intent -- Criminal Code, ss. 306(1), 386(1),400(a).

This was a charge of an indictable offence of unlawfully and wilfully injuring cattle. Following a night of drinking, the accused and another broke into and entered a barn filled with cattle. The accused threw disinfectant on the cows, sprayed red paint on the animals and rammed the handle of a pitchfork into the vaginas of the cows. The accused asserted that he was intoxicated while committing the offence, that the offence required specific intent as opposed to general intent and that drunkenness was a defence to an offence requiring specific intend.

HELD: The accused was found guilty. The accused was possessed of the requisite intent at the material time. The offence of unlawful and wilful injury of cattle required only a general intent. The word "wilfully" in s. 400 of the Criminal Code did not mean that the section required specific intent. "Wilful" meant intentional as opposed to accidental. As a result, the defence of drunkenness was not available and the Crown had satisfied its onus and proved the guilt of the accused beyond a reasonable doubt.

K. Tarwid, for the Crown

C. Russell, for the Accused

OLIPHANT, J.:-- The accused stands charged with two counts as follows:

1. THAT he, the said Vincent Patrick Martens, on or about the 1st day of December, A.D. 1984, at or near the Rural Municipality of Wallace, in the Brandon Judicial Centre, in the Province of Manitoba, did unlawfully and wilfully injure cattle to wit: cows, the property of Fred Stewart.
2. THAT he, the said Vincent Patrick Martens, on or about the 1st day of December, A.D. 1984, at or near the Rural Municipality of Wallace, in the Brandon Judicial Centre, in the Province of Manitoba, did unlawfully break and enter a certain place, to wit: a barn the property of Fred Stewart, situate at or near the Rural Municipality of Wallace, in the Province of Manitoba and did commit therein the indictable offence of unlawfully and wilfully injuring cattle.

At approximately three o'clock in the morning of December 1st, 1984, the accused and a friend, Michael David Rempel broke and entered a barn owned by one Frederick James Stewart at the Rural Municipality of Wallace, in Manitoba. The stated intention of the accused in entering the barn was that he wanted to get warm.

After entering the barn, the accused and Rempel embarked upon a course of conduct that can only be described as bizarre and sadistic.

There were a number of cattle in the barn at the time in question and the accused proceeded to throw disinfectant on the cows. It should be noted, in passing, that, without exception, all of the cows were in calf.

Not being satisfied with merely throwing disinfectant on the animals the accused proceeded to spray the rumps of at least certain of the cows with what would appear to be red paint from an aerosol can. When asked to explain why the paint was sprayed on the rumps of the cows, the accused said that he did not want to endanger his own life by going in between the cows and "getting squished".

As might be expected, there were pitchforks in the barn and the accused and Rempel each took a pitchfork and proceeded to ram the handles of their respective forks into the vaginas of the cows.

The evidence of the owner of the cattle was that the handles of the forks were covered in blood from the tip of the handle downward to a distance of approximately 2.5 feet. A statement given by the accused to a member of the R.C.M.P. was entered as an exhibit and in that statement the accused said that he had stuck the handle of the fork into the vaginas of the cows approximately 1.5 feet.

According to the owner of the cattle, five cows were affected. The evidence of Melville Everett More, a Veterinary Surgeon, was that two cows showed signs of irritation to the areas of their vagi-

nas and vulvas; that there was a bloody discharge from one of the cows and a "prolonged" discharge from another. He testified that four of the five cows were put on antibiotics and opined that the injuries were caused by penetration by a foreign object.

In his statement, the accused said that he stopped sticking the handle of the pitchfork into the cows when he noticed that one of the animals was bleeding. In his evidence the accused said that he had stopped after being told to do so by Rempel, who had observed blood coming from one of the cows.

Shortly thereafter both Martens and Rempel left the barn and proceeded to walk down the highway towards their homes. I will refer later in this judgment to what transpired subsequent to the departure of the accused and his friend from the barn.

