REGINA v. PENASSE AND McLEOD

(1971). 8 C.C.C. (2D) 569

Ontario Provincial Court, Lunney Prov. Ct.J., 17 March 1971

Game and fisheries -- Selling fish caught without a licence- Statute providing that onus on accused to prove lawful excuse in prosecutions in respect of "taking, killing, procuring, or possessing" fish -- Whether offence charged within terms of section -- Whether onus on accused to prove lawful excuse -- Game and Fish Act. 1961-62 (Ont.), ss. 64(2), S1(a), 28(1).

A prosecution for being concerned in the sale of fish taken without a commercial licence contrary to s. 64(2) (am. 1970, c. 58, s. 9(2)) of *the Game and Fish Ac*t, 1961-62 (Ont.), c. 48 (now R.S.O. 1970, c. 186, s. 69(2)), is not within the terms of s. 81(a) (now s. 89(a)), provides that in a prosecution in respect of "taking, killing, procuring or possessing fish" the onus is upon the person charged to prove the fish was lawfully taken. None of possession, taking, killing or procuring of fish is an ingredient of the offence charged, which can be committed without any of these acts being proved against the accused. Therefore the onus remains on the Crown to prove the unlawful taking.

Indians -- Fishing rights -- Charge of unlawfully selling fish caught without a licence -- Application of statute made "Subject to terms of any treaty" -- Treaty in effect reserving "full and free privilege to fish as they have heretofore been in the habit of doing" -- No evidence to show any acts of accused going beyond rights secured by treaty -- Accused acquitted -- Crown must prove inapplicability of treaty beyond reasonable doubt -- Robinson Treaty, 1850 -- Game and Fish Act, 1961-62 (Ont.), ss. 81(a), 64(2).

[*R. v. Moses*, [1970] 5 C.C.C. 356, [1970] 3 O.R. 314, 13 D.L.R. (3d) 50, refd to]

EDITORIAL NOTE: This decision only recently came to our attention but was thought of sufficient importance to report at this time.

TRIAL of the accused on a charge of selling fish caught without a licence contrary to s.64(2) of the *Game and Fish Act, 1961-62* (Ont.).

J. J. Blais, for accused.
John Inch, for the Crown.

LUNNEY, Prov.Ct.J.:- In this case George Penasse, Rita Penasse, Stella McLeod, Dennis Goulais and Dwylla Goulais, are charged that between the dates of September 1, 1970, and October 2, 1970, at the Nipissing Indian Reserve No. 10, in the District of Nipissing, unlawfully did be concerned in the sale of yellow pickerel taken from Ontario waters by a person or persons without a commercial fishing licence, contrary to s-s.(2) of s.64 of the *Game and Fish Act*, 1961-62 (Ont.), c.48 as amended [now R.S.O. 1970, c. 186, s. 69(2)].

Subsection (2) of s. 64 of the *Game and Fish Act* as amended by 1970, c.58, s. 9(2), now reads as follows:

> (2) No person shall sell, offer for sale, purchase or barter, or be concerned in the sale, purchase or barter, of yellow pickerel (also know as pike-perch, walleye or dore), pike, lake trout or sturgeon taken from Ontario waters by angling or taken in any other manner by a person with a commercial fishing licence.

At the conclusion of the Crown's case it was conceded that there was no evidence to connect Dennis Goulais or Dwylla Goulais with the offence charged and it was accordingly dismissed against them. The Crown abandoned the prosecution of the charge against Rita Penasse. The matter has now come before me for judgment on the issue of the guilt of the two remaining defendants, namely -- George Penasse and Stella McLeod.

The evidence established that George Penasse requested one Clifford Peer to see if he could sell some fish. Clifford Peer is a 62-year-old resident of the City of Hamilton, Ontario, who operates a truck through the resort areas of this part of Northern Ontario during the summer months selling produce, fresh vegetables and the like. It was part of his ordinary round of call to stop in at Garden Village which is located in Nipissing Indian Reserve No. 10. Acting upon the said request of the defendant George Penasse, Mr. Peer established an outlet for fish by an arrangement with a company known as Hamilton Findlay Fish Company and he subsequently delivered fish to the Hamilton Findlay Fish Company on several occasions, received money for these fish from Hamilton Findlay Fish Company and with that money or some part of it, purchased produce which he then gave to, among others, George Penasse. The evidence of Clifford Peer is that at least on one occasion he got fish from the defendant Stella McLeod for delivery and sale to Hamilton Findlay Fish Company. There are no commercial fishing licences permitting the taking of yellow pickerel from any Ontario waters in this part of Ontario.

One of the several defences proposes to the Court by counsel for the defendants is based upon their status and rights as Indians under a treaty known as the Robinson Treaty, 1850, and dealt with recently in the case of *R. v. Moses*, [1970] 5 C.C.C. 356, [1970] 3 O.R. 314, 13 D.L.R. (3d) 50.

For the purposes of this decision it is admitted that these defendants are descendants of a signatory of the Robinson Treaty and would be in the same position to enjoy the rights conferred by the Robinson Treaty as the defendant in the *Moses* case.

I believe that I am bound by this decision and, if it is applicable to the facts in the case before me, I must apply it.

