

1978 CarswellPEI 35

Prince Edward Island Supreme Court, Appeal Division

R. v. Bulger

1978 CarswellPEI 35, 16 Nfld. & P.E.I.R. 275, 42 A.P.R. 275

**Bennett Nicholas Bulger Bruce Allison Mann Reginald Joseph  
Arsenault Appellants v. Her Majesty The Queen Respondent**

Nicholson, C.J., Darby and M.J. McQuaid, JJ

Judgment: August 25, 1978

Docket: Doc. GDC-441

Counsel: For the Appellant - Bulger, *T. Daniel Tweel, Esq.*

For the Appellant - Mann, *S.C. Bhatia, Esq.*

For the Appellant - Arsenault, *E.S. Murphy, Esq.*

For the Respondent, *D.R. Hammond, Esq.*

Subject: Criminal

**Related Abridgment Classifications**

**Criminal law**

**XXIII Sentencing by offence**

**XXIII.10 Offences against rights of property**

**XXIII.10.k Theft and related offences**

**XXIII.10.k.ii Fraudulently taking cattle, or defacing brand on cattle**

**Headnote**

**Criminal Law --- Sentencing — Sentencing principles — Prior criminal record**

Sentence of accused having seven prior convictions for theft, breaking and entering or attempted theft reduced from 3 years to 2 years imprisonment — Sentence of accused having no previous criminal record reduced from 2 years less 1 day to 1 year — Criminal Code, R.S.C. 1970, c. C-34, s. 298(1.1).

**The Judgment of the Court was delivered by *Nicholson, C.J.*:**

**NOTE OF JUDGMENT**

1 The appellants were tried at Summerside in Prince County, under the provisions of Part XVII of the Criminal code by the Honourable Arthur H. Peake and a petit jury, on a charge that they, on or about the 3rd day of August 1977, at or near Baltic in Prince County, did steal a cow, the property of Bruce Riley of Baltic, contrary to the provisions of Section 298(1.1) of the Criminal Code. The jury found the appellants guilty as charged on the 15th day of December 1977. On February 9th, 1978, the following sentences were imposed:

Bennett Nicholas Bulger - Imprisonment in a Federal Penitentiary for a term of three years.

Bruce Allison Mann - Imprisonment in Prince County Gaol for a term of two years less one day.

Reginald Joseph Arsenault - Imprisonment in Prince County Gaol for a term of two years less one day.

2 The appellants Bulger and Mann, who have been in custody since December 15th, 1977, apply for leave to appeal from the sentences imposed upon them. The appellant Arsenault was granted leave to appeal and released from custody by an Order of

M.J. McQuaid, J. made on March 23rd, 1978. In these circumstances, leave to appeal is now granted to the appellants Bulger and Mann.

3 The grounds of appeal advanced by the appellants are as follows:

(a) The appellant Bulger -

1. That the sentence imposed on the accused is an unfit and improper sentence due to its excessive severity in all the circumstances of the case.
2. That the learned Trial Judge, while imposing sentence made an erroneous finding of fact, i.e. that the cow was alive at the time of being stolen and that such erroneous finding of fact influenced the sentence imposed upon the accused.

(b) The appellant Mann -

1. The sentence is excessive in view of the circumstances of the case.

(c) The appellant Arsenaault -

1. That the sentence imposed on the accused is an unfit and improper sentence due to its excessive severity in all the circumstances of the case.
2. That the learned trial Judge, while imposing sentence made an erroneous finding of fact, i.e. that the cow was alive at the time of being stolen and that such erroneous finding of fact influenced the sentence imposed upon the accused.

4 We shall first consider ground of appeal number two advanced by the appellants Bulger and Mann, namely:

That the learned trial Judge, while imposing sentence made an erroneous finding of fact, i.e. that the cow was alive at the time of being stolen and that such erroneous finding of fact influenced the sentence imposed upon the accused.

In passing sentence on the appellants, the learned trial Judge states:

To deal with the evidence before the Court. The stolen cow was a healthy young heifer, one year and a half old, weighing between six hundred fifty to seven hundred pounds live weight as described by its owner, Mr. Riley when he saw it on August 1st, two days before she disappeared. There was no evidence given that the heifer was slaughtered at the pasture field from where she was taken or how she died. There were only drag marks which led eventually to Mr. Bulger's home. It is obvious that the heifer was alive when dragged from the pasture and died somewhere enroute to the Bulger home, a distance of 8.1 miles. One cannot imagine greater cruelty to dumb animals than this.

