HER MAJESTY THE QUEEN .....APPELLANT;

AND

HARTLEY BEAMAN .....RESPONDENT.

1963
*Feb. 28
*Mar. 1
Apr. 1

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Criminal law—Arrest—Escaping from lawful custody—Assistant forest ranger making search of vehicle under Game Act—Whether a "peace officer"—Whether escape constitutes escape from lawful custody—The Game Act, R.S.N.B. 1952, c. 95—The Forest Service Act, R.S.N.B. 1952, c. 93, s. 7, as amended by 1960 (N.B.), c. 34—Criminal Code, ss. 2(30)(c), 29(2)(b), 110(a), 125(a), 434, 437.

The respondent was charged and convicted of escaping from custody contrary to s. 125(a) of the *Criminal Code*. An "assistant forest ranger" stopped a truck driven by the respondent and stated he was going to search it. While the ranger returned to his car to get an axe to pry open a door of the truck, the respondent commenced backing the truck. The officer followed in his car. When the truck stopped after about half a mile, the officer got out of his car, pulled out the truck's ignition key and told the respondent that he was under arrest. The officer had no warrant.

The conviction was set aside by the Court of Appeal on the ground that the Crown had failed to prove that the respondent was lawfully arrested under the *Game Act*, and consequently that it could not rely on the Act to support its contention that the respondent was in lawful custody at the time of his escape. The contention of the Crown, which appealed to this Court, was that the assistant forest ranger, being a deputy game warden under the *Game Act*, was a peace officer under the *Criminal Code*.

Held: The appeal of the Crown should be dismissed.

The *Game Act* gives every game warden, including a deputy as was ex-officio every assistant forest ranger, the powers of a constable and therefore of a peace officer within the meaning of the Code. It is true that these powers are limited to provincial laws and are conferred solely for the purpose of the *Game Act*, nevertheless any person who wilfully obstructs a game warden in the execution of his duties commits the indictable offence of wilfully obstructing a peace officer in the execution of his duties contrary to s. 110 of the *Criminal Code*.

However, in 1960, by an amendment to the *Forest Service Act*, the words "assistant forest ranger" were deleted and substituted by "district forest ranger" or "extension forest ranger". The information described the arresting officer as an assistant forest ranger, and the Crown's case was closed without any evidence to show that, in 1961 at the time of the arrest, the officer held any of the positions upon which the authority of a provincial constable or a game warden was conferred by the statute then in force. Accordingly, the record failed to disclose that the officer was a peace officer or that he had any authority to stop a vehicle for search, or that the respondent in acting as he did committed any offence for which he could be lawfully

*PRESENT: Taschereau, Fauteux, Abbott, Martland and Ritchie JJ.

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arrested without a warrant. The respondent was therefore not proved guilty of escaping from lawful custody.

APPEAL by the Crown from a judgment of the Supreme Court of New Brunswick, Appeal Division, setting aside the respondent's conviction. Appeal dismissed.

L. D. D'Arcy, for the appellant.

Douglas E. Rice, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal, brought with leave of this Court, from a judgment of the Appeal Division of the Supreme Court of New Brunswick setting aside the conviction of the respondent by the Magistrate for Albert County on the charge that, on the 1st day of December 1961, he did,

being in lawful custody, having been arrested without a warrant by Assistant Forest Ranger Austin Goggin, escape from such custody contrary to s. 125(a) of the Criminal Code.

The Appeal Division found that Austin Goggin was an "assistant forest ranger" and that the respondent had escaped from his custody, so that the only question remaining to be determined was "whether the evidence established a lawful arrest". The circumstances of the arrest are described in the decision appealed from in the following terms:

The facts are Austin Goggin, accompanied by one Babin, another Assistant Forest Ranger, while on game patrol during the evening of December 1, 1961, was driving his car on a highway in the Flint Hill area of the Parish of Elgin in the County of Albert. At about 8.00 p.m., Goggin and Babin got out of the car and stopped a half-ton truck approaching them which was being driven by the defendant who had seated beside him Mrs. Marjorie Robb and her husband Irvine Robb, the owner of the truck, Mrs. Robb being in the centre.

After stopping the truck, Goggin and Babin told the occupants they were going to search it. Goggin then went to his car to get an axe to pry open a plywood door on the truck. While he was doing this, the defendant commenced backing the truck. Goggin got in his car and followed. The evidence is that after the truck had backed up on the road about one-half of a mile it stopped and Goggin placed his car in such a position that the truck could not pass if it attempted to move forward. He then got out of his car, ran to the truck, and reaching in from the passenger side, turned off the ignition switch and pulled out the key. At the same time Goggin said to the occupants "You're under arrest." He had no warrant for the arrest of any of them.

