

Citation: *R. v. Keenan*, 2016 YKTC 61

Date: 20161020
Docket: 15-06630
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Lilles

REGINA

v.

ROBERT JAMES KEENAN
AND
GRAYDON ROBERT JOHN KEENAN

Appearances:
Lee Kirkpatrick
Robert Keenan
Graydon Keenan

Counsel for the Territorial Crown
Appearing on his own behalf
Appearing on his own behalf

REASONS FOR JUDGMENT

[1] LILLES J. (Oral): Robert and Graydon Keenan have been charged as follows:
on or about August 28, 2015, at or near McQuesten Lake, in the Yukon Territory, having
possession of a moose, did allow meat from a big game animal to be wasted, contrary
to s. 32(1) of the *Wildlife Act*, RSY 2002, c. 229 (the “Act”).

[2] Robert Keenan is Graydon Keenan's father. A 14-year-old relative accompanied
the Keenans on this hunting trip but was not otherwise involved in the hunt or these
proceedings. There is no need to refer to him again.

The Law

[3] The following provisions of the *Act* are relevant to the charge and circumstances of this case.

Requirement for hunting or trapping licence

7(1) Except under the authority of a licence or a permit, a person shall not hunt or trap

- (a) a big game animal;
- (b) a small game animal;

...

(2) Despite subsection (1), a person may, without a licence or a permit

...

- (b) kill wildlife in the circumstances set out in sections 85, 86, and 87.

...

Defence of life

86(1) Subject to subsection (2), a person may kill wildlife in defence of his or her life or the life of another person if

- (a) there is imminent or immediate threat of grievous bodily harm; and
- (b) all other practical means of averting the threat of harm have been exhausted.

(2) Subsection (1) does not authorize the killing of any bird or any herbivore other than a moose or wood bison.

...

Report of emergency killing

88(1) If a person kills any big game animal, lynx, fox, wolverine or specially protected wildlife under sections 85, 86 or 87 and the person is not authorized to kill the animal under a provision of this Act other than those sections, the person shall, as soon as practicable after killing the animal, report to a conservation officer the number and species or types of animals killed, and provide such other information as reasonably may be required by the conservation officer.

(2) The Minister may, within 24 hours after a report is received under subsection (1), require the person making the report to deliver as soon as practicable all or part of the animal to a conservation officer to be disposed of in accordance with the directions of the Minister.

(3) A person who delivers all or part of an animal to a conservation officer under subsection (2) may apply to the Minister for its return in the circumstances prescribed by the regulations.

[4] The Keenans were properly licensed to hunt for moose in August 2015. In the evening of August 26, around 8:30 p.m., they shot a young bull moose. Unexpectedly, they were charged by a cow moose and that animal was shot in self-defence. The Crown agreed that, in these circumstances, that the shooting is governed by s. 86(1) of the *Act*. It should be noted that the *Regulations* preclude the hunting of cow moose and that at any circumstance, other than self-defence, it would have constituted an offence to shoot it.

[5] The charge of “wasting meat”, contrary to s. 32(1) of the *Act*, applies to the shooting of the cow moose:

Waste of meat

32(1) No person who has possession of a dead game bird, big game animal or small game animal shall allow any of the meat to be wasted.

(2) For the purposes of this section, "meat" does not include the hide, head or viscera of a game bird, big game animal, or small game animal.

(3) A person shall be deemed to have allowed meat to be wasted if that person allows any portion of a game bird, big game animal, or small game animal that is reasonably suitable for human consumption to be

- (a) fed to dogs or other domestic animals, or to wildlife in captivity;
- (b) destroyed or to become spoiled;
- (c) abandoned;
- (d) used for bait; or
- (e) left in the field without being properly dressed and cared for to prevent the meat from being scavenged or spoiled.

...

Possession defined

36(1) For the purposes of this Act, a person has anything in his or her possession if the person has it in their personal possession or knowingly

- (a) has it in the actual possession or custody of another person; or
- (b) has it in any place, whether or not the place belongs to or is occupied by the person, for the use or benefit of that person or another.

(2) For the purposes of this Act, if one of two or more persons, with the knowledge and consent of the rest, has anything in his or her custody or possession, it shall be

deemed to be in the custody and possession of each and all of them.

[6] Although the cow moose was shot in self-defence, the Keenans had possession of it as defined in s. 36 of the *Act*. As a result, they were under a positive obligation not to allow any of the meat to be wasted according to s. 32(1) of the *Act*. That positive obligation is further defined in s. 32(3)(e). If a person in possession of the meat leaves it in the field without being properly dressed and cared for to prevent the meat from being scavenged or spoiled, he is deemed to have allowed the meat to be wasted.

