REGINA v. MYRAN ET AL.

(1973), 35 D.L.R. (3d) 473 (also reported: [1973] 4 W.W.R. 512, 11 C.C.C. (2d) 271)

Manitoba Court of Appeal, Monnin, Guy and Hall JJ.A., 9 March 1973

(On appeal from judgment of Manitoba County Court, **supra** p.5444)

(Appealed to Supreme Court of Canada, reported **sub nom. Myran et al. v. The Queen, infra** p. 552)

Indians - Hunting privileges - Immunity from provincial game laws - Indians by statute guaranteed right to hunt - Whether guarantee provides immunity from prosecution for hunting without due regard for safety of others - Wildlife Act (Man.), ss.10(1), 46(1) - Manitoba Natural Resources Act, Sch., para. 13.

Paragraph 13 of the Schedule to the *Manitoba Natural Resources Act*, R.S.M. 1970, c. N30, providing that Treaty Indians have the right to hunt, trap and fish year-round on all unoccupied Crown lands and on all other lands to which they have a right of access, does not provide immunity for Treaty Indians hunting for food on lands to which they have a right of access where they are charged with hunting without due regard for the safety of other persons contrary to s. 10(1) of the *Wildlife Act*, R.S. 1970, c.W140. Section 10(1) does not restrict the type of game, not the time or method of hunting, but simply imposes a duty on every person of hunting with due regard for the safety of others.

[Prince and Myron v. The Queen, [1964] 3 C.C.C. 2, [1964] S.C.R. 81, 41 C.R. 403, distd]

APPEAL by the accused from a decision of Kerr, Co.Ct.J., dismissing their appeals by way of trial *de novo* from their convictions by Coward, Prov.Ct.J., for hunting without due regard for the safety of others contrary to s. 10(1) of the *Wildlife Act* (Man.).

H. I. Pollock, Q.C., and *M. F. Garfinkel*, for accused, appellants.
A.G. Bowering, for the Crown, respondent.

The judgment of the Court was delivered by

HALL, J.A.:- The appellants who are Treaty Indians, were charged before Provincial Judge Coward of Brandon, Manitoba:

> That on or about the ninth day of October A.D. 1971 at the Rural Municipality of North Cypress in the Province of Manitoba, did hunt without due regard for the safety of other persons in the vicinity, CONTRARY TO THE PROVISIONS OF THE WILDLIFE ACT.

Section 10(1) of the *Wildlife Act*, R.S.M. 1970, c.W140, provides as follows:

> 10(1) Any person who hunts in a manner that is dangerous to other persons in the vicinity, or who hunts without due regard for the safety of other persons in the vicinity, is guilty of an offence and is liable, on summary conviction, to a fine of not less than fifty dollars and not more than five hundred dollars, or to imprisonment for a term of not less than one week and not more than three months, or to both such a fine and such imprisonment.

The learned Provincial Judge found the appellants guilty and imposed upon each of them a fine of $50, or, in default of payment, imprisonment in the Correctional Institute at Portage la Prairie, Manitoba, for seven days. In so finding he concluded that the appellants were hunting for food on land to which they had a right of access and that notwithstanding para. 13 of the Schedule to the *Manitoba Natural Resources Act*, R.S.M. 1970, c. N30, they were not exempt from s. 10 of the *Wildlife Act*.

On appeal by trial de novo, Kerr, Co.Ct.J., affirmed the conviction and sentence by holding that s. 10(1) of the Wildlife Act, applies to all persons regardless of status. On December 15, 1972, leave to appeal to this Court was granted by Freedman, C.J.M., on the following issue only:

> Did the learned trial judge err in holding that paragraph 13 of the Schedule of the Manitoba Natural Resources Agreement Act, 1930, did not provide immunity to the accused from the restrictions on hunting set out in The Wildlife Act, and specifically section 10(1) thereof.

Having regard to the limited nature of the appeal we feel bound to accept the implicit findings of the trial Judge that the accused were Treaty Indians and that, at the time, they were hunting for food on lands to which they had a right of access. The accused were night-lighting for deer on farm property in the vicinity of the owner's home and farm buildings by means of a motor vehicle,

spotlight and a loaded rifle. They were found guilty of hunting without due regard for the safety of other persons in the vicinity.

Section 46 (1) of the *Wildlife Act*, reads:

> 46 (1) Nothing in this Act reduces, or deprives any person of, or detracts from, the rights and privileges bestowed upon him under paragraph 13 of the Memorandum of Agreement approved under The Manitoba Natural Resources Act.

