SUPREME COURT OF YUKON

Citation: *R. v. Leduc*, 2015 YKSC 8

Date: 20150227
S.C. No. 14-AP012
Registry: Whitehorse

Between:

REGINA

Respondent

And

ROMEO LEDUC

Appellant

Before: Mr. Justice L.F. Gower

Appearances:

Peter Sandiford — Counsel for the Respondent
Romeo Leduc — Appearing on his own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a summary conviction appeal from a conviction for damaging or interfering with a bear den under s. 91(1) of the *Wildlife Act*, R.S.Y. 2002, c. 229, as amended ("the *Act*"). That section states: "No person shall damage or interfere with a ... den … of any wildlife."

[2] The trial took place on October 7, 2014. The appellant, Romeo Leduc, failed to appear for the trial. The Crown prosecutor informed the trial judge that she had corresponded with Mr. Leduc by email confirming the date and the time of the trial and that he responded saying he would not be present for "a number of reasons", which were

not specified on the record. The trial judge allowed the trial to proceed in Mr. Leduc's absence. The Crown called three witnesses: Stephen Dyck, a layperson and neighbour of Mr. Leduc; and, Conservation Officers ("CO's"), Russell Osborne and Ryan Hennings.

[3] Mr. Leduc was sentenced for this offence to pay a fine of $2,000 and to complete a hunter education and ethics development ("HEED") course and pass an examination for applicants for hunting licenses before being allowed to hunt. He appeals from both the conviction and the sentence.

[4] Mr. Leduc previously applied to have the appeal proceed as a new trial pursuant to s. 822(4) of the *Criminal Code* and Rule 5 of the *Summary Conviction Appeal Rules*, 2009. On November 25, 2014, I denied that application and directed that the appeal proceed as an appeal on the record.

[5] Mr. Leduc subsequently applied to introduce fresh evidence on this appeal. That application was heard at the commencement of the appeal hearing. I dismissed the application, with reasons to follow. This decision includes those reasons.

FACTS

[6] The Crown established at the trial that, on April 15, 2014, Mr Leduc poured 40 litres of water down a bear's den located about 700 metres from his residence near Haines Junction, in the center of a forested area in which Mr. Leduc was permitted to cut firewood for commercial purposes. The Forest Management Branch ("FMB"), of the Yukon Government's Department of Energy, Mines and Resources, discovered the presence of the bear den on Mr. Leduc's woodlot in November 2013 and initially established a buffer zone around the den with a 300 metre radius. Mr. Leduc was prohibited from logging within the buffer zone, which caused him to become very

frustrated. He lobbied FMB to have the buffer reduced to a 100 metre radius. FMB eventually did so in a policy statement dated February 25, 2014 (the "FMB policy"), but there was a subsequent delay of approximately 30 days before Mr. Leduc received notice of the reduction, which added to his frustration.

[7] On April 14, 2014, Mr. Leduc obtained his hunting licence and a bear seal.

[8] On April 15, 2014, Mr. Leduc and Mr. Dyck went to the location of the bear den together. Both had firearms with them at the time. Mr. Leduc had previously asked Mr. Dyck, to accompany him. He indicated that he wanted to wake the bear up with the water and had arranged for Mr. Dyck to be present with his 12-gauge shotgun in case the bear attacked them. After Mr. Leduc poured the water down the den, a black bear came out in a groggy condition. A few minutes later, the bear came towards Mr. Dyck, who fired a round from his shotgun into the ground in front of the bear. That caused the bear to climb up a poplar tree. After observing the bear in the tree for about a further 20 minutes, the two men left the area.

FRESH EVIDENCE APPLICATION

[9] In his Notice of Appeal, Mr. Leduc raised only one legitimate ground of appeal - that the trial judge failed to consider the application of s. 91(4) of the *Act*. That provision states:

> A person does not violate this section if that person damages or interferes with a den… in the course of clearing or working land for building or road construction, for agricultural use, or for any similar purpose.

