

 **BUTLER v. WHALEN**

Newfoundland and Labrador Judgments

Newfoundland District Court Judicial Centre of St. John's

McCarthy, D.C.J.

June 28, 1984

1983 No. 1758

[1984] N.J. No. 254 | 49 Nfld. & P.E.I.R. 88 | 145 A.P.R. 88*

(14 paras.)

CASES NOTICED:

R. v. Comber, [28 C.C.C.\(2d\) 444](#), (Ont. Co. Ct.), ref'd to. [para. 10].

STATUTES NOTICED:

Criminal Code of Canada, R.S.C. 1970, c. C-34, ss. 386(2) [para. 9]; 401(a) [para. 8].

COUNSEL

David H. Orr, for the appellant Thomas G. Mills, for the Crown, intervening on behalf of the respondent

This appeal was heard before McCarthy, D.C.J., of the Newfoundland District Court, Judicial Centre of St. John's, who delivered the following judgment on June 28, 1984.

McCarthy, D.C.J.

1 The appellant was convicted by His Honour Judge G.W. Seabright, a judge of the Provincial Court of Newfoundland, of the offence that he:

"on the 25th day of January, A.D. 1982 at Bauline in the Province of Newfoundland did wilfully and without lawful excuse kill a dog, the property of the Informant, contrary to Section 401(a) of the Criminal Code of Canada."

and was fined \$ 100.00 or in default of payment thereof within 30 days to imprisonment of 30 days in Her Majesty's Penitentiary.

2 The appellant appeals from this conviction and sentence.

3 The respondent did not appear and did not submit any written memorandum. The Crown intervened on behalf of the respondent. Crown counsel appeared, but he did not comment nor submit any written memorandum.

4 The transcript of evidence clearly established that the respondent was the owner of the dog in question and that the appellant shot and killed that dog.

5 Counsel for the appellant argued that the respondent did not keep the dog for a lawful purpose, that the

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respondent did not tether the dog as required by the Dog Act, 1976, the Act No. 13 of the Statutes of Newfoundland, [*page89] 1975-76, and that the appellant shot the dog because he believed that the dog was a threat to his sheep.

6 The Provincial Court Judge said in his decision:

"There is no doubt that the dog is dead and there is no doubt who did it. The question is lawful excuse. If I go anywhere for lawful excuse, first I have to go to the Dog Act ... Section 8 is the one relied ... on in Section 8 ... it says

'any person may shoot or otherwise destroy a dog who is found killing, maiming or worrying human beings or livestock.'

"That is the crux of the matter. Now, what is the evidence? The evidence is by Mr. Butler's own words is the fact that the dogs were out in his yard and rather than disturb them, he went over to his own house or over to his son's house and got a gun and shot them. I don't think it could be found any more precise than that. That is about the size of the evidence. Now, prior to that he heard a swish. He heard no barking--this is his evidence now, not anybody else, this is his evidence. He heard no barking, no indication that the dogs chased the sheep and the question is when he came out and shot the dog, was that a reasonable excuse or is that a lawful excuse and I say it is not and I am prepared to convict him on the charge."

7 The appellant was convicted of wilfully and without lawful excuse killing the dog in question contrary to s. 401(a) of the Criminal Code.

8 Section 401(a) of the Criminal Code provides:

"401. Every one who wilfully and without lawful excuse

- (a) kills, maims, wounds, poisons or injures dogs, birds or animals that are not cattle and are kept for a lawful purpose, or ... is guilty of an offence punishable on summary conviction."

9 Section 386(2) of the Criminal Code provides:

"(2) No person shall be convicted of an offence under Sections 387 to 402 where he proves that he acted with legal justification or excuse and with colour of right."

10 In *R. v. Comber*, [28 C.C.C.\(2d\) 444](#), (Ont. Co. Ct.), Comber was charged "with wilfully, in effect, and without lawful excuse killing the dog in question."

11 Thompson, Co. Ct. J., said in *Comber* at p. 448:

"There were a number of cases cited to me which in my respectful opinion have no application to the facts of this case. The law seems to be clear that there is no right to wilfully kill a dog simply because it trespasses onto property. There are certain occasions when a dog may be lawfully killed and it has been held that where it is attacking domestic animals, the owner of such animals is entitled, if he catches the dog in the course of such attack, to protect his property by killing the dog. However, once the attack is over, he is not entitled to follow the dog to its place of residence or indeed, I rather gather from the authorities, is he entitled to shoot the dog unless it is in the act of attacking the animals in question. That is, of course, not the situation here. The dog in question was not attacking domestic animals."

12 In this appeal the dog in question was not attacking the appellant's sheep. Accordingly, I find that the Provincial Court Judge was correct when he convicted the appellant of a breach of s. 401(a) of the Criminal Code of Canada.

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13 The Provincial Court Judge did [*page90] not consider the sentencing principles before he sentenced the appellant. I consider it to be in the best interest of the appellant and not contrary to the public interest to direct by order that the appellant be discharged absolutely.

14 Accordingly, I allow the appeal and order that the appellant be discharged absolutely.

Appeal allowed in part.

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