R. v. Broklebank

Date: 20000619
Docket: A08980042W

IN THE CRIMINAL DIVISION OF
THE PROVINCIAL COURT OF ALBERTA
(TRAFFIC)

BETWEEN

HER MAJESTY THE QUEEN

v.

MAC BROKLEBANK

REASONS FOR JUDGEMENT OF HIS WORSHIP

PATRICK M. McILHARGEY

COUNSEL: B. Purdy, for the Defendant
AGENT: T. Melendy, for the Crown

[1] At about 8:00 o'clock in the morning on Saturday, February 5, 2000, the Defendant, MacDougal Broklebank, shot and killed a cougar that was in a tree in the yard in front of his house. Mr. Broklebank did not have a licence to hunt the cougar and he was charged, under the name "Mac Broklebank", with "hunt wildlife without a licence" contrary to s. 26(1) of the Wildlife Act (Alberta).

[2] The Defendant argues that the cougar was shot and killed to protect persons and property. That it was shot in "self defence".

[3] In my opinion if there is a defence in these circumstances then it should be assessed in terms of and as analogous to a defence of necessity. At page three of his decision in R. v. Jones, [1986] N.W.T.J. No. 10 Action No. SC 3655, a decision of the Supreme Court of The Northwest Territories, de Weerdt, J. states:

> "Scant attention (if any) was given, it appears, to the circumstances in which the bear came to be killed. --- that the bear was killed in the act of
>
> charging an unarmed individual who could otherwise have been very seriously harmed in consequence. In such cases, the doctrine of necessity supplies a defence for the killing of the animal:" (Emphasis added)

de Weerdt, J. cites as authority the decisions of Perka v. The Queen, (1984) 14 C.C.C. (3d) 385 (S.C.C.), and R. v. Koonungnak, (1963) 45 W.W.R. 282 (N.W.T.T.C.).

[4] The relevant sections of the Wildlife Act are as follows:

> "s.26(1) Subject to subsection (3), a person shall not hunt wildlife unless he holds a licence authorizing him, or is authorized by or under a licence, to hunt wildlife of that kind.
>
> s.1(g.1)"hunt" means, subject to subsection (6), with reference to a subject animal,
> (i) shoot at, harass or worry,
> (ii) chase, pursue, follow after or on the trail of, search for, flush, stalk or lie in wait for,
> (iii) capture or wilfully injure or kill, or ---
>
> s.1(x) "wildlife" means big game, ---
>
> s.10(1) Subject to this section, the property in all wildlife in Alberta is vested in the Crown."
> (Emphasis added)

[5] The provisions of s.26(2) and (3) and the exceptions to the definition of "hunt" as set out in s.1(2) of the Wildlife Act have no application in this matter.

[6] The charge against the Defendant is characterized as a regulatory or strict liability offence. The Crown need not prove intent, however, the Crown has the onus of proving beyond a reasonable doubt not only that the Defendant committed the prohibited act but that his actions in doing so were voluntary. In the Supreme Court of Canada decision in Perka v. R., Dickson, J. at p. 404 states as follows:

> "Although necessity is spoken of as a defence, in the sense that is raised by the accused, the Crown always bears the burden of proving a voluntary act. The prosecution must prove every element of the crime charged. One such element is the voluntariness of the act. Normally, voluntariness can be presumed, but if the accused places before the court, through his own witnesses or through cross-examination of Crown witnesses, evidence

> sufficient to raise an issue that the situation created by external forces was so emergent that failure to act could endanger life or health and upon any reasonable view of the facts, compliance with the law was impossible, then the Crown must be prepared to meet that issue. There is no onus of proof on the accused."

[7] I am satisfied beyond a reasonable doubt that the Defendant's actions contravened s.26(1) of the Wildlife Act, in that he shot at and killed a big game animal in the Province of Alberta and that at the time he held no licence authorizing him to do so. It is the voluntariness of his actions that is at issue in these proceedings and was addressed by Mr. Broklebank's counsel in arguing self defence under s.34 of the Criminal Code, and it is that same issue that is addressed by the Court in this matter in considering the availability of a defence of necessity. That is, if the Defendant had no choice but to shoot the cougar then his actions could not be found to be voluntary.

[8] The following additional facts are relevant.

[9] The Defendant was a rancher. His home and yard, where the cougar was shot, were located six miles west and one mile north of the Town of High River. He ran a cow/calf operation on four sections of land. There were cows, calves and bulls in pens and corrals in the immediate vicinity of his yard. The Defendant's son's home and two rental houses were located within 2/10 of a mile of the Defendant's home.

[10] At about 5:00 o'clock in the morning on February 5, 2000, the Defendant was woken by his dog's barking. After approximately fifteen minutes he determined that there was a cougar about thirty to forty feet up a tree in his yard. The tree was thirty meters from the front of his house. The driveway into Mr. Broklebank's yard passed beside the base of the tree and his dog was barking at the cougar. Two other adult persons, Sandi Kennedy and the Defendant's daughter Jacqui, were present in the house. The Defendant testified that they brewed some coffee and sat down to watch the cougar and to try and decide what to do.

[11] At 7:30 A.M., just as it was getting light, the cougar came down out of the tree and tried to run to some carigana bushes at the edge of the yard. It was chased by the dog, it tried unsuccessfully to climb into the bushes, it was involved in a brief scuffle with the dog and returned to the original tree.

[12] At this time Sandi Kennedy took photographs of the cougar as it was returning to the tree and then as it was standing in the tree. These photographs were entered as exhibits 7 and 8 in these proceedings.