[10] The Notice of Appeal contains 15 other paragraphs under the section dealing with grounds of appeal. However, all of these paragraphs are either improper attempts by Mr.

Leduc to introduce evidence or they constitute argument. None of these paragraphs contain any other legitimate grounds of appeal.

[11] The fresh evidence that Mr. Leduc wants to introduce is contained in two affidavits. He swore the first on November 18, 2014. It is 33 paragraphs long and contains 17 exhibits. The second affidavit was sworn by Mr. Leduc on February 9, 2015 and contains as one of the exhibits a flash drive of a warned video statement given by him to CO Hennings on August 6, 2014.

[12] The test for allowing fresh evidence on an appeal is set out in *R. v. Palmer*, [1980] 1 S.C.R. 759, at p. 775, as follows:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1964] S.C.R. 484].
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
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> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[13] The due diligence criterion was further qualified by the Supreme Court in *R. v. G.D.B.*, 2000 SCC 22, at paras.19 and 20:

> 19 The due diligence criterion exists to ensure finality and order - values essential to the integrity of the criminal process…
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> …
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> However, jurisprudence pre-dating *Palmer* has repeatedly recognized that due diligence is not an essential requirement

> of the fresh evidence test, particularly in criminal cases. That criterion must yield where its rigid application might lead to a miscarriage of justice…
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> …
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> …The due diligence requirement is one factor to be considered in the "totality of the circumstances". The importance of this criterion will vary from case to case.
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> 20 In determining whether or not the due diligence required by *Palmer* has been met, an appellate court should determine the reason why the evidence was not available at the trial. The reason for the evidence not being available at first instance is usually one of fact…

[14] Mr. Leduc could have attempted to introduce the evidence contained in his two affidavits by attending the trial. It is clear that he was present at his first appearance when the trial date was set. In subsequent email correspondence, the Crown prosecutor reminded him of the trial date and, indeed, encouraged him to appear. Although his reasons for not doing so were not specified on the record at the trial, it is telling that Mr. Leduc stated in his Notice of Appeal that he did not attend the trial, as he felt the charge was "totally ridiculous" since he was "legally entitled" to pour water down the bear's den, as he admits he did. He further stated during the appeal hearing: "I don't deny what happened there."

[15] Mr. Leduc also suggested both in the Notice of Appeal and at the appeal hearing that the Crown prosecutor improperly failed to introduce into evidence the warned video statement that he gave to CO Hennings on August 6, 2014. I presume this is because he thinks that this statement is the best evidence presenting his side of the story.

[16] At the trial, the Crown established to the satisfaction of the judge that the statement was freely and voluntarily given and that there were no breaches of Mr.

Leduc's *Charter* rights. Following that, the Crown chose to ask CO Hennings to testify about what Mr. Leduc said during the video statement, rather than playing the video or introducing it as an exhibit. That, was entirely within the Crown prosecutor's discretion.

[17] The totality of the circumstances here satisfy me that Mr. Leduc's conduct in intentionally failing to attend his trial constitutes a complete absence of due diligence. I recognize that due diligence is not an essential requirement of the fresh evidence test in criminal or regulatory cases, and that if a rigid application of the requirement would lead to a miscarriage of justice, courts may tolerate some lack of diligence. However, in this case there was no diligence at all.

[18] The second requirement of the fresh evidence test is that the evidence sought to be introduced must be relevant in the sense that it touches upon a potentially decisive issue in the trial. This relates closely to the fourth requirement of the test that the evidence must be such that, if believed and when taken with all of the other evidence already adduced, it could reasonably be expected to affect the result of the trial.

[19] Interestingly, to the extent that Mr. Leduc's fresh evidence is relevant to a decisive issue in the trial, it supports the Crown's case. The evidence contains numerous admissions, either explicit or implicit, on the following points:

- Mr. Leduc had knowledge of the bear den on his woodlot prior to the commission of the offence;
- he also knew about the bear den buffer zone imposed by FMB;
- the buffer zone adversely affected his ability to harvest firewood , which caused him lost profits;
- he corroborates the substantial truth of Mr. Dyck's testimony; and

- he “makes no apologies” for his actions.