[7] Section 88(1) of the *Act* requires an individual to report an emergency killing of a big game animal to a conservation officer as soon as practicable. The Minister may require the person making the report to deliver part or all of the animal to a conservation officer to be disposed of. That person may, pursuant to s. 88(3), apply to the Minister for the return of the animal.

[8] It is clear that the obligations imposed on a hunter by s. 88 of the *Act* are in addition to those imposed by s. 32. In other words, the *Act* imposes exactly the same obligations regarding the wasting of meat on a hunter who shoots a cow moose in self-defence as it does on a hunter who legally shoots a bull moose. The defendants did not suggest otherwise.

[9] Section 32 of the *Act* is a strict liability offence. The Crown is relying on s. (3)(e), which deems the meat to be wasted if it is “left in the field without being properly dressed and cared for to prevent the meat from being scavenged or spoiled”. The Crown must merely prove that the meat was in the possession of the accuseds and that

it was wasted. This is the *actus reus* of the offence. The Crown does not have to prove that the accused intended to commit the offence charged.

[10] Once the *actus reus* of the offence has been proven beyond a reasonable doubt, the onus shifts to the accused to adduce evidence that they took all reasonable care to have avoided committing the offence. The evidential burden on the accused is the lesser one of balance of probabilities. (see *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299)

The Crown's Case

[11] On Friday, August 28, 2015 at 8:30 in the morning, Conservation Officer ("CO") Kevin Johnstone, received a telephone call at his desk in Whitehorse and spoke to Mr. Robert Keenan. Mr. Keenan reported that he had been hunting at McQuesten Lake and shot a male moose. As he approached the male moose, he was charged by a cow moose and shot it in self-defence. Mr. Keenan advised that this incident occurred on Wednesday, August 26, 2015 around 8:30 p.m. He advised that the cow moose had been "gutted" and that they had intended to return the next day to deal with it. He further advised that they did not return to the kill site from their launch site the next day because of wet weather and a lack of sufficient gas.

[12] CO Johnstone initially contacted CO Deb Morris, who was stationed in the Mayo office, which is the closest office to McQuesten Lake. As CO Morris was unavailable, he sent an email to CO Kirby Meister in Dawson with the relevant information around 10:30 a.m. that same morning, Friday, August 28.

[13] As the cow moose had been reported gutted, both CO Johnstone and CO Meister assumed all of the entrails, meaning guts and internal organs, had been removed. In fact, the Yukon Hunting Regulations Summary Handbook, Exhibit 1, at pages 74 and 76, oblige the hunter to remove the guts and organs of a shot animal as soon as possible. All the Crown witnesses testified that such “gutting” is essential or otherwise the meat will spoil rapidly. These Crown witnesses were also experienced hunters who indicated that they understood the term "gutting" to mean that both the guts and the internal organs of the animal have been removed.

[14] CO Johnstone was of the opinion that if the cow moose had been properly gutted, the meat would still be salvageable on Friday.

[15] CO Meister has been a conservation officer for 25 years and is the Manager of the Northern Region Yukon, including Dawson, Mayo, Carmacks, and Ross River. Based on his education, numerous training courses, his 35 years' experience as a hunter and investigations of hundreds of kill sites, the Court accepted him as an expert witness in field care of hunted animals and in dealing with spoiled meat.

[16] CO Meister provided detailed information as to the best way to shoot an animal and how to deal with it once it is shot. He referred to the Yukon Hunting Regulations Summary Handbook, which is distributed to all hunters in the Yukon and which has a chapter devoted to “Field Dressing”.

[17] When an animal is down, it is important to open the body cavity within a few hours and to remove all the guts, entrails, and diaphragm. This requires a long incision from the chest to the anus of the animal. The animal should be positioned so the body

cavity remains open and exposed to cooling air. If necessary, when the animal is on its side, the cavity should be propped open with sticks. Unless the animal is properly gutted and opened up to let it cool, decomposition will set in quickly. As most animals are active in and shot in the evening, leaving the animal ungutted overnight is risky. Leaving the animal longer than overnight will invariably result in some meat spoilage.

