

Saskatchewan Court of Queen's Bench

Citation: R. v. Peterson

Date: 1928-10-12

Criminal Code, S. 537 — Shooting of Silver Black Fox—Whether “Wilful”—S. 509, Cr. Code — Justification—Game Act, 1924 (Sask.)—Live Stock and Live Stock Products Act, R.S.C., 1927, Ch. 120.

A charge laid under sec. 537 of *The Criminal Code* of wilfully killing a silver black fox which had escaped from its cage was dismissed on the ground that the accused's shooting of the fox was not done “wilfully,” within the meaning of that term in said section, but was justified to protect his property (*O'Leary v. Therrien*, 25 C.C.C. 110, applied on the meaning of “wilful”). The cases on the killing of dogs held to be applicable, since said section covers the killing of “any dog * * * or other animal not being cattle.”

[Note up with 1 C.E.D., *Animals*, sec. 1; 2 C.E.D., *Criminal Law*, secs. 7, 20.]

Counsel:

M. Stechishin, for informant.

A. Macdonald, for accused.

October 12, 1928

[1] WEDDERSPOON, P.M.—The charge against the accused is that he, on July 27, 1928, at Theodore, Saskatchewan, did wilfully kill a beast, a silver black fox female, being ordinarily kept in a state of confinement and for a lawful purpose, of the value of \$500, the property of the Steppe Silver Black Fox Company, Limited. This charge is laid under sec. 537 of the *Criminal Code, R.S.C., 1927*, ch. 36, which makes it an offence to wilfully kill any dog, bird, beast; or other animal not being cattle, etc. The informant is the president of the company which carries on the business of a fox ranch near Theodore, Saskatchewan.

[2] On the morning of July 27, 1928, about 7 a.m. a female breeder fox belonging to the company escaped from its cage during feeding and jumped over the eight foot board fence around the ranch. The caretaker and the informant immediately went in pursuit of the fox but were unable to locate it, and they gave no alarm to neighbours.

[3] The accused's premises are situated about 500 yards from the ranch and he kept a number of pure bred chickens running in an open place. Accused stated that he did not know what kind of an animal it was and that he had never seen a black fox before although he had formerly trapped red foxes. As the animal appeared to be doing damage to the chickens, the accused chased it away, but it returned and killed eight chickens. Then the accused got a gun and shot the animal and he states that it was only then he discovered the animal was a fox. It seems that foxes in the month of July look their poorest which is admitted by the informant and the accused states that he could not determine what kind of an animal it was.

[4] The fox in question was purchased in 1925 for \$500 and on account of it being a breeder, at the time it was shot, the informant now values the animal at \$700.

[5] It is argued by Mr. Macdonald, counsel for the accused, that the animal in question did not come within the provisions of sec. 537 of the *Code*, in that it was a wild animal and not the subject of larceny under common law, and he quoted sec. 345 (3) of the *Code* as applicable by analogy. That section is as

follows:

3. All other living creatures wild by nature shall, if kept in a state of confinement, be capable of being stolen so long as they remain in confinement or are being actually pursued * * *

[6] Mr. Macdonald contended that the alleged pursuit by the informant was not such a pursuit as is meant by the last-quoted section. He also contended that sec. 541 of the *Code* applied, which section is as follows:

541. [Colour of right. Partial interest.] Nothing shall be an offence under any of the foregoing provisions of this Part unless it is done without legal justification or excuse, and without colour of right.

[7] And in his argument he stated that the accused had a colour of right to protect his own property from damage and was justified or excused in the circumstances in shooting the animal. Further, that the accused had an honest belief that he was not doing wrong, that the animal was a wild animal and the informant had no redress.

[8] It was further contended by Mr. Macdonald that there was no proof that the animal was kept lawfully nor that the company was in possession of a licence from the Saskatchewan government to keep game and he quoted *The Game Act*, 1924, ch. 30, as amended by 1927, ch. 41, sec. 11, as follows:

30 (1) Notwithstanding anything in this. Act, any person desiring to engage in the business of breeding game or fur bearing animals may make application in writing to the minister in the form prescribed by him, for a permit to do so.

[9] Counsel for the accused submitted that this provision was compulsory but it will be noted that the Act uses the word "may" which ordinarily is merely permissive.

[10] Counsel for the prosecution contended that he had proved the ownership and value of the animal, that it had escaped accidentally and that the owners were in pursuit. He also submitted that the animal in question was "live stock" under the provisions of the *Live Stock and Live Stock Products Act*, R.S.C., 1927, ch. 120, as follows:

2 (g) "Live stock" means horses, cattle, sheep, swine, fur-bearing animals raised in captivity, live poultry and bees.

