1920 CarswellSask 16
Saskatchewan King's Bench, Chambers

R. v. Fusell

1920 CarswellSask 16, [1920] 1 W.W.R. 614, 13 Sask. L.R. 154, 34 C.C.C. 57

Rex v. Fusell

Taylor, J.

Judgment: January 17, 1920

Counsel: *A.G. MacKinnon*, for the accused.
H.E. Sampson, K.C., for the Crown.

Subject: Criminal; Property; Torts
Related Abridgment Classifications
Criminal law
XVI Wilful and forbidden acts in respect of certain property
XVI.2 Cruelty to animals
Criminal law
XXIV Investigation and arrest
XXIV.1 Information
XXIV.1.c Substance of information
XXIV.1.c.i Statement of offence
XXIV.1.c.i.C Essential wording
Personal property
I Animals
I.1 Injury to animals
I.1.f Malicious injury
Headnote
Animals --- Malicious injury to animals
Criminal Law --- Wilful and forbidden acts in respect of certain property — Injury or causing cruelty to animals — Injuring or endangering animals other than cattle — Nature and elements of offence
Criminal Law --- Compelling appearance of accused — Information — Substance of information — Statement of offence — Essential wording
Criminal Law — Effect of Information Not Sufficiently Stating Criminal Offence — Effect of Omission of "Wilfully" in Charge of Shooting Dog — Conviction on Admissions without Regard to Accused's Story of Justification.
Where the facts stated in an information fall short of an allegation of a criminal offence a justice cannot, without amendment and full opportunity to make answer thereto, infer or find from the evidence a further fact necessary to constitute the criminal offence and convict therefor.
Quaere whether a charge that accused "did unlawfully shoot and kill a dog ... contrary to sec. 537 of *The Criminal Code* of Canada," omitting the word "wilfully," which is used in the words describing the offence in said section, but in view of its definition in sec. 509, is not sufficient.
Where to prove the shooting of a dog there is only the admission of the accused, the magistrate ought also to accept the accused's reasonable story of justification where there is nothing in the evidence to controvert it.

Application for writ of *certiorari* and to quash a conviction of shooting and killing a dog. Conviction quashed.

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***Taylor, J.*:**

1 This is an application for writ of *certiorari* and to quash a conviction. The information was laid before the justice for that Mrs. Fred F. Fusell, of Earl Grey, on October 4, 1919, at the south-west quarter of sec. 22, tp. 23, rge. 20, west of the second meridian in the said province, did unlawfully shoot and kill a dog the property of the complainant, valued at $25, contrary to sec. 537 of *The Criminal Code* of Canada, R.S.C., 1906, ch. 146.

2 The accused was tried on October 16, 1919. At the conclusion of the taking of the evidence adjournment was made until Monday, October 20, 1919, when the justice announced his conclusion and made a minute: "I find the accused guilty and fine her $5.00 and costs, and I award damages of $15.00 for loss of the dog."

3 Notice of motion for writ of *certiorari* and to quash the conviction was given about December 18. Counsel for the Crown appears and files the original record now in his possession, and an amended conviction that

> Mrs. Fred Fusell on the 4th day of October, 1919, at the southwest quarter of Section 22-23-20, West of the 2nd Meridian, in the said province, wilfully, without legal justification or excuse and without color of right did kill one dog, the property of Charles Kiehl, adjudging a fine of $5.00 and $7.10 costs, in default one month in jail without hard labour. This conviction is in amendment of and substitution for a certain conviction of even date herewith, wherein the above named complainant is complainant and the said Mrs. Fred Fusell is convicted of an offence in effect above described, and wherein the punishment is as above, except that $15.00 damages was also awarded.

4 Counsel for the Crown admits that this conviction was drawn by him and sent to the magistrate, and that at the time he sent it he understood that there had been a formal conviction, therefore, the insertion of the reference to the amendment of and substitution for a certain conviction. I understand from counsel that the formal conviction was not signed or made until after these proceedings were launched and until the counsel had been instructed by the Attorney-General's department.

5 The first objection taken is that the information is insufficient and does not disclose a crime, not having charged that the killing was "wilfully." Sec. 537 is that everyone is guilty of an offence and liable on summary conviction ... who *wilfully* kills any dog, etc. The section must be interpreted as provided in sec. 509 that

> every one who causes any event by an act which he knew would probably cause it, being reckless whether such event happens or not, is deemed for the purposes of this Part to have caused it wilfully.

6 And it is subject to the further limitation of sec. 541, that

> Nothing shall be an offence under any of the foregoing provisions of this Part unless it is done without legal justification or excuse, and without colour of right.

7 It is contended that even if the information be insufficient, the amended conviction cures the omission. That would mean that the accused having been summoned to answer what was not a crime and at most a civil complaint and having endeavoured to answer that complaint, could, on the justice concluding that the evidence disclosed a criminal offence, be convicted therefor, notwithstanding that there had been no charge and no trial for that offence. To state the conclusion seems to me to refute it, and I would have no hesitation in holding against the contention were it not for the authorities cited which seemingly bear it out.

8 In *Rex v. Graf*, 19 O.L.R. 238, the information and conviction omitted the allegation that the accused "knowingly" sold the obscene books. The conviction before return to the *certiorari* was amended by inserting the word "knowingly," but the information returned did not contain the word. Riddell, J. at p. 244 says:

> It is quite clear that the police magistrate might amend the conviction at any time before the return: *Regina v. McCarthy*, (1886) 11 O.R. 657, and it is equally clear that the fact that the information is defective is immaterial: *S.C.* at p. 658; *Regina v. Emily Munro* (1864) 24 U.C.R. 44.