[18] CO Meister testified that he received CO Johnstone's email at 10:29 a.m. advising him of Mr. Keenan's reported shooting of a cow moose in self-defence. He initiated a telephone call to Robert Keenan for the location of the moose. As he had been told that the cow moose had been gutted, he did not consider this to be an emergency and did not expect the meat to be wasted. He drove from Dawson to Mayo; met with Steven Therriault, a Resource Officer in Mayo, who agreed to assist him, and together, they departed by boat and located the dead cow moose at 5:45 p.m., about 12.6 km from the launch site on McQuesten Lake .

[19] CO Meister took numerous photographs of the dead cow moose from different angles and distances, and these were entered as evidence. His first observation was the moose had not been gutted. There was an 18-inch incision in the belly and some of the stomach had pushed out, but it appeared to be still attached to the body. He did not see any of the internal organs or guts outside of the body and, in any event, it would have been extremely difficult, if not impossible, to remove them from such a small incision. Furthermore, the hide had not been skinned back and had closed over the cut, sealing out cool air. The carcass had a very strong, putrid, rotting flesh smell and his first reaction was, "not gutted, it's rotten."

[20] CO Meister skinned back some of the hide following the path of the bullet, exposing the entire shoulder, so he could see the condition of the meat. The connective tissue, which is normally white, had a greenish tinge (visible in the photographs) confirming that the meat had spoiled.

[21] CO Meister testified that gutting a moose on land would take 15 to 30 minutes. CO David Bakica said it would take him 25 to 30 minutes working with a partner, but as long as 45 minutes working alone. I have inferred from the photographs of the bull moose that was shot, field dressed, quartered, and hung by the Keenans that they are competent and knowledgeable hunters. It would be reasonable to conclude that Robert and Graydon Keenan, working together, could have gutted the cow moose within 30 to 45 minutes.

[22] While CO Meister testified as an expert witness, the Court also heard from CO Johnstone, with 23 years' experience as a conservation officer; CO Morris, with eight years' experience as a conservation officer; and CO Bakica, who has been a hunter since early adulthood. Their evidence was consistent. Their main point was that if it was necessary to leave moose meat in the field, at the very least, the animal should be cut open and all the organs should be removed. If possible, the animal should be rolled on its back in order to keep the body cavity open to facilitate cooling. If the animal is left on its side, the body cavity should be kept open with sticks.

[23] The expert evidence from CO Meister stated unequivocally that if the moose was not properly gutted, "the meat might still be good in the morning." If left longer than overnight, "the meat will almost never be recoverable."

Robert Keenan's Evidence

[24] The bull moose was shot and died in shallow water, and the cow moose that charged the Keenans was shot on shore around or shortly after 8:30 p.m. on Wednesday, August 26. Due to the condition of the shoreline and shallow water, it was not possible to pull the bull moose onto the land. At this time of the year, it was getting dark due to the misty, overcast weather.

[25] Robert Keenan's plan was to pull the bull moose out of the mud and grass and look for a clear shoreline to gut and field dress it. When the bull moose was properly field dressed, he would return and properly gut the cow moose. Robert Keenan directed his son to open up the cow moose to allow the stomach out in order to reduce bloating and they then departed, towing the bull moose behind the boat.

[26] Robert Keenan knows the lake very well, having hunted there before. He said that there were only three good places on the lake where a moose can be landed, field dressed, and cut up. It took two hours to get to such a site and by 4:00 a.m., they had finished cutting up and packing the moose. They got back to their camp shortly after 7:00 a.m. and, as they were very tired, slept for several hours. When they woke up around 11:00 a.m., they discovered that they did not have enough fuel to return to the kill site and field dress the cow moose. As a result, Robert Keenan decided to drive to Mayo.

[27] According to Robert Keenan, they drove directly to Mayo and arrived at the Game Branch building between 6:10 and 6:30 p.m. The doors were locked and there were no after-hours contact numbers. He understood that he had to report the shooting

of the cow moose directly to a conservation officer so he drove around town looking for a conservation officer's marked truck but found none.

[28] Although Robert Keenan had a cell phone, he did not attempt to contact anyone in a position of authority to assist him. He stated that he was concerned that the bull moose meat that was cut and hung in the back of his truck might "go off", meaning spoiled. For that reason, he decided to drive overnight to his home in Whitehorse. He contacted CO Johnstone at the Whitehorse office by telephone at 8:30 a.m. on Friday, as I indicated earlier.

Findings

[29] Although s. 88(3) of the *Act* permits a hunter to apply to the Minister for the return of an unauthorized shot animal, CO Johnstone testified that, to his knowledge, such a request is never granted. As a long-time experienced hunter, Robert Keenan knew that the cow moose meat would be disposed of to third parties and that he would not receive any of it.

