REGINA v. PRINCE ET AL.

[1963] 1 C.C.C. 129 (also reported: (1962), 39 C.R. 43, 40 W.W.R. 234)

Manitoba Court of Appeal, Miller C. J. M. , Schultz, Freedman, Guy and Monnin JJ.A. , 19 October 1962

(Appealed to Supreme Court of Canada, reported **sub nom. Prince and Myron v. The Queen, infra** p.543)

Indians - Game laws - Whether prohibitions against use of night lights, snares, etc. in hunting game apply to Indians - Game and Fisheries Act (Man.), s. 31 (1) - Manitoba Natural Resources Act, Schedule, para. 13.

Accused, who were Treaty Indians, were charged with an offence against s. 31(1) of the *Game and Fisheries Act,* R.S.M. 1954, c. 94, In that they did hunt game by means of a night light, which, together with traps, nets, snares, baits or similar contrivances, is specifically prohibited as a method of hunting by the section. Accused were found hunting deer with a night light on privately owned and cultivated land but claimed exemption from the provisions of s. 31(1) by reason of s. 72 (1) of the Act in conjunction with para. 13 of the Schedule (Memorandum of Agreement] to the *Manitoba Natural Resources Act,* R.S.M. 1954, c. 180, which provides that the Provincial game laws apply to Indians subject to their right of "hunting for food at all seasons of the year on . . . . any lands to which the Indians may have a right of access". *Held,* that the accused were hunting for food in the instant case, as opposed to hunting commercially or for sport, and, in the absence of posted notices or express warnings by the owner that hunting was forbidden on the land, they had a right of access to the land in question even though it was privately owned and under cultivation. *Held* further, however, Freedman and Schultz, JJ.A., dissenting, that although the accused had a right to hunt for game at any time on the land, provided their intention was to secure food, such right did not extend to hunting game by means or methods contrary to the *Game and Fisheries Act,* such as the use of night lights, which would frustrate the object of the legislation to preserve the continuance of game and secure to Indians the supply of food assured to them by the *Manitoba Natural Resources Act.* In the result accused were guilty of the offence charged.

Per Freedman, J.A. (Schultz, J.A., concurring), dissenting: The prohibition against hunting by means of a night light, or other forbidden methods, does not apply to Indians so long as they are engaged in a quest for food. In the instant case the accused were hunting for food in a permitted area, and not for sport or commercial purposes, and accordingly they were exempt from the restrictions of the *Game* and *Fisheries Act* by para. 13 of the Schedule to the *Manitoba Natural Resources Act* aforesaid.

[*R. v. Wesley,* 58 Can. C.C. 269. [1932] 4 D.L.R. 774, 26 A.L.R. 433, not folld; *R. v. Smith,* 64 Can. C.C. 131, [1935] 3 D.L.R. 703: *R, v. Little Bear* (1958), 122 Can. C.C. 173; *R. v. Kogogolak* (1959), 28 W.W.R. 376, refd to]

APPEAL from acquittal of accused, by Magistrate B.P. McDonald, on charge of offence against *Game and Fisheries* Act (Man.). Reversed.

B. Hewak, for the Crown.
H. I. Pollock, for accused, respondents.

MILLER, C.J.M.:-This is an appeal by way of stated case from a decision of Magistrate Bruce McDonald of Portage la Prairie against the acquittal of the three accused, all of them Treaty Indians and members of the band of the Long Plain Indian Reserve. The three accused had been charged with hunting deer by the use of a night light. Section 31(1) of the *Game and Fisheries Act,* R.S.M. 1954, c. 94, provides as follows:

> "31(1) No person shall hunt, trap or take any big game protected by this Part and the regulations by-means of night lights of any description, traps, nets, snares, baited line, or other similar contrivances, or set such traps, nets, snares, baited line, or contrivance for such big game at any time, and, if so set, they may be destroyed by any person without incurring any liability for so doing."

The Magistrate acquitted the Indians because the term "night lights" as used in the above subsection was not capable of definition, that the land upon which the hunting was being done was land to which the Indians had access in that there were no prohibition signs posted, and that the Indians were entitled, in any event, to hunt in any manner they saw fit on land to which they had access.

The questions propounded in the stated case are as follows:

> "(a) having found that Rufus Prince, George Prince and Robert Myran were hunting big game by means of a spotlight was I right in holding that such spotlight was not a night light within the meaning of Section 31(1) of The Game and Fisheries Act, R.S.M. 1954, Cap. 94;
>
> "(b) was I right in interpreting the term 'night lights' as contained in Section 31(1) of The Game and Fisheries Act, R.S.M. 1954, Cap. 94, as a classification or description of an object rather than a method or means of hunting;
>
> "(c) having found that the land upon which Rufus Prince, George Prince and Robert Myran were hunting was land that was occupied and under cultivation and privately

owned land, was I right in holding that such land was land to which the said Rufus Prince, George Prince, and Robert Myran had 'a right of access.'