None of this evidence could affect the outcome of the trial.

[20] Further, none of this proposed evidence relates to the sole ground of appeal that the trial judge failed to consider the application of s. 91(4) of the *Act*. That section creates a possible defence for an accused who has damaged or interfered with an animal den, if the accused can establish that the damage or interference was done “in the course of” clearing or working the land for construction, agricultural use or “any similar purpose”. The Crown on this appeal acknowledges that forestry activities might constitute a “similar purpose” under this section. I will say more about this in disposing of the appeal proper, but for the purposes of the fresh evidence application, it is sufficient to say that none of this evidence tends to establish that Mr. Leduc was legitimately engaged in a forestry operation within the buffer zone when he poured the water into the den.

[21] The third requirement in the fresh evidence test is that the evidence must be credible. To a large extent this is a non-issue. On the one hand, Mr. Leduc has not been cross-examined by the Crown on his affidavits and therefore his credibility has not yet been tested. On the other hand, much of the evidence he seeks to introduce is consistent with the evidence adduced by the Crown at the trial.

[22] In the result, Mr. Leduc failed to persuade me that the evidence he wants to introduce could reasonably have affected the outcome of the trial. Accordingly, I dismissed his fresh evidence application. I will now proceed to deal with the disposition of the appeal proper.

APPEAL ON s. 91(4) ISSUE

[23] During a case management conference on November 25, 2014, Mr. Leduc confirmed that his only ground of appeal was whether the trial judge erred in failing to apply s. 91(4) of the *Act*.

[24] Section 180 of the *Act* states:

> In a prosecution under this *Act*, the burden of proving that an exception, exemption, excuse or qualification under this *Act* operates in favour of the accused is on the accused, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, excuse or qualification does not operate in favour of the accused, whether or not it is set out in the information or ticket commencing the proceedings.

[25] Section 180 is very similar in wording to s. 794(2) of the *Criminal Code*, which provides:

> The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

[26] Section 794(2) was dealt with in *R. v. Goleski*, 2015 SCC 6, where the Supreme Court agreed with the British Columbia Court of Appeal, 2014 BCCA 80, that the section imposes a persuasive burden on the accused, on a balance of probabilities, to prove that an exception (or the like) applies.

[27] I agree with the Crown on this appeal that the effect of s. 91(4) of the *Act* is to provide an accused with an “excuse” for damaging or interfering with an animal den, if that damage or interference was incidentally, or perhaps necessarily, caused “in the course of” undertaking a legitimate activity such as clearing or working land for building or

road construction, agricultural use, or "any similar purpose." As I noted above, the Crown concedes that s. 91(4) might include forestry activities such as logging and cutting firewood.

[28] However, since Mr. Leduc failed to appear for his trial, he also failed to meet his burden of proving, pursuant to s. 180 of the *Act*, that such an excuse applies. Further, there is no evidence on the record that Mr. Leduc was legitimately engaged in the clearing or working of land for forestry purposes at the time that he interfered with the bear den. Therefore, there was no obligation on the trial judge to consider the issue.

[29] At the appeal hearing, Mr. Leduc raised a further issue arising from the FMB policy of February 25, 2014. The policy is contained within one of Mr. Leduc's affidavits, which I have refused to admit as fresh evidence. Therefore, technically speaking, Mr. Leduc is not able to rely upon the FMB policy, or the other evidence in relation to it, for the purposes of this appeal. However, for the sake of disposing of his argument on the point, I will briefly make reference to this evidence.

