R. v. MUSQUA; R. v. PELLY; R. v. WHITEHAWK; R. v. COTE

Saskatchewan Provincial Court, Diehl P.C.J., November 28, 1986

G. Carson, for the Crown
D. Knoll, for the accused

The accused, treaty Indians, were charged with unlawfully using a light for the purpose of hunting contrary to s. 37 of the Wildlife Act, S.S. 1979, c.W-13.1. All four accused were hunting for food and were driving together in a truck on a rural road which was considered to be a main road for farm and public use in the area, but was not one to which Regulation 16 of the Wildlife Regulations, 1981 applied as it was not a provincial highway or grid road. A light was shone from the vehicle along the road allowance and toward the adjacent private property. The road allowance was not posted, nor had permission been obtained by, or granted to, the accused by the owners of the private land to hunt thereon. Evidence of a conservation officer was that the road in question was commonly used by hunters to search for deer, and that a hunter could shoot from the shoulder of the road into the ditch so long as there was no discharge of the firearm along or across the roadway.

Held: Information dismissed.

1. With respect to Indian hunting for food an offence under s. 37 of the Wildlife Act requires proof of intention to locate, and with the aid of a light, kill game on land to which there is no right of access. In the circumstances of this case the evidence was not sufficient to establish such intent.

2. It is not unlawful for treaty Indians while hunting for food to use a spotlight on land to which there is a right of access. The accused in this case had a right of access to hunt on the road allowance.

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DIEHL P.C.J.: Each of the accused is before me upon separate Informations alleging the commission by each of them of an identical offence.

Upon the trial of Alvin Larry Musqua the accused called no evidence. With respect to each remaining accused, both counsel being the same on all trials, the evidence in the Musqua trial was agreed to be evidence for the Crown against each accused none of whom called any evidence.

Charge

The accused is before the Curt upon an Information alleging that on the 16th day of September, 1985, at or near Hudson Bay, Saskatchewan at 4:00 a.m. he did unlawfully use lights for the purpose of hunting contrary to s. 37 of the Wildlife Act.

Facts

On the day in question the accused, a treaty Indian, in the company of three other treaty Indians, was spotted by a conservation officer on air patrol in a Cessna 337 at 7000 feet in a motor vehicle spotlighting form a road in the area in question. Subsequent ground patrols confirmed that all four treaty Indians were driving together in a truck on a rural municipal road which traversed an area where big game were known to be found. It was about 4:00 a.m. The vehicle was travelling slowly along the rural road and occasionally stopping for a short time before proceeding again. From the aircraft it could clearly be seen that a high powered light was being shone from a slowly-moving vehicle along a road allowance and toward the property adjacent to the North and to the South of the road. At times the vehicle would top briefly and the light would continue to sweep over the illuminate the neighbouring road allowance and lands immediately adjacent thereto. No other vehicles were so using the road at all or using lights to scan the area. The above-described activity occupied about 25 minutes. The road in question was about 2 miles long. It was not a grid road. There was no gravel on it. It was low graded. It was described as "Forest Road". It seemed to run toward a stream over which there was a rock crossing. There were grain fields on either side. The road was considered to be a main road for farm and public use in the local area.

It eventually connected up to a grid road further away at one end, and ended up in a farm yard not far from the crossing at the stream.

It is obvious that the immediate area in question was not far from some forested land some of which was privately owned (as were the grain fields) and some unoccupied provincial forest.

The Indians were fully and adequately armed with both high-powered and small bore rifles and ammunition. Some rifles were scoped. No rifles were loaded.

The road allowance between the travelled roadway and the adjacent occupied privately-owned land had some scrubby brush growth on it. There were no fences. The land was not posted against trespassers or hunting.

On the evidence it is abundantly clear that the accused, and his companions, all treaty Indians, were searching for game. There is no evidence of any conservation between the apprehending officers and the Indians except that they were hunting for food. All the Indians produced treaty numbers. They were in possession of recently-shot undressed deer.

Two local farmers in personal private possession of the land in question testified for the Crown. None of the Indians was known to them. Neither farmer had ever spoken to these Indians. No permission had been sought by, or granted to, the Indians by the farmers to hunt on the land in question. None of the land in question nor any surrounding private forested land was used by the Indians for hunting by custom, tradition, or common usage.

With respect to the privately-owned grain fields over which the spotlight had scanned, the owners had no objection to anyone hunting for big game on this land even without permission, so long as no damage resulted to private property. One owner of scanned farm land stated that he did not like night hunting on his property. Both farm properties were beyond question good big game hunting areas for elk, deer, or moose.

Evidence of a conservation officer was that the road in question may be used by a hunter to search for deer, and, in fact this road was commonly used by hunters for this purpose. The conservation officer further stated that a hunter may shoot from the shoulder of the road at an animal in the ditch so long as there was no discharge of the firearm along or across the roadway. However, the evidence is not that this toad was a provincial highway or a grid road. It appears to be a rural road to which Regulation 16 of the Wildlife Regulations, 1981 (O.C. 1304/81 Sask. Gazette August 21, 1981) does not apply: Section 16 reads:

> 16. No person shall discharge a firearm along or across the travelled-portion of a provincial highway or a grid road.

Ruling

In my opinion with respect to treaty Indians hunting for food an offence under s. 37 of the Wildlife Act falls into the first category of classification of offences requiring proof on mens rea referred to in The Queen v. The Corporation of the City of Sault Ste. Marie (1978), 85 D.L.R. (3d) 161 (S.C.C.) per Mr. Justice Dickson at pages 181-182. In R. v. Sanderson, Sanderson, Burns and Moostoos, Saskatchewan Court of Appeal, judgment delivered May 2, 1986, Mr. Justice Cameron stated in the unreported judgment [reported infra at p. 113] at page 31 [p.133, infra]:

> …one does not necessarily have to set foot upon property to be found to be hunting thereon. I agree, as well, with the approach taken by the Manitoba Court of Appeal in R. v. Daniels [[1985] 4 C.N.L.R. 151], and believe the case before us falls to be decided according to the same principle.
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> Since the appellants could be found to be hunting the adjoining lands only if they intended to locate, and with the said of the light, kill game on the adjacent property, the Crown had to prove, beyond a reasonable doubt, that that was they intention. The nature of the intention required of an accused before he can be said to be hunting within the meaning of s. 37 of the Wildlife Act is, of course, a matter of law, while his particular intention in doing the act complained of is an issue of fact. Lampard v. The Queen, [1969] S.C.R. 373.

It is not unlawful for a treaty Indian who is hunting big game for food to use a spotlight at night. However the spotlight hunting must be carried out in a non-dangerous fashion. It must be carried out on land to which the hunter has a right of access. The accused, on the evidence before me,

had a right of access to hunt, in the manner that he was hunting, on the road allowance bordering the road on wither side where he was seen from the air and the ground to be so doing.

On the facts before me, the use of the spotlight may be as equally consistent with intending to search for game on the road allowance ditch as it is to search for game on the adjacent farm land to which, on these particular facts, there may or may not have been a consent to hunt. I am not entering upon a consideration of the issue of consent as, in view of my findings respecting the issue of intention, I do not have to.

On the whole of the evidence with respect to the element of mens rea where intention is involved, I am not satisfied beyond a reasonable doubt as to the guilt of the accused.

The Information is dismissed.