"(d) having found that the land upon which Rufus Prince, George Prince and Robert Myran were hunting was land to which the said Rufus Prince, George Prince and Robert Myran had 'a right of access', was I right in dismissing the charge under Section 31(1) of The Game and Fisheries Act on this ground."

I have no difficulty at all in disposing of (a) and (b). I can see no ambiguity in s. 31(1). In my opinion it can only mean that hunting with the assistance of night lights of any description is clearly prohibited by the section in question. To read it otherwise would mean that the words mean nothing or that they are subject to a ridiculous interpretation. It is well known, and indeed counsel for the accused commented on it, that a light at night does attract animals and makes it very easy to kill them. These three Indians had a spotlight and one of them was sitting on the hood of the car using same to attract a deer. They had in their possession one deer which they admitted shooting earlier in the day. They also admitted they were endeavouring to shoot more. There is no dispute that the Indians were definitely using this light for the purpose of attracting deer. The other two accused were sitting in the car with the means to kill the deer when they were attracted by the light. There is nothing in the well-known rules of interpretation to be invoked. To me there is no ambiguity or uncertainty about the intention of the words of the section in question.

In addition s. 13 of the *Interpretation Act,* 1957 (Man.), c. 33, reads as follows:

"13. Every enactment shall be deemed remedial, and shall be given such fair, large, and liberal construction and interpretation as best insures the attainment of its objects."

This disposes, therefore, of the first two questions, both of which should be answered in the negative.

With question (c), I also find little difficulty. In my opinion the land in question, although cultivated land, was land to which the Indians had access.

Section 72(1) of the *Game and Fisheries Act,* R.S.M. 1954, c.94, reads as follows:

"72(1) Notwithstanding this Act, and in so far only as is necessary to implement The Manitoba Natural Resources Act, any Indian may hunt and take game for food for his own use at all seasons of the year on all unoccupied Crown lands and on any other lands to which the Indian may have the right of access."

The above section refers to the *Manitoba Natural Resources Act*, R.S.M. 1954, c. 180, of which para. 13 of the Schedule [Memorandum of Agreement] thereto reads as follows:

"13. *In order to secure* to *the Indians of the Province* the *continuance* of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish *for food at all seasons of the year* on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

The italics are mine. The italicized words emphasize that an important reason for making the *Game Act* apply is to "secure the continuance" of game and not deplete it.

I would add that the protection given to the Indians to hunt for food and so carefully preserved to the Indians has also been accompanied by an equally urgent desire to conserve the game so the Indian food supply would continue to be available. Otherwise the right given to the Indians to hunt for food would not be of lasting value.

Subsections(1) and (2) of s. 76 of the *Game and Fisheries Act* read as follows:

"76(1) No person shall hunt any bird or any animal mentioned in this Part if it is upon or over any land with regard to which notice has been given under this Part, without having obtained the consent of the owner or lawful occupant thereof.

"(2) Notice may be given under this Part by maintaining signs at least one foot square on or near the boundary of the land intended to be protected, or upon the shores of any water covering it or any part thereof, containing a notice in the following form or to the like effect: 'Hunting or shooting is forbidden'; and the signs shall be not more than eighty rods apart and posted in prominent places."

I am satisfied that unless notices are posted on the land pursuant to s. 76(2) a person has access thereto for shooting purposes. It is true that the owner or occupant might specifically warn people off the land and it this were done the person intending to shoot, whether he be Indian or

not, would be prohibited from going on that land to shoot and would not be deemed to have access thereto, but in the absence of a prohibition, either by notice or otherwise, the Indians would have access to the land upon which they were found hunting. The fact that the land was cultivated does not make any difference. The fact that the common law rights as to trespass are preserved does not make any difference to the right of access above mentioned

The answer to question (c) should therefore be in the affirmative.

The answer to question (d) is the only one that gives difficulty. This question involves the broader question as to the extent to which Indians are subject to the provisions of the *Game and Fisheries Act.* Indian Treaties were discussed in argument before us and Mr. Hewak for the Crown also mentioned various historical facts as to what was said to the Indians at the time the Treaties were signed. These facts were very interesting but, of course, do not give me much help in answering this particular question. A great deal of latitude was given to both counsel in presenting argument in view of the novelty of this question in Manitoba.

I have already set out para. 13 of the Schedule to the *Manitoba Natural Resources Act.* It is clear from that section that the Indians are not wholly free from the restrictions of the *Game and Fisheries Act* because the section (and the same law has been confirmed by an Imperial statute) provides "that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof" subject to the right of the Indians to hunt, trap and fish for food at all seasons of the year, etc.