If the animal was, as the trial Judge states "*alive when dragged from the pasture and died somewhere enroute to the Bulger home, a distance of 8.1 miles*", there would be no doubt that the appellants would be guilty of an offence under Section 402(1) (a) of the Criminal Code. That section reads as follows:

402. (1) Every one commits an offence who

- (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or bird,

An offence under Section 402(1)(a) is "*an offence punishable on Summary Conviction*". This offence is not an "*included offence*" in a charge under Section 298(1.1) and if a person is to be punished for cruel treatment of animals he or she must be charged under Section 402 of the Criminal Code. If the animal was dead before it was dragged behind the appellant's truck, no amount of bad treatment of the carcass would be considered as being cruelty to animals.

5 In sentencing the appellants, the learned trial Judge seems to have been influenced by his finding (not supported by the evidence) that the animal was cruelly killed. Sentences such as were imposed are in our opinion excessive in the circumstances of this case. The maximum punishment for theft of cattle under Section 298(1.1) is ten years imprisonment, the same punishment as for any theft of an article valued in excess of \$200.00, [Section 294(a)]. If we are to assess the gravity of the crime of theft of an animal by reference to the maximum punishment provided in the Criminal Code, then we must assume that this particular theft is no worse a crime than theft of an article having a value in excess of \$200.00. There may be cases of theft of large numbers of cattle which would call for a very severe sentence, but this is not such a case.

6 In our opinion, a fit sentence for an offence under Section 298(1.1) of the Code should not be different than for an offence under Section 294(a).

7 We must now consider the sentence as they relate to the individual appellants. Before doing so we would refer to the case of *MacQuarrie v. The Queen*, (1964) 49 M.P.R. 418, (P. E. I. Supreme Court) in which a sentence of four months imprisonment was imposed. This sentence being for possession of a stolen animal knowing it to have been stolen.

8 The appellant Bulger is characterized by the learned trial Judge as "*the mastermind of this operation*"; and as one "*who attempted to pin the leadership of the episode on Fred MacDonald*". The record of previous convictions of the appellant Bulger is as follows:

December 5, 1960, Newmarket, Ont., Attempted Theft, Sec. 405 C.C.C. Disposition: Suspended Sentence plus one year probation.

August 3, 1961, Newmarket, Ont., driving while disqualified, Sec. 225(3) (a) C.C.C. Fined \$200 i/d 30 days.

August 4, 1961, Newmarket, Ont., Theft, Sec. 280 C.C.C. (4 charges). Disposition: Nine months definite, three months indef. (On each charge).

March 24, 1962, Paroled from Ontario Reformatory

March 24, 1964, Niagara Falls, Ont. 1. Dangerous Driving Sec. 221(4) C.C.C. Fifteen days in jail and \$100 fine. 2. Driving while suspended, Sec. 225(3) C.C.C. Seven days jail, consecutive

December 2, 1965, Hamilton, Ont. Assault, Sec. 231(1)(a) C.C.C. two months jail;

April 22, 1969, Hamilton, Ont. Break & Enter with Intent, Six months jail;

April 8, 1971, Summerside, P.E.I. Theft under \$50, Sec. 280(b) C.C.C. Disposition, 1 year suspended sentence and \$1000 bond.

August 4, 1971, P.E.I. Sec. 236 C.C.C.

July 11, 1972, P.E.I. Sec. 236 C.C.C.

September 26, 1972, P.E.I. Sec. 236 C.C.C.

July 23, 1975, P.E.I. Sec. 236 C.C.C.

June 30, 1976, Summerside, P.E.I. Possession of firearms dangerous to public peace; disposition: One year conditional discharge and probation.

August 17, 1977: Sec. 235(2) C.C.C. P.E.I.

9 Of these convictions seven are for theft, breaking and entering, or attempted theft. His past record is not a good one and no doubt must be taken into consideration. In our opinion, taking into consideration all matters referred to in the pre-sentence report and the judgment of the trial Judge, as well as argument of counsel, the sentence imposed upon the appellant Bulger should be varied from one of three years imprisonment in a federal penitentiary to one of two years in a federal penitentiary.

10 The appellants, Mann and Arsenault, have no serious previous criminal record. They deserve a less harsh sentence than the appellant Bulger for the reason that they have no serious previous record of criminal offences. In our opinion, the sentence of imprisonment for two years less one day in the Prince county Gaol should be varied in each case to one of imprisonment in Prince County Gaol for a term of twelve months. Time served by either appellant to be counted against the time of twelve months.

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