The defence asserted in this case is that at the relevant time, the accused was intoxicated; that the accused is charged with the offences requiring specific intent as opposed to general intent and that drunkenness is a defence where a person is charged with an offence requiring specific intent.

On the evening of November 30, 1984, the accused and Rempel were passengers in a motor vehicle operated by one David Thomas Kerik. The evidence is that sometime between 10:00 p.m. and 11:00 p.m. on that evening, these three individuals left Virden, Manitoba and drove around the country in Kerik's vehicle. Kerick testified that between 11:00 p.m. on November 30, 1984 and 2:00 a.m. on December 1, 1984 the accused drank about 18 bottles of beer. Kerik testified that he drank approximately 10 bottles of beer during that same time frame. Kerik said that at approximately 2:30 a.m. he dropped the accused and Rempel off on the highway as he, Kerik, was tired and wanted to go home. Kerik testified that at that time the accused's speech was slurred and that he was staggering. He said that when the accused got out of the car he had to hold onto the car in order to stand and that when he was not holding onto the car, the accused fell down. Kerik said "In my opinion he (the accused) was really intoxicated."

Although Kerik was not aware as to how much beer Rempel had consumed, he testified that Rempel did not appear "that bad to me".

Kerik testified that the temperature was below the freezing mark on the morning in question.

The evidence of Michael David Rempel was that the beer was purchased sometime between 10:00 p.m. and 11:00 p.m. on November 30th but he was not sure how much beer was purchased. He estimated that between 24 and 36 bottles had been obtained. He testified that he was not aware as to how much beer either Martens or Kerik had consumed but that the drinking commenced sometime between 10:00 p.m. and 11:00 p.m. on November 30 and ended at approximately 2:00 a.m. on December 1. Rempel testified that after he and the accused left Kerik's vehicle it was their intention to hitchhike home. I should note at this point that it was approximately 20 miles from the point at which the accused and Rempel were dropped off to their homes.

Rempel testified that he and the accused walked two to three miles before going into the barn in question. He estimated that they entered the barn at around 3:00 o'clock in the morning. He said that he thought that the accused was drunk but when asked if he would say that the accused was fairly drunk, Rempel responded: "I don't know. It's a long time ago. It's a long time ago. It's hard to remember what all happened."

The accused testified that on the day in question he was just over 18 years of age and that he weighed between 150 and 155 pounds. He said that he was approximately 6 feet tall.

According to the accused, the last meal eaten by him prior to his commencing to drink was at noon hour on November 30th when he had "a small dinner". He said that he had eaten nothing during the course of the evening.

According to the accused he started to drink sometime between 10:00 p.m. and 10:30 p.m. and that he drank 17 or 18 beers. It was the accused's evidence that he stopped drinking at approximately 2:00 a.m. on December 1st and that between the time that he started to drink and he finished drinking, the drinking was steady. The accused stated that although he had consumed that many beers before, he had not done so in such a short time and that drinking that amount of beer was not his normal habit.

He testified that it was cold during the early morning hours of December 1. Rempel, so far as the accused was concerned, drank approximately 6 beers.

After leaving Mr. Stewart's barn, the accused and Rempel left the farmyard and proceeded in a westerly direction down the highway. The accused said that they knocked on a few doors as they proceeded but that they had difficulty arousing anyone. Finally, however, someone was aroused at a farm home and allowed the accused and Rempel to enter and to make a telephone call. The accused testified that he was attempting to reach a taxi, that he looked in the phone book and found the telephone number and that he used the telephone. He could not recall whether the telephone was a dial telephone or a push-button telephone.

When he could not get an answer on the telephone, the accused and Rempel departed the home and continued on their way down the highway. Shortly thereafter, however, the occupant of the home from which the telephone call had been placed drove up in a truck, picked up both individuals and drove them home.

With respect to his injuring the cattle, the accused said: "When I assaulted the cattle, I didn't know what I was doing. I like animals. I don't see how anybody could do that."

In cross-examination, the accused testified that he had purchased two 12 bottle cases of Old Vienna beer. He said that when he left Kerik's vehicle he had three or four beers in his pockets. He said that he did not drink every weekend, as he had on the night in question, but that drinking 18 beers was not terribly unusual for him.