[13] The Defendant's dog was described as weighing seventy-five kilograms. The dog was agitated by the presence of the cat and the Defendant testified that it was unlikely to respond to commands. There was no evidence that the Defendant tried to call off his dog or to secure it when at one point it returned to the house for a period of one to two minutes to eat. Accordingly, the dog remained more or less at the foot of the tree throughout.

[14] The Defendant's daughter had limited cognitive ability and skill development and the Defendant testified that she could not be left alone for fear that she would come out of the house. The Defendant had livestock to feed at 8:00 o'clock and Sandi Kennedy had to leave for a 9:00 o'clock appointment in the nearby town of Okotoks. The Defendant considered that the presence of the cougar created a very dangerous situation, he was concerned for the safety of his daughter, his neighbours down the road and his livestock. At about eight o'clock he shot and killed the cougar, moved it to a storage shed and about 8:45 A.M. telephoned Fish and Wildlife and left a message reporting the incident. Examined by a wildlife officer after it had been shot, the cougar was described as a healthy adult male, in good physical condition and weighing about sixty-five kilograms.

[15] On February 5, 2000, the offices of Alberta Environment, Natural Resources Service, ("Fish and Wildlife") in the town of High River were closed. A person calling by telephone would reach a recording which would give a 1-800 number for emergency assistance. In situations such as that faced by the Defendant it was the Department's policy to tranquilize and relocate a subject animal.

[16] The Defendant made no attempt to contact Fish and Wildlife or the R.C.M.P. until after the cougar had been shot. His evidence was that he didn't think of it.

[17] The Defendant's counsel, Mr. Purdy, argued self defence under the Criminal Code. I am satisfied that by it's terms the statutory defence set out in s.34 of the Criminal Code does not apply in these circumstances.

[18] While there is no statutory defence of necessity in Alberta the common law defence has been preserved in Canada by s.8(3) of the Criminal Code, see Perka v. R., supra., and is available to a person raising the defence in relation to protection of property, see R. v. Hill, (1999) 42 M.V.R. (3d) 141 (B.C.P.C.).

[19] In the decision of Perka v. R., supra., Dickson, J. at p.405 summarises ten "conclusions as to the defence of necessity in terms of it's nature, basis and limitations." The following of his conclusions are germane to this matter:

> "(7) actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle;
>
> (8) the existence of a reasonable legal alternative similarly disentitles; to be involuntary the act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law;
>
> (9) the defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril;
>
> (10) where the accused places before the court sufficient evidence to raise

> the issue, the onus is on the Crown to meet it beyond a reasonable doubt."

[20] The comments of Dickson, J. at p. 400 are of assistance in understanding his ninth conclusion, he stated:

> "At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make counsel of patience unreasonable.
>
> The requirement that compliance with the law be "demonstrably impossible" takes this assessment one step further. Given that the accused had to act, could he nevertheless realistically have acted to prevent the peril or avoid the harm, without breaking the law? *Was there a legal way out*?
> ---
> The question to be asked is whether the agent had any real choice: could he have done otherwise? If there is a reasonable legal alternative to disobeying the law, then the decision to disobey becomes a voluntary one, impelled by some consideration beyond the dictates of "necessity" and human instincts."

[21] In the matter before me then there must be evidence of a threat of imminent peril and of the lack of a reasonable legal alternative.

[22] It seems to me that the immediacy of the peril will significantly impact the availability of reasonable legal alternatives. For example, a person being charged by a moose is in a far different situation than an Eskimo whose village is threatened, although not immediately threatened, by the presence in the area of a disenfranchised bull musk ox. Clearly the Eskimo protecting his village has greater time for reflection. If however, in the end result, there exists no reasonable legal alternative then in both such cases the defence of necessity (self defence) is available. See R. v. Breau, (1959) 32 C.R. 13 (N.B.S.C.), and, R. v. Koonungnak, supra.

[23] Mr. Broklebank testified that he believed the presence of the cougar posed a serious threat. Clearly he did not believe that this was an immediate threat as he waited approximately three hours before shooting the cougar. The Defendant, his daughter and Sandi Kennedy were in the house. They were not in immediate danger. As well, there was very little objective evidence of the seriousness of the threat posed by the cougar to Mr. Broklebank's livestock. Cougars are predators and carnivores but there was no evidence of cougar activity in the area prior to February 5, 2000, and no evidence of any livestock being taken by cougars. In terms of the perceived threat to people and livestock, at 7:30 A.M. when the cougar was on the ground the Defendant and Sandi Kennedy were outside taking photographs of it.

[24] There were numerous legal alternatives available to Mr. Broklebank. In the time available he could have called the R.C.M.P. and/or Fish and Wildlife and let them deal with the cat. The town of High River was only seven miles away. He could have secured his dog to allow the animal to escape. If he considered the cat a threat to his neighbours he could have and should have called them to warn them of the presence of the cougar. In terms of his family's safety, he simply had to keep them in the house and remain with them until Fish and Wildlife were given an

opportunity to respond. There was no evidence that the feeding of his livestock could not be delayed.

[25] I am not satisfied that in this matter there is evidence of either an imminent peril or of the absence of legal alternatives. I am not satisfied that the evidence before me meets the threshold referred to by Dickson, J. in R. v. Perka.

[26] I am satisfied beyond a reasonable doubt that the Defendant's actions were voluntary.

[27] I find the Defendant guilty.

Dated at the Town of Okotoks, in the Province of Alberta, this 19th day of June, 2000.

Patrick M. McIlhargey
Traffic Commissioner