The point is, just what restrictions in the *Game and Fisheries Act* do apply to Indians? It seems to me that the manner in which they may hunt and the methods pursued by them in hunting must, of necessity, be restricted by the said Act. Mr. Pollock, counsel for the Indians, argued that they were only restricted by the provisions of the *Game and Fisheries Act* when hunting for sport or commercial purposes. I can only say that I am unable to read any such provision into para. 13 of the Schedule to the *Manitoba Natural Resources Act.* I do not think Indians are debarred from hunting for food during any one of the 365 days of any year, and can hunt for food on all unoccupied Crown lands and on any land to which Indians have a right of access. I am of the opinion, though, that they have no right to adopt a method or *manner* of hunting that is contrary to the *Game and Fisheries Act,* because para. 13 of the Schedule to the *Natural Resources Act, supra,* specifically provides that the *Game Act* of the Province *shall* apply to Indians in some respects.

There does not appear to be any authority in this Province regarding the matter, but there are at least two cases in Alberta and one in Saskatchewan, as well as a recent Northwest Territories case. This last mentioned is *R. v. Kogogolak* (1959),28 W.W.R. 376, a decision of Sissons, J., which although it relates to Eskimo rights nevertheless follows the principles of, the *Wesley* case, *infra.*

The Saskatchewan case is *R. v. Smith,* 64 Can. C.C. 131, [1935] 3 D.L.R. 703, wherein an Indian was convicted on a charge of carrying firearms on a game preserve contrary to the *Game Act* of Saskatchewan. The appeal against conviction was dismissed by the Saskatchewan Court of Appeal on a stated case.

In the Alberta case of *R. v. Wesley,* 58 Can. C.C. 269, [1932] 4 D.L.R. 774, 26 A.L.R. 433, an Indian was convicted of shooting a deer having antlers less than 4 inches in length, contrary to the *Game Act* of Alberta. This offence took place on unoccupied Crown land. On appeal by way of stated case the Court quashed the conviction.

McGillivray, J.A., in referring to the *Alberta Natural Resources Act,* said at pp. 275-6 Can. C. C., p. 781 D.L.R.:

> "It seems to me that the language of s. 112) is unambiguous and the intention of Parliament to be gathered therefrom clearly is to assure to the Indians a supply of game in the future for their support and subsistence by requiring them to comply with the laws of the Province, subject however to the express and dominant proviso that care for the future is not to deprive them of the right to satisfy their present need for food by hunting and trapping game, using the word 'game' in its broadest sense, at all seasons on unoccupied Crown lands or other land to which they may have a right of access.
>
> . . . . .
>
> I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who generally speaking does not hunt for food and was by the proviso to s. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial."

And at p. 277 Can. C. C., p. 782 D.L.R.:

> "It seems to me that the enacting part of the section subjecting Indians to the game laws of the Province in general terms is subject to a clear excepting and qualifying

> proviso in favour of Indians who are hunting for food to whom the game laws of the Province are not intended to apply when so engaged on unoccupied Crown lands or other lands to which they have a right of access."

And at pp. 284-5 Can. C.C., p. 790 D.L.R.:

> "This does not in any wise imply that the Game Act of this Province is *ultra vires.* I merely hold that it has no application to Indians hunting for food in the places mentioned in this section.
>
> "It is satisfactory to be able to come to this conclusion and not to have to decide that 'the Queen's promises' have not been fulfilled."

The other Alberta case is *R. v. Little Rear,* a judgment of Turcotte, D.C.J., reported in (1958), 122 Can. C.C. 173. This judgment was confirmed by the Court of Appeal without written reasons. In 122 Can. C.C. at p. 181 the reasons of Turcotte, D.C.J., were followed. This judgment of Turcotte, D.C.J., relates mainly to the right of access with which, with respect, I agree. Of course the law in Alberta prohibits anyone from shooting big game on occupied land without first obtaining the consent of the owner or occupant of the land. This provision is not in our Act and consent is only necessary in Manitoba when notices are posted on the land pursuant to the Act as above mentioned.

Certainly the reasons for judgment of McGillivray, J.A. [in *R. v. Wesley*], would seem to soundly support the argument of counsel for the accused in this case but I am unable to accept that learned Judge's reasoning where he says:

> ". . . . subject to a clear excepting and qualifying proviso in favour of Indians who are hunting for food to whom the game laws of the Province are not intended to apply when so engaged on unoccupied Crown lands or other lands to which they have a right of access."

Nor do I agree with the learned Judge's statement in his judgment above quoted where he states: "I merely hold that it (the *Game Act)* has no application to Indians hunting for food in the places mentioned in this section."