Paragraph 13 of the Schedule to the *Manitoba Natural Resources Act*, reads:

> 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 their 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 sole question for determination is whether the appellants are subject to the limitations imposed by s.10(1) of the *Wildlife Act*.

Counsel for the appellants contends that the right to hunt for food on land to which his clients had a right of access is unfettered and unqualified, and that any restriction or limitation of the kind contemplated by s.10 (1) cannot be sustained. In support of that argument he relies principally on the decision of the Supreme Court of Canada in *Prince and Myron v. The Queen*, [1964] 3 C.C.C. 2, [1964] S.C.R. 81, 41 C.R. 403. In that case the accused were charged with the specific offence of hunting bug game by means of night-lights, and the sole question for determination was the meaning of the word "hunt" in s. 72(1) of the *Game and Fisheries Act*, R.S.M. 1954, c. 94, which now has been repealed; that section read [p.4]:

> "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 Indians may have the right of access."

Hall, J., in delivering the judgment of the Supreme Court, stated at p. 5:

With respect, I agree with the reasons of Freedman, J.A., in his dissenting judgment and also with the statement of McGillivray, J.A., in *R. v. Wesley*, 58 C.C.C. 269, [1932] 4 D.L.R. 774, (1932) 2 W.W.R. 337, 26 A.L.R. 433, when he said at p. 276 C.C.C., p. 781 D.L.R., p. 344 W.W.R.:

> "If the effect of the proviso is merely to give to 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 [of the *Alberta Natural Resources Act*, 1930, c. 21] reassured of the continued enjoyment of a right which he has enjoyed from time immemorial."

The dissenting reasons of Freedman, J.A., (as he then was), are reported in [1963] 1 C.C.C. 129 at p. 137, 39 C.R. 43, 40 W.W.R. 234, where he stated in part:

> 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 these 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 fame 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 be must hunt only in the manner and at the times prescribed by the Act. Bur the ordinary citizen does not hunt for food for sustenance purposes. The Indian does, and the statute, recognizing his eight to sustenance, exempts him from the ordinary game laws when he is hunting for food in areas where he is so permitted.

In the present case the governing statute if the *Wildlife Act*, and in particular s. 41(1) thereof. Section 10(1) under which the accused were charged does not restrict the type of game, nor the time or method of hunting, but simply imposes a duty on every person of hunting with due regard for the safety of others. Does that duty reduce, detract or deprive Indians of the right to hunt for food on land to which they have a right of access? Of one regards that right in absolute terms the answer is clearly in the affirmative; but is that the case? Surely, the right to hunt for food as conferred or bestowed by the agreement and affirmed by the statute cannot be so regarded.

Inherent in the right is the quality of restraint, that is to say that the right will be exercised reasonably. Section 10(1) is only a statutory expression of that concept, namely, that the right will be exercised with due regard for the safety of others, including Indians.

The intent of the Legislature, to use the words of the agreement, was "to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence". And the right conferred was to that end. The duty imposed by s. 10(1) is to exercise that right with due regard for the safety of others. It is simply giving expression and effect to the quality of restraint inherent in the right conferred.

The Canadian Bill of Rights, 1960 (Can.), c. 44 [now R.S.C. 1970, App. III], confers may fundamental freedoms without specifically defining them; that does not mean that such freedoms can be asserted with impunity, but it does mean that such freedoms are subject to corresponding duties or restraints. By a parallel reasoning the tight conferred by the statute and the agreement under consideration is not impaired by the statutory duty imposed by s. 10(1) of exercising that with due regard for the safety of others. To hold otherwise would be to countenance the exercise of the right of hunting with impunity, which I cannot believe the Legislature intended. It is of importance to emphasize that s. 10(1) imposes no restriction on Indians as to the kind of game they may hunt or as to the time and method of hunting. It only provides that they should exercise their right with due regard to the safety of others, including people of their own status. It is those considerations that distinguish the case at bar from the decision in the *Prince and Myron v. The Queen case, supra.*

For these reasons it is our opinion that the learned trial Judge did not err in holding that para. 13 of the Schedule of the *Manitoba Natural Resources Agreement Act, 1930*, did not provide immunity form the restriction or limitation imposed by s. 10(1) of the *Wildlife Act*. Accordingly, we would respond in the negative to the issue propounded in the order granting special leave to appeal. The appeal is therefore dismissed.

Appeal dismissed.