In answer to questions asked of him by the Court, the accused conceded that he wasn't too sure as to how many beers he had consumed. He allowed that it could have been as few as 12 beers.

In terms of assisting the Court in determining the condition of the accused, so far as drunkenness is concerned, the evidence of the person who allowed the accused and Rempel into his home would have been most helpful. Unfortunately, that person was not called to testify by either the Crown or the defence.

The defence did call, however, Dr. Daniel Samuel Sitar. The Crown acknowledged that Dr. Sitar is an expert in the field of alcohol and its effects on the human body.

Dr. Sitar, as an expert, was present in the courtroom during the whole of the trial.

He testified that if Martens had consumed between 16 and 18 beers in a three hour period, his blood-alcohol level would have been between 400 and 420 mgs. percent from 2:00 a.m. to 3:00 a.m. on December 1, 1984. According to Dr. Sitar, a person with a blood alcohol level in that range would be extremely impaired but that there would not necessarily have been a total loss of memory.

When asked if a person with a blood alcohol level of 400 to 420 mgs. percent could look up a telephone number and place a telephone call, Dr. Sitar testified that a person can accomplish strange things, even at that level, but that the quality of the actions would be impaired.

He said that the ability of Martens to make rational decisions would be impaired; that Martens would think he knew what he was doing but that his activities would seem incongruous to him if there had been a lower blood-alcohol level. It was Dr. Sitar's evidence that Martens would not appreciate the difference between what is appropriate and what is inappropriate if he had a blood alcohol level between 400 and 420 mgs. percent.

Although Martens' speech would be slurred, he would, according to Dr. Sitar, be able to walk, move and act even with a blood alcohol level of 400 to 420 mgs. percent.

Dr. Sitar stated that if Martens had consumed 12 bottles of beer during the relevant time period, the blood alcohol level would have been 300 mgs. percent. Even at that level, Martens would have been extremely impaired and his ability to tell right from wrong would also be impaired.

In cross-examination, Dr. Sitar conceded that he was not able to tell if, at the relevant time, Martens knew right from wrong but emphasized that there was no doubt in his mind that, at either level, Martens would be extremely impaired.

It was Dr. Sitar's opinion that if Martens had consumed 10 bottles of beer during the relevant time period, his blood alcohol level would have been between 230 and 250 mgs. percent. Even at those levels, Dr. Sitar stated that he would expect to see easily discernable signs of impairment.

Dr. Sitar explained that even where blood alcohol levels are high, people can remember specific details especially if there is stress associated with the events in question. He said that stress of the moment helps recall. Dr. Sitar was of the view that there was stress on the accused in that he was out on the highway in the middle of a dark cold night many miles from his home.

Dr. Sitar said that a person might recall what transpired without appreciating at the time the nature of his actions.

In answer to questions posed by the Court, Dr. Sitar testified that, in his opinion, Martens' ability to form an intent would be impaired and that his judgment would be affected.

On further examination by defence counsel, Dr. Sitar testified that it was possible that Martens might not be able to form the intent necessary to commit the acts with which he was charged.

Having conducted a review of the evidence, I now turn to a consideration of the relevant law.

The relevant sections of the Criminal Code are as follows:

> Section 306(1)(b) Everyone who breaks and enters a place and commits an indictable offence therein is guilty of an indictable offence...
>
> Section 386(1) Everyone who causes the occurrence of an event by doing an act or by ommitting 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.

> Section 400(a) Everyone who wilfully kills, maims, wounds, poisons or injures cattle is guilty of an indictable offence...

The onus is on the Crown, throughout, to prove beyond a reasonable doubt all elements of both offences with which the accused is charged. While the defence put forward by the accused is the defence commonly referred to as "drunkenness", there is no onus on the accused to prove that he was so drunk as to be rendered incapable of forming the intent required to constitute the offences. It is for the Crown to prove that the accused was possessed of the requisite intent.