[30] For that reason, and as stated by Robert Keenan several times in his evidence, the bull moose was clearly a "priority" for him. He had little incentive to return to the kill site and salvage the cow moose meat properly and in a timely manner, as required by law.

[31] Robert Keenan told his son, Graydon, to merely "open up" the cow moose. There was no intention to properly gut it by removing the entrails. No cogent reason

was given for not removing the cow moose entrails at the time, other than that it was his intention to return the next day to deal with it.

[32] Robert Keenan is a very experienced hunter. He knew or should have known that leaving the cow moose without removing the entrails would result in rapid spoilage of the meat. Yukon hunting regulations directs the hunter to remove the organs and guts of the shot animal as soon as possible.

[33] I accept the evidence of the expert witness, CO Meister, and the other conservation officers who testified. All are experienced hunters as well.

- (a) "Gutting" means removing all of the shot animal's entrails and which essential or otherwise the meat will spoil rapidly.
- (b) Gutting should be done as soon as possible.
- (c) Leaving the animal ungutted overnight is risky. Leaving the animal longer than overnight will invariably result in some meat spoilage.
- (d) Gutting the cow moose on land would have taken an experienced hunter like Robert Keenan 30 to 45 minutes.
- (e) Had the cow moose been properly gutted or field dressed, the cow moose meat would have been salvageable on Friday afternoon when the carcass was located by CO Meister. In fact, CO Meister attended the site with his butchering tools intending to recover the meat.

[34] The drive from McQuesten Lake to Mayo takes approximately one hour and, even nearer, to Keno City, less than one half hour. Both locations have telephones. No attempt was made to contact a conservation officer from those locations.

[35] The Keenans arrived in Mayo after 6:00 p.m. on Thursday and after the Conservation Office was closed. The drive from McQuesten Lake takes approximately one hour. No explanation was given why their arrival in Mayo was so late. Accepting Robert Keenan's evidence that they were tired and slept until 11:00 a.m., a much earlier arrival date in Mayo would have been predicted.

[36] Robert Keenan gave as a reason for returning to Whitehorse on Thursday night that the smell of the meat in the back of his truck was a little off and he was afraid that it might spoil. This meat had been cut up and hung in the back of the truck. This evidence is inconsistent with that of CO Meister, who expected the meat of the cow moose, which had merely been gutted, to be salvageable on Friday afternoon.

[37] Much time was spent examining the different meanings attributed to the word "gutted". Robert Keenan insisted that the term only meant that the body cavity of the animal was open to reduce bloating. All the other witnesses used the term to mean that all the guts and entrails of the animal had been removed. In the end result, I find that nothing legally significant turns on this difference of interpretation of the use of the term "gutted".

[38] The Crown introduced evidence of telephone locations in Mayo and Keno, as well as the existence and use of the TIP line. I would only note that by the time these

resources could have been available to the Keenans, the cow moose had already spoiled, at least partially if not totally.

Conclusion

[39] On the facts as stated, I am satisfied beyond a reasonable doubt that the cow moose was shot by the accuseds and that they had possession of it. The cow moose was shot shortly after 7:00 p.m. on Wednesday, August 26, 2015. The kill was reported by Robert Keenan by telephone on Friday at 8:30 a.m., some 36 hours later, to the Conservation Office in Whitehorse. When CO Meister attended the kill site later on Friday, he found the ungutted cow moose and its meat spoiled.

[40] The Crown has proven the *actus reus* of the offence contrary to s. 32(1) of the *Act*.

[41] The onus now shifts to the Keenans to establish on a balance of probabilities that they took all reasonable care to have avoided committing the offence. (See *R. v. Sault Ste. Marie*)

[42] In my opinion, the first question I must decide is whether the Keenans took reasonable care to avoid wasting the cow moose meat when they decided not to "field dress it", meaning fully open up the animal and remove its entrails.

[43] What constitutes "all reasonable care" in these circumstances?

[44] In *R. v. Rhone*, 2012 BCPC 0254, the Court states at para. 15:

I consider the meaning of reasonable care in any particular case to be drawn from context. That context will be informed

by the significance of the offence, or the significance of the requirement the breach of which constitutes the offence, and the means or ease a person has of determining compliance. Reasonable care is an objective standard.

[45] I note, with respect to ease of determining compliance, that properly gutting the cow moose would have taken at most 45 minutes and would have avoided wasting the meat.