Also I am unable to accept the statement of the same learned Judge when he says at p. 277 Can. C.C., pp. 782-3 D.L.R.:

> "In the result I hold that in turning over to Alberta the Public Domain of the Province the Dominion has sought and the Province has given an assurance which has been confirmed by the Imperial Parliament, that Indians hunting for food may kill all kinds of wild animals regardless of age or size wherever they may be found on unoccupied Crown lands or other lands to which they have a right of access, at all seasons of the year and that they may hunt such animals with dogs or otherwise as they see fit and that they need no license beyond the language of s. 12 to entitle them so to do."

Even with the great respect that I have for the opinions of McGillivray, J.A., I am unable to agree that the Indians may hunt with the freedom indicated by that learned Judge. It seems to me the *Wesley* case failed to appreciate or recognize the important conservation principle of para. 12 of the Schedule to the *Natural Resources Act* of Alberta (our para. 13).

I do not think there can be any restriction on the quantity of game killed by Indians so long as it is for food and it is clear no licence to hunt is required, otherwise the provisions which protect the Indians and enable them to hunt for food would be meaningless. Although it was not set out in the stated case before us that these Indians were hunting for food, both counsel made to the Court an admission that they were, and that the evidence before the learned Magistrate so disclosed.

I would therefore say that the three Indians were guilty of the offence for which they were charged and would answer the fourth question in the negative.

I would refer the matter back to the learned Magistrate with a direction that conviction should be entered against the three accused and that appropriate penalties should be imposed.

SCHULTZ, J.A., concurs with FREEDMAN, J.A.

FREEDMAN, J.A.:-The judgment of My Lord the Chief Justice, which I have been privileged to read, makes my task measurably easier. I am in agreement with him with respect to the disposition that should be made of the first three questions in the stated case. With great respect, however, I find myself in disagreement upon the fourth question.

I have come to the conclusion that the case of *R.* v. *Wesley,* 58 Can. C.C. 269, [1932] 4 D.L.R. 774, 26 A.L.R. 433, was correctly decided and that its reasoning should be applied to the matter

now before us. Because the judgment of My Lord the Chief Justice contains extensive quotations from the decision of McGillivray, J. A., in that case, I do not need to repeat those quotations here. The learned Chief Justice does not agree with the reasoning of McGillivray, J.A. I, however, do.

The fundamental fact of this case, as I see it, is that the accused Indians at the time of the alleged offence were hunting for food. It was not a case of hunting for sport or for commercial purposes. By s. 72(1) of the *Game and Fisheries Act* and by para. 13 of the Schedule to the *Manitoba Natural Resources Act,* the special position of the Indian when hunting for food is acknowledged and recognized. The clear purpose of those sections is to secure to the Indians, within certain given territories, the unrestricted right to hunt for game and fish for their support and sustenance. The statement in para. 13 of the Schedule to the *Manitoba Natural Resources Act* that the law of the Province respecting game and fish shall apply to the Indians is, in my view**,** subordinate in character. Its operation is limited to imposing upon the Indian the same obligation as is normally imposed upon every other citizen, namely, that when he is hunting for sport or commerce he must hunt only in the manner and at the times prescribed by the Act. But the ordinary citizen does not hunt for food for sustenance purposes. The Indian does, and the statute, recognizing his right to sustenance, exempts him from the ordinary game laws when he is hunting for food in areas where he is so permitted.

The matter was put thus by McGillivray, J.A. [at p. 276 Can. C.C., p. 781 D.L.R.], in a passage not [fully] quoted in the judgment of the learned Chief Justice:

> "If the effect of the proviso is merely to give the Indians the extra privilege of shooting for food 'out of season' and they are otherwise subject to the game laws of the Province, it follows that in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them. I cannot think that the language of the section supports the view that this was the intention of the law makers. I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who generally speaking does not hunt for food and was by the proviso to s. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial."

To hunt game with the aid of a night light is clearly unsportsmanlike. Here, however, the accused Indians were not engaged in sport. They were engaged in a quest for food. Once that quest was satisfied they would then be subject to the restrictions of the Act.

That indiscriminate resort to unsportsmanlike methods of hunting and fishing would be prejudicial to the supply of game and fish is no doubt true. The answer, however, lies in the education of the Indian so he will appreciate that what is in the best interests of the citizenry of Manitoba is also in his own best interests. The answer does not consist in construing the section contrary to what appears to me to be its plain and dominant purpose.

My answer to the fourth question would be, Yes.

I would dismiss the appeal accordingly.

Guy and MONNIN, JJ.A., concur with MILLER, C.J.M.

Appeal allowed; verdict of conviction directed.