In order for me to determine whether the Crown has proved the requisite intent, it is incumbent upon me to consider whether the intent required with respect to each of the offences is a general intent or a specific intent.

The defence of drunkenness is available to an accused in those offences requiring a specific intent. Such is not the case in offences requiring a general intent. See Leary v. The Queen, 33 C.C.C.(2d) 473, a decision of The Supreme Court of Canada.

In Regina v. George (1960), 128 C.C.C. 289, Fauteux, J. stated, at p. 301:

> "In considering the question of Mens Rea, a distinction is to be made between
>
> (i) intention as applied to acts considered in relation to their purposes and
> (ii) intention as applied to acts considered apart from their purposes.
>
> A general intent attedding the commission of an act is, in some cases, the only intent required to constitute the crime while in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act."

The accused is charged here with unlawfully and wilfully injuring cattle and with unlawfully breaking and entering a barn and therein committing the indictable offence of unlawfully and wilfully injuring cattle.

In Regina v. Quin, 9 C.C.C. (3d) 94, a decision of the Ontario Court of Appeal, the court dealt with a charge of break and enter and committing the offence of assault causing bodily harm contrary to s.306(1)(b) of the Criminal Code.

At p. 95, MacKinnon, A.C.J.O. said:

> "It is common ground that drunkenness, depending upon the evidence, is a defence to crimes of specific intent. The charge here covers break and enter and committing the offence of assault causing bodily harm. It was not strenuously argued by counsel for the respondent that the offence of assault causing bodily harm was not a crime of basic or general intent: D.P.P. v. Majewski, [1977] A.C. 443; R. v. Janvier (1979), 11 C.R.(3d) 399. If the offence alleged to have been committed inside the building after the break and enter is one of specific intent, which does not contain an included offence of general intent, then the offence of drunkenness is available in respect of that offence and consequently the charge in such cases would not be made out. It is equally clear that the defence of self-

> induced intoxication negativing the requisite criminal intent is not available to charges of crimes of general
> intent:....."

Therefore, if the charge of unlawfully and wilfully injuring cattle requires general intent only, the defence of drunkenness is not available to that charge or to the charge of break and enter and committing the offence of unlawfully and wilfully injuring cattle.

In R. v. Butler, 42 C.R.(3d) 270, the accused was charged with breaking and entering a dwelling house and committing the indictable offence of mischief.

At p. 271, Salhany, Co. Ct. J. makes the following statement:

> "It is argued by Mr. Westman that the offence of mischief under s.387 [am.1972, c.13, s.30] of the Code is a crime of specific intent because the charging section creates the offence of mischief by anyone who "wilfully' destroys or damages property, etc.
>
> He argues that the word "wilful' connotes some mental deliberation, which is a general element underpinning the distinction between specific and general intent.
>
> However, a review of the authorities indicates that the courts have generally approached the issue without any general test, dealing with each offence on an ad hoc basis. It is an approach which was more aptly described by Professor Glanville Williams as a humpty dumpty attitude'."

After referring to a statement made by Dickson J. (as he then was) in R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, to the effect that words such as "wilfully" and "unlawfully" are no longer considered to have the same significance as they once did, Salhany, Co. Ct. J. states, at p. 272:

> "In my view, the word wilful' means nothing more than intentional as opposed to accidental. In other words, just as there cannot be an assault, which is a crime of general intent, if a person stumbles against another, because he did not intend to apply force, similarly there can be no mischief if a person accidentally falls against a wall and damages it. In my view, it is not necessary for the Crown to demonstrate that the accused committed the crime of mischief with evil or corrupt intention. In my view, the offence of mischief is one of general intent and the defence of drunkenness is not available."

I find myself in agreement with the statements of Salhany, Co. Ct. J. in the Butler decision.

In my judgment, the use of the word "wilfully" in s.400 of the Criminal Code does not mean that it is an offence requiring specific intent. See also R. v Dupont (1976), 22 N.R. at p. 519, a division of the Alberta Supreme Court, Appeal Division, affirmed by the Supreme Court of Canada at [1978] 1 S.C.R. 1017 which is authority for the proposition that the expanded definition of wilfully in s.386(1) of the Criminal Code is not simply limited to an evil intent.