[30] The FMB policy provides:

> If a suspected bear den is encountered during forest operations the location of the den must immediately be reported to a Forest Officer. Activities within 200 meters of the den shall be suspended <u>until</u> it is assessed by a qualified professional. <u>Following assessment</u> the appropriate no disturbance buffer or retention area from Table 1 shall be applied. (my emphasis)

Table 1 specifies that the buffer radius around the den of a black bear without cubs is to be 100 metres. "Qualified Professional" is a defined term within the policy.

[31] Mr. Leduc argued that the den had not been assessed by a qualified professional and thus there was no "legal" buffer zone around it when he interfered with it on April 15,

2014. However, it is obvious from the wording of the FMB policy that as soon as a bear den is suspected to be in a particular location, all activities within 200 metres of the den must be suspended "until" a qualified professional assesses the den. It is only following that assessment that a determination is made as to the appropriate buffer zone radius. In the meantime, the 200 metre radius applies. Accordingly, Mr. Leduc cannot argue that he was legitimately undertaking forestry activities when he poured water down the den on April 15, 2014.

SENTENCE APPEAL

[32] Mr. Leduc argued that the $2,000 fine is excessive. He also argued that requiring him to successfully complete the HEED hunter education program before qualifying for his next hunting license is an inappropriate sentence, given that he has been a hunter and a big game hunting guide for over 40 years. However, Mr. Leduc provided no sentencing authorities or case law in support of either proposition.

[33] Crown counsel informed me that the usual practice in sentencing offenders for wildlife offences is to seek:

1) an appropriate fine;
2) a hunting prohibition; and
3) successful completion of the HEED course.

[34] In this case, counsel submitted that the Crown was more lenient than usual in not seeking a hunting prohibition *per se*. Counsel filed three examples of cases that are representative of the range of sentence for this type of offence:

- *R. v. Murdoch*, September 17, 2009 (YKTC, unpublished): shooting a moose within a no hunting corridor; $2,500 fine; complete HEED before hunting again;

- *R. v. Allaire*, June 26, 2012 (YKTC, unpublished): poaching a mule deer on his own property; $3,500 fine; complete HEED before hunting again; and
- *R. v. Nukon*, September 12, 2014 (YKTC, unpublished): hunting big game without a license; failing to show up for court; $1,000 fine; two-year hunting prohibition; complete HEED before hunting again.

[35] Crown counsel also provided case law in support of the general proposition that an appellate court should grant the sentencing judge considerable deference when reviewing the fitness of a sentence. An appellate court should not modify a sentence simply because it feels that a different order ought to have been made. Rather, a sentence should only be interfered with if it is shown to be "demonstrably unfit" or if it reflects an error in principle, the failure to consider a relevant factor, or the over-emphasis of a relevant factor: *R. v. Purdy*, 2012 BCCA 272, at paras. 14 and 15.

[36] In this case, the trial judge fairly took into account the delay of more than 30 days by FMB in notifying Mr. Leduc of the reduction of the buffer zone radius from 300 metres to 100 metres. He also acknowledged that this added to Mr. Leduc's frustration because it was adversely affecting's firewood business.

[37] On the other hand, the trial judge concluded: "Even at 300 meters, there was still plenty of wood to cut from." With respect, the trial judge appears to have failed to fully appreciate the significance of the difference between a 300 metre radius, being an area of 28 hectares, and a 100 metre radius, which is only 3.14 hectares. Were I the trial judge, I might have given this interference with Mr. Leduc's business greater weight as an explanatory factor. However, as noted above, that is not the test for interfering with a sentence.

[38] In any event, the trial judge correctly, in my view, identified Mr. Leduc as a man who has difficulties with authority. Given Mr. Leduc's representations during this appeal, that would seem to be an understatement. Not surprisingly, the judge's reasons clearly suggest that, had Mr. Leduc approached wildlife officials to assist him in determining whether a bear was in the den on April 15, 2014, he would not have been charged for this offence. However, for reasons that remain rather mysterious, Mr. Leduc decided to take matters into his own hands. And, for that he makes no apology.

[39] The sentence appeal is dismissed.

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GOWER J.