[11] By ch. 42 of the Statutes of Saskatchewan, 1927, the Dominion Act has the force of law in Saskatchewan.

[12] Counsel for the prosecution contended that the Dominion Act protected silver black foxes in the same manner as any of the other live stock designated and that therefore the accused would not be justified in killing the fox in question in any circumstances.

[13] The section of the *Code* under which this charge is laid states that the Act complained of must be done "wilfully." This is defined in *Code*, sec. 509, as follows:

Everyone who causes any event by an act which he knew would probably cause it, being reckless whether such event happens or not, is deemed for the purposes of this Part to have caused it

wilfully,

but this must be read in conjunction with sec. 541 quoted above. This word as applied in criminal law is also defined in the case of *Ex parte O'Shaughnessy* (1904) 8 C.C.C. 136, at 139, where Wurtele, J., says:

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

[14] I have looked up the reported cases but have been unable to find any directly on the point of killing animals such as foxes. All the cases which might be applicable are in connection with charges for killing dogs which at first glance might appear to be in a different category from live stock but if the wording of sec. 537 of the *Code* is looked at carefully it will be observed that, while cattle are excepted from the provisions of that section, other animals are included along with dogs, and therefore the cases reported under this section would in my opinion apply here.

[15] I have found the case of *O'Leary v. Therrien* (1915) 25 C.C.C. 110, the most enlightening on the point of wilfulness. In that case Cross, J., goes very fully into the question and some of his remarks and quotations are in my opinion very appropriate to the case before me.

[16] In the case of *Miles v. Hutchings* [1903] 2 K.B. 714, 72 L.J.K.B. 775, the Court held that the test of the gamekeeper's liability was whether he acted under the *bona-fide* belief that what he was doing was necessary for the protection of his master's property and that it was the only way in which the property could be protected.

[17] The case of *Aldrich v. Wright*, 53 N.H. 398, was an action for penalties for having killed minks in the close season, and a defence of justification was held good, in that the defendant honestly believed that the animals were at the time pursuing geese.

[18] I mention that case because an act admittedly done in contravention of a statute was held to have been justified in defence of property.

[19] I would also refer to *Halsbury's Laws of England*, vol. 9, (Criminal Law and Procedure) at No. 507 where it is stated:

In cases when a particular intent or state of mind is of the essence of an offence, a mistaken but *bona fide* belief by a defendant that he had a right to do a particular act may be a complete defence in showing that he had no criminal intent.

And further in the same work at No. 857:

It is no defence to a charge of unlawfully and maliciously killing, wounding or maiming a dog that it was trespassing at the time, but if the accused proves that he *bona fide* believed that the act was necessary and that he could save his property in no other way, he is entitled to be acquitted.

[20] In the case of *Anderson and Eddy v. C.N.R.*, 10 Sask. L.R. 325, [1917] 3 W.W.R. 143, at 151, Brown, J. states [quoting 40 *Cyc.* 944]:

But generally in penal statutes the word "wilful" or "wilfully" means something more than a voluntary or intentional act; it includes the idea of an act intentionally done with a bad motive or purpose, or, as

it is otherwise expressed, with an evil intent.

[21] In the case of *Rex v. Fusell* [1920] 1 W.W.R. 614, 13 Sask. L.R. 154, 34 C.C.C. 57, Taylor, J., says at p. 618:

The evidence shows clearly that the accused justified the shooting because the dog was chasing some pigs belonging to her husband around the yard and biting them, as she believed. The magistrate had only her own admission to, prove the shooting. I can conceive no reason why he should accept the admission and disregard this, a most reasonable story of justification.

[22] I am of the opinion that the case of *Anderson and Eddy v. C.N.R.*, *supra*, does not apply in a criminal matter but that I should follow the definition of the word "wilful" as explained in the case of *O'Leary v. Therrien*, *supra*, and I think this is borne out by the quotation by Brown, J., in the case of *Anderson and Eddy v. C.N.R.*, *supra*.

[23] In the case before me I cannot say that the accused's act in shooting the fox in question comes within the scope of the definition of the word "wilfully" and I think the accused was justified in shooting the fox to protect His property. I do not think it material that the informant's company did not have a licence as *The Game Act* is not peremptory on that point. The fact that foxes are included in the definition of "live stock" in the Dominion Act does not in my opinion give them absolute protection in circumstances such as happened in this case and I think the reported cases on the killing of dogs are appropriate to the killing of this animal, as sec. 537 of the *Code* covers the killing of any dog, bird, beast or other animal not being "cattle." As foxes cannot come within the definition of "cattle" the accused would be subject to the consequences of the cases quoted by me.

[24] I therefore find that the accused was justified in his act and I dismiss the charge against him with costs to be paid forthwith and in default distress.