In the case of Regina ex rel Cordwell v. McHugh, a decision of the Nova Scotia Supreme Court (In Banco), [1965] 50 C.R. 263, the Court had occasion to consider s. 371(1) of the Criminal Code (now s. 386(1) of the Criminal Code).

Bissett, J. observed, at p. 269:

> "It seems to me that "wilfully' in this matter must be given the broad meaning provided for by s. 371(1): that the section does not restrict the meaning of "wilful' but extends it to include reckless acts as well as acts done with a bad motive or evil intent or acts done by any one as a free agent who knows what he is doing and intends to do it."

In that case, the accused was charged with unlawfully and wilfully causing unnecessary pain to a race horse.

Upon my considering the relevant case law and by applying s. 386(1) of the Criminal Code, I have come to the conclusion that the offences with which the accused are charged are both general intent offences and that the defence of drunkenness is therefore not available.

I therefore am satisfied that the onus upon the Crown has been satisfied and that the Crown has proved the guilt of the accused, on both counts, beyond a reasonable doubt.

If I am in error in concluding that the offences require a general intent as opposed to a specific intent, I would still convict the accused on both counts.

The leading case with respect to the defence of drunkenness is that of Director of Public Prosecutions v. Beard, [1920] A.C. 479, a decision of The House of Lords.

The three rules, as set forth in Beard can be summarized briefly as follows:

1. That insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged;
2. That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent; and
3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

In my opinion, for the purposes of this case, consideration need only be given to the second of the three tests.

I am of the view that drunkenness per se is not a pure defence. From a plain reading of the decision of Lord Birkenhead, L.C, in Beard, it is clear that the evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime is not to be considered in isolation. Rather, that evidence is to be considered with the other facts proved in order to determine whether or not the accused was possessed of the requisite intent.

There is, on the evidence, no doubt in my mind that the accused broke and entered the barn owned by Mr. Stewart and therein injured cattle. In point of fact, the accused, in his evidence, admits to the commission of this act.

While I am satisfied, on an examination of the evidence, that the accused was intoxicated, I am not satisfied, in considering all of the evidence, that he was so intoxicated so as to be incapable of forming the requisite intent.

On one hand, there is evidence that within a period of three or four hours, the accused consumed between 12 and 17 bottles of beer. Upon exiting the motor vehicle on the highway, the accused required the motor vehicle for support and the evidence discloses that he fell down when that support was not available. He was staggering when he walked.

On the other hand, in the barn, the accused was able to insert the handle of the pitchfork into the vaginas of three to four cows. He knew enough to stop his activity when he saw blood. Also, while in the barn, the accused sprayed what I believe to be red paint over the rumps of the cows. That paint was in an aerosol can. He explained that he sprayed the rear ends of the cattle "Because I didn't want to walk beside them, because I didn't want to get run over or squished".

After departing the barn, the accused and Rempel walked in a westerly direction on the highway. Within one hour, the accused was able to locate the telephone number of a taxi company in the telephone book and to place a call to that company by using a telephone which was either a dial telephone or a push-button telephone.

In his statement given to a member of the Royal Canadian Mounted Police on December 2nd, 1984, the accused was able to recall in detail the events of the early hours of the prior morning.

In the course of the taking of the statement, the police officer asked the accused, in relation to his activities in the barn, "Why did you do it?" The accused responded "Because we were drinking and we didn't know what we were doing."

I do not believe the accused when he says that he did not know what he was doing at the relevant time. How can the accused give an accurate description of the events which form the basis of the charges against him and, at the same time say that he did not know what he was doing because of the drinking? In my opinion, the accused's position in this regard is simply untenable.

Having considered the evidence of drunkenness together with the other proved facts, I am left with no doubt that the accused was possessed of the requisite intent at the material time.

For the foregoing reasons, therefore, I find the accused guilty on both counts in the indictment.

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