[46] In *R. v. Kurtzman*, 1991 66 CCC (3d) 161, (ON CA), the Court states:

...The due diligence defence must relate to the commission of the prohibited act, not some broader notion of acting reasonably. ...

[47] All reasonable care is not an impossible standard; otherwise, it would result in absolute liability. In *R. v. Westfair Foods Ltd.*, 2006 SKQB 87, the Court stated at para. 29:

Reasonable care and due diligence do not mean superhuman efforts. They mean a high standard of awareness and decisive, prompt and continuing action. To demand more, would, in my view, move a strict liability offence dangerously close to one of absolute liability.

[48] Yet, on the facts of this case, more than the care expected of an ordinary citizen is demanded. At the very least, the care must reflect the diligence of a reasonable hunter possessing the expertise suitable to the activity in issue. (*Giftwares Wholesale Company v. Rodger*, (1977) 36 C.C.C. (2d) 330, Manitoba County Court)

[49] What constitutes all reasonable care depends in part on the seriousness of the offence. A variable standard of care ensures the requisite flexibility to raise or lower the

requirements of care in accord with the special circumstances of each case. The care warranted in each case is principally governed by the gravity of potential harm, the available alternatives, the likelihood of harm, the skill required, and the extent the accused could control the causal elements of the offence. (*R. v. Gonder*, (1981) 62 C.C.C. (2d) 326, Yukon Territorial Court)

[50] In the Yukon, this Court considers wasting meat to be a serious matter. For example, in *R. v. Arey*, 2006 YKTC 105, I noted that the range of fines for these kinds of offences falls between \$1,000 and \$10,000, depending on the circumstances. In other words, the amount of the fine indicates that this is a very serious offence. In these kinds of cases, all reasonable care demands a high standard of care.

[51] What constitutes reasonable care may be implied from the Crown's case but on the facts here, that evidence was led by the accuseds. They said they intended to return to the kill site to deal with the cow moose after they had taken care of the bull moose first. It was not an obvious priority for them because they knew they would not be allowed to keep the meat from the cow moose. The only action taken regarding the cow moose was to cut an 18-inch opening in the cow moose's stomach in order to reduce bloating. Robert Keenan stated that they intended to return in the morning to deal with the cow moose properly.

[52] The expert evidence of CO Meister was unequivocal. Leaving the cow moose overnight was risky, as the meat will spoil rapidly. The evidence of CO Meister, CO Morris, CO Bakica, and CO Johnstone, all long time Yukon hunters, was that when an animal is shot, the body cavity should be opened within a few hours at most and all the

guts, entrails, and diaphragm should be removed in order to prevent spoilage. The Yukon hunting regulations provide a similar directive.

[53] Robert Keenan's stated plan to return to the site the following morning falls far short of the reasonable care standard enunciated by the witnesses and required by law. Moreover, properly gutting or field dressing the cow moose is not a difficult or time-consuming procedure. As I mentioned previously, it could have been done in 30 to 45 minutes. Other than stating that the bull moose was a priority, no cogent reason was given for not properly gutting the cow moose at the kill site after it was shot. The accuseds' conduct falls short of the due diligence standard.

[54] Robert Keenan knows McQuesten Lake very well. He stated there were only three suitable places to tow the moose, land it, and process it. He must have known the distances involved and the time involved in towing the moose to those locations. In any event, they arrived at their camp shortly after 7:00 a.m. and then slept until 11:00 a.m., when they discovered that they had insufficient gas to return to the kill site. Even if they had been able to return to the kill site, at this time, I am satisfied that at least some of the meat would have been lost due to spoilage. In other words, the lack of sufficient gas to return to the kill site was not the cause of the meat spoiling. The lack of gas cannot be relied upon as a reasonable excuse for wasting the meat of the cow moose.

[55] I would add that the defendants' conduct upon leaving the cow moose was inconsistent with the serious intention to return to deal with it properly. The expert evidence of CO Meister and that of the three additional conservation officers established that a prudent hunter exercising due diligence or all reasonable care in the

circumstances would have properly gutted or field dressed the cow moose before leaving the kill site. Further, had it been properly cared for at the kill site, the meat would have been salvageable when CO Meister attended the site.

[56] In these circumstances, the defendants have not established, on a balance of probabilities, that they took all reasonable care to have avoided committing the offence.

[57] I find Robert Keenan and Graydon Keenan guilty of the offence of wasting meat as defined in s. 32(1) of the *Act*.

LILLES T.C.J.