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9 The last case cited by Riddell, J. (*Reg. v. Munro*) appears to me anything but an authority for his conclusion. That was an application to quash a warrant of commitment on return to writ of *habeas corpus* and *certiorari*. In the report of the argument (p. 49) Richards, Q.C., for the Crown said:

> The conviction has not been properly removed here, for the six days' notice required by 13 Geo. II., ch. 18, have not been given to the magistrate. [*M.C. Cameron* (for the Prisoner). — That is necessary only when the removal is for the purpose of quashing.]

10 And further at p. 49 by Crown counsel, "the objections urged are grounds for quashing the conviction, not for this application."

11 Draper, C.J. in delivering the judgment of the Court, at p. 52 expressly qualifies the decision:

> If the prisoner had been charged with the information, and on being called on to answer had confessed the information, and then had been convicted of matter not contained in the information, we have no doubt the conviction could be quashed, and in that case, while the conviction stood unreversed, it would warrant a commitment following its terms.

12 *Reg. v. McCarthy, supra*, is poorly reported. The facts do not appear. It is held that the information was "defective," but there is nothing to show in what way. To it the accused pleaded guilty. The only conviction returned was correct. Galt, J., held that the objection that the information was defective was not admissible, being prohibited by sec. 5 of ch. 31, 32-33 Vict. (Dom.)

13 The section referred to by Galt, J., is carried into *The Criminal Code*, 1906, in sec. 724, subsecs. 1 and 4, and provides:

> No objection shall be allowed to any information, complaint, summons or warrant for any alleged defect therein, in substance or in form, or for any variance between such information, complaint, summons or warrant and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint.

14 That section is taken from the Imperial Statute, 11 & 12 Vict. ch. 43, sec. 1, and it has been held as stated in *Paley on Summary Convictions*, 8th ed., p. 90, that this section will not justify an information for one offence and a conviction for a different one under another Act of Parliament, or punishable in a different manner. In *Martin v. Pridgeon* (1859) 1 El. & El. 778, 28 L.J.M.C. 179 (Campbell, C.J., and Crompton, J.) a conviction for drunkenness only was quashed when the charge was drunkenness and riotous behaviour under a different statute.

15 In *Reg. v. Hughes*, 4 Q.B.D. 614, 48 L.J.M.C. 151, Hawkins, J. at p. 624 states:

> In short, then they [the justices] convicted him of an offence with which he had never been legally charged. In this, I am of opinion, they were wrong; and upon this ground I am strongly inclined to think the conviction may be quashed. *Martin v. Pridgeon* [*supra*] and *Reg. v. Brickhall*, 33 L.J.M.C. 156, 10 Jur. (N.S.) 677, ... are strong authorities in favour of this view.

16 Cleasby, B. in *Blake v. Beech*, 1 Ex. D. 320, at p. 333, 45 L.J.M.C. 111, refers to the rule established by the authorities, "that the charge must be comprised within the information, and not different from it."

17 In my opinion it follows that where the facts stated in the information fall short of an allegation of criminal offence, and the justice proceeds to enquire into the merits of the allegations so made he cannot without amendment and full opportunity to make answer thereto, infer or find from the evidence a further fact necessary to constitute the criminal offence and convict therefor. That would be convicting the accused of an offence with which he had never been legally charged.

18 Therefore I think that if the information in this case does omit an essential ingredient of the criminal offence, as it appears that at no time during the progress of the trial was the omission rectified, that the finding of guilt would fall short of a finding of criminal guilt; and the conviction would have to be quashed. Counsel for the Crown stated that he was not prepared to argue that the information was sufficient without the allegation that the killing was "wilful." The charge is that the accused did unlawfully shoot and kill a dog contrary to sec. 537 of *The Criminal Code*. In view of the special definition of "wilfully" in sec. 509 that

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> every one who causes any event by an act which he knew would probably cause it ... is deemed for the purposes of this Part to have caused it wilfully

which excludes bad motive, or purpose, or evil intent, as a necessary ingredient to constitute the offence, it may well be that the charge as laid is sufficient, coupled as it is with a reference to the section of *The Code*. The cases cited in *Tremeear's Annotated Criminal Code*, p. 651, to which reference was made, where it is held that a charge omitting "wilfully" is insufficient, are cases requiring proof of something more than is required in sec. 537, and not on an interpretation of Part VIII. However in view of counsel's statement I have not gone into the matter to the extent that I would express a concluded opinion; especially as I have a clear opinion that on another ground the conviction must be quashed.

19 The evidence shows clearly that the accused justified the shooting because the dog was chasing some pigs belonging to her husband around the yard and biting them, as she believed. The magistrate had only her own admission to prove the shooting. I can conceive no reason why he should accept the admission and disregard this, a most reasonable story of justification. There is nothing in the evidence to controvert it. He would probably be bound to accept it: See *Rex v. Covert*, 10 Alta. L.R. 349, [1917] 1 W.W.R. 919, 28 C.C.C. 25 at p. 37.

20 But I think the explanation is that he overlooked sec. 541, that nothing shall be an offence under any of the foregoing provisions of this Part unless it is done without legal justification or excuse, and without colour of right. In some cases it would be a harsh measure to shoot a dog chasing pigs, but as the evidence disclosed that one pig died from a dog bite and others had their ears chewed by a dog, it can safely be stated that there was at least "colour of right." See *Rex v. Johnson*, 7 O.L.R. 525.

21 The conviction will be quashed, and following *Rex v. Standall*, 12 Sask. L.R. 282, [1919] 2 W.W.R. 632, with costs against the informant. The money paid in as security will be paid out to the applicant or her solicitors.

22 I cannot protect the magistrate as it does not appear that the $15 damages which it is stated he collected has been returned to the accused.

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