HER MAJESTY THE QUEEN v. MICHAEL THOMAS PINAY

Indexed as: [**R. v. Pinay**]

Saskatchewan Court of Queen's Bench, Geatros J., May 29, 1990

T.J. Schonhoffer, for the Crown
K. Fenwick, for the accused

The accused was charged under s.264.1(1)(a) of the *Criminal Code* with uttering a threat to cause death to a deputy sherriff who was serving the accused with a statement of claim. The accused contended that his actions were justified because the deputy sherrif was trespassing on the reserve. The deputy sherriff did not have express permission to be on the reserve.

Held: Accused guilty.

1. The *Indian Act*, R.S.C. 1985, c.I-5 does not define trespass so the common law definition must be considered: trespass involves entering another's land without lawful justification.

2. Because reserves are not enclaves a provincial official entitled to enter private property for a particular purpose (which would have been so in the present case) may enter a reserve for the same purpose.

3. Section 89 of the *Indian Act* is not relevant here since the deputy sherriff's purpose was not to alienate property in anyway outlined in the section.

4. The accused's threat would have been without lawful justification even if the deputy sherriff had been trespassing since a trespasser must first be requested to leave and given a reasonable opportunity to do so.

*** * * * * ***

GEATROS J. (orally): Now in the matter of *The Queen v. Michael Thomas Pinay*, the accused is charged that he did on or about May 31, 1989, at Peepeekisis Indian Reserve in Saskatchewan, knowingly utter a threat to Frank Miles to cause death to Frank Miles, contrary to s.264.1(1)(a) of the *Criminal Code.* That subsection reads:

> Every one commits an offence who in any manner, knowingly utters, conveys or causes any person to receive a threat . . . to cause death . . . to any person.

I need not review the circumstances under which the charge arose. Suffice it to say that I have already found that the accused did in fact utter the threat alleged in the indictment, and that it was of a kind contemplated in s-s.264.1(1)(a) of the *Criminal Code*.

The matter was adjourned until today for a ruling on the question of whether Mr. Miles at the time was a trespasser on the reserve. The accused contends that his actions were justified, alleging that Frank Miles was a trespasser.

It is common ground that Miles had not obtained permission from the band or anyone at the band office to be on the reserve. Miles' purpose in being there was to serve Mr. Pinay with a Statement of Claim in an action initiated by the Canadian Wheat Board.

The *Indian Act*, R.S.C. 1985, c.I-5 deals with trespassers on a reserve. Section 30 provides, "a person who trespasses on a reserve is guilty of an offence ...." But the Act does not define "trespass." So one must look at common law. The definition given by Chief Justice Ford in *R. v. Gingrich*, [1959] 29 W.W.R. 471, commends itself to me. He said at page 473:

> The definition of common law trespass varies as stated by different authorities, but it clearly involves the entering upon another's land without lawful justification.

I am in agreement with the Crown's contention that Miles was a trespasser on the reserve only if, in similar circumstances, he would have been a trespasser on any private property. LaForest J., in

delivering the judgment of the Supreme Court of Canada *in R. v. Francis* [1988] 1 S.C.R. 1025 at 1028, [1988] 4 C.N.L.R. 98 at 99, 5 M.V.R. (2d) 268, 41 C.C.C. (3d) 217, 85 N.R. 3, 85 N.B.R. (2d) 243, 217 A.P.R. 243, said:

> ... in the absence of conflicting federal legislation, provincial motor vehicle laws of general application apply *ex proprio vigore* on Indian Reserves. To hold otherwise would amount to resuscitating the 'enclave' theory which was rejected by a majority of this court in *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695.

By analogy, it seems to me, provincial officials (Frank Miles is a Deputy Sheriff) if otherwise entitled to enter private property, which would have been so in the present case, see *R. v. Bushman*, [1968] 4 C.R. (N.S.) 13, may enter upon a reserve for the same purpose. In my judgment, and Indian reserve is not to be looked upon as an "enclave" upon which Frank Miles, a Deputy Sheriff, can be denied the right of entry when on lawful business.

I am not persuaded, as Mr. Fenwick contends, that s.89 of the *Indian Act* mitigates against the view I have taken. That section prohibits the alienation of the property of an Indian or a band situated on a reserve by "charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian." I do not look upon that section as having any relevance on the question of whether Frank Miles was a trespasser on the reserve.

In entering the reserve it was not his purpose to alienate Indian or band property by any of the modes outlined in s.89 of the *Indian Act*.

It is of no moment that the plaintiff some time down the road could find itself in a position to levy execution but would be prohibited from doing so in view of the section. The task Miles was directed to undertake does not fall within the ambit of the section of the *Indian Act* alluded to. I have been able to find any statutory provision mitigating against the Crown's contention that Miles was not a trespasser. I have concluded that he was not.

It matters not whether the threat involved the use of the hammer that the accused was holding at the time. The Crown need only prove that the accused uttered the threat. *R. v. Carons*, [1979] 42 C.C.C. (2d) 19.

And I am satisfied beyond a reasonable doubt that the accused intended the threat to be taken seriously; that he possessed the requisite mens rea. It follows that the accused must be found guilty of the offence charged.

It must not be presumed from what I have had to say that Miles was a trespasser the accused would have been entitled to an acquittal. A trespasser must first be requested to leave and afforded a reasonable opportunity of doing so peacefully. That was not done here. The accused's threat to Miles would have been without lawful justification.

I find the accused guilty. I will hear counsel now on the matter of sentence.