In the *Moses* case, Little, D.C.J., held that [at pp. 365-6]: " no derogating legislation has been enacted by the Parliament of Canada to restrict in any way the right of Indians entitled to the benefits under the Robinson Treaty from hunting moose at any time on unoccupied Crown lands". His Honour further held that the defendant had satisfied the onus cast upon him by s. 81(a) of the *Game and Fish Act, 1961-62*, and therefore, did not commit an infraction of s. 38(1) of the *Game and Fish Act, 1961-62*, in hunting moose without a licence during a closed season.

Section 81(a) [now s. 89(a)] of the *Game and Fish Act, 1961-62*, reads as follows:

> 81. In prosecutions under this Act in respect of,
> (a) taking, killing, procuring or possessing game or fish, or any part thereof, the onus is upon the person charged to prove that the game or fish or part thereof was lawfully taken, killed, procured or possessed by him;

This prosecution is not one of those contemplated by s. 81(a) of the *Game and Fish Act, 1961-62*. Neither the possession, taking, killing nor procuring of fish is an ingredient of the charge. The offence of being concerned in the sale of fish contrary to s.64(2) could be committed without any of these things beings proved against the accused. For instance a go-between who brings a buyer and seller together in a transaction prohibited by s.64(2) could be properly charged and convicted of an offence under this section. This prosecution is simply not "in respect of taking, killing, procuring or possessing fish". Evidence of one or more of these acts might be adduced in a prosecution on a charge of being concerned in the sale of fish contrary to s.64(2) but that still would not make the prosecution a prosecution in respect of these matters, it would still be a prosecution in respect of being concerned in the sale of fish etc., as set out in s.64(2).

The application of the onus section is a very important distinction between this case and that of the *Moses* case.

The Robinson Treaty, which has been filed as an exhibit in these proceedings, provides in part: "land further to allow the said Chiefs and their Tribes the full and free privilege to hunt over the Territory now ceded by them, and to fish in the waters thereof, as they have heretofore been in the habit of doing;".

If the onus were on the defendants under s.81 it might well be argued that to make out a defence under the treaty they would have to show by evidence what were the actual fishing practices "heretofore" *ie*., prior to the execution of the treaty in 1850, and that the actions of the defendants giving rise to the present charge against them came within the intent and meaning of the treaty. The onus on the Crown does not shift, however, and the evidence must show beyond and reasonable doubt that the defendants are subject to the provisions of s. 64(2) of the *Game and Fish Act, 1961-62*. The fact-question implicit in the wording of the treaty therefore, namely, the meaning and effect of the limiting words "as heretofore" are a problem for the prosecution and not the defence in this case. There is no evidence to suggest, let alone show, that these defendants were acting outside the scope of their rights under the treaty.

It may be put forward that it is not incumbent on the Crown to negative any and every possible exception, excuse or exclusion of the application of a general statute. To apply this principle here would be to put the cart before the horse. The treaty preceded the statute. The treaty secures substantive rights to the defendants. These rights are theirs unless they have been subsequently abrogated, derogated from or otherwise diminished. In the trial of an issue involving Indians asserting rights under such a treaty where the treaty is older than the statute on which the prosecution is founded, it would seem that the onus should be on the Crown to show that the statute abrogated, derogated from or diminished the treaty right asserted. Further, the application of the *Game and Fish Act, 1961-62,* to these defendants, is, by s.87 of the *Indian Act*, R.S.C. 1952, c. 149 [now s. 88, R.S.C. 1970, c. I-6] "Subject to the terms of any treaty". In the absence of the availability to the Crown of an onus section such as s. 81 of the *Game and Fish Act, 1961-62,* it is up to the Crown to bring the defendants within the statute, and not the other way about.

I can only repeat, in paraphrase, the decision of Little, D.C.J., that in the case at bar no derogating legislation had been enacted by the Parliament of Canada to restrict in any way the rights these Indians are entitled to under the Robinson Treaty, and the Crown has failed to show that the evidence in this case discloses any act on the part of the defendants that goes beyond the rights secured to them by the Robinson Treaty.

On this basis, therefore, this case must be dismissed and it is not necessary to go further into the evaluation of the evidence to determine whether there has or has not been a failure on the part of the

prosecution to prove its case under s.64(2) irrespective of the question of the treaty rights of the defendants.

The dismissal of this prosecution against these Indians may for them however prove to be Pyrrhic victory because it is difficult to see how their status as beneficiaries of the Robinson Treaty would constitute a defense for anybody else who becomes concerned in the sale of yellow pickerel taken from Ontario waters by a person without a commercial fishing licence, even if it were proved that the fisherman involved were beneficiaries of the Robinson Treaty.

There is a further serious aspect of this matter and that is that if there in not at the present time any effective control on the quantity of fish that may be taken from the waters of Lake Nipissing and adjacent Ontario waters regardless of the status or treaty or other rights of the person so taking such fish, then the entire Nipissing fishery and with it a very considerable tourist industry in Northern Ontario from which Indians too derive benefits, is gravely threatened.

Effective legislation to protect and preserve the fishery, whether it is enacted by the Band council, the Parliament of Canada or some other competent authority is urgently required. If the fishery is not protected all the residents of this part of Northern Ontario whether Indians or not will be seriously adversely affected. In view of the seriousness of these issues, I take the liberty of expressing the hope that this matter will be pursued, either by way of appeal of this decision, or effective legislation or both.

Accused acquitted.