Under the provisions of s. 19 of *The Game Act,* R.S.N.B. 1952, c. 95 (as amended), "every game warden" may, without warrant, stop and search any vehicle for evidence of a violation of the provisions of the Act, and s. 1(*u*) of the same Act provides that unless the context otherwise requires "game warden" includes an ex officio deputy game warden under *The Forest Service Act.*

On the assumption that "*the Forest Service Act* sets forth that every assistant forest ranger is ex officio a deputy game warden under *The Game Act*", Bridges J.A., who rendered the decision of the Appeal Division, concluded that there was "no question but that Goggin and Babin, as ex officio game wardens, had the authority to stop and search the truck . . .", but he went on to hold that "the Crown failed to prove that the defendant was lawfully arrested without a warrant under *The Game Act* and cannot rely on such Act to support its contention that he was in lawful custody at the time of his escape".

It was, however, contended by the Crown that in backing up the truck after having been told of the proposed search, the respondent was wilfully obstructing "a peace officer in the execution of his duty", contrary to s. 110(*a*) of the *Criminal Code,* and was therefore committing an indictable offence and subject to lawful arrest without a warrant by "any one" who found him committing it (s. 437 of the *Criminal Code*).

Bridges J.A. found that by backing the truck as he did the respondent wilfully obstructed Goggin and Babin in the execution of their duty, but that, although he considered them to be "game wardens" under *The Game Act,* they were not "peace officers" within the meaning of s. 110(*a*) of the *Criminal Code,* and that accordingly no offence had been committed for which the respondent could have been lawfully arrested without a warrant.

The application pursuant to which leave to appeal was granted to this Court is limited to this latter finding as it is based upon the following grounds:

1. The Court having found that the deputy game warden was wilfully obstructed in the execution of his duty was in error in holding that the said deputy game warden was not a peace officer under s. 2(30)(c) of the Criminal Code.

2. That there is conflict in the judgment of the Supreme Court of New Brunswick, Appeal Division, in the above noted case and the

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judgment of the Ontario Court of Appeal in *Rex v. Smith*, 1942, 3 D.L.R. 764.

Section 2(30)(*c*) of the *Criminal Code* provides that:

> A peace officer includes a police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace, or for the service or execution of civil process.

The general powers and authority of a "game warden" are described in s. 18 of *The Game Act*, which reads as follows:

> 18. Every warden may and shall for the purpose of this Act, exercise all the powers and authorities of a provincial constable and shall have the same power to ask and require assistance in the performance and execution of his duties as a peace officer or constable in the execution of his duty as such, and every warden shall be ex officio a peace officer within the meaning of any law for the protection of peace officers.

The decision of the Appeal Division that such a warden is not a "peace officer" as defined by s. 2(30)(*c*) was expressed by Bridges J.A. in one part of his decision in the following language:

> This section (i.e., s. 18 of the Game Act) does not make a warden a provincial constable, who comes within the definition of peace officer under the Code. It only purports to give a warden the powers of such a constable when enforcing the Game Act. These powers must, in my opinion, be limited to provincial laws and cannot include the right to arrest for criminal offences without warrant for, although the Province may appoint constables and other law enforcement officers it cannot give them the authority to act in criminal matters, such field of legislation belonging wholly to the Federal Parliament.

With the greatest respect, it appears to me that this passage is not altogether clear. In my view, the provisions of s. 18 of *The Game Act* not only purport to give but do give to every "game warden" the powers of a "constable" and therefore of a "peace officer" within the meaning of ss. 2(30)(*c*) and 110 of the *Criminal Code*. I agree that these powers are limited to provincial laws and are conferred solely for the purpose of *The Game Act* but this does not alter the fact that any person who wilfully obstructs a "game warden" in the execution of his duties under that Act is committing the indictable offence of wilfully obstructing a "peace officer in the execution of his duties", contrary to s. 110 of the *Criminal Code*.

As has been observed, it is provided by s. 434 of the *Criminal Code* that "*any one* may arrest without warrant a

person whom he finds committing an indictable offence" (the italics are mine), and it is accordingly apparent that the right to arrest without a warrant under these circumstances is not conferred by any provincial law or accorded to a "game warden" by virtue of *The Game Act* but is a right which stems directly from the *Criminal Code* and is, by that statute, conferred on every citizen.

The situation appears to me to be that although the sphere of a game warden's authority is limited to the enforcement of a provincial statute, he is, nevertheless, for that purpose and by that statute, clothed with all the rights, powers and protections afforded to a peace officer by the *Criminal Code*. With all respect, this does not in my view mean that the province is giving to one of its law enforcement officers "the authority to act in criminal matters" and I cannot see that this legislation gives rise to any problem or conflict between the provincial and federal fields.

This appears to me to dispose of the question on which the application for leave to appeal is based but it does not determine the matter.

The case for the Crown, and much of the decision of the Court of Appeal, is predicated upon the assumption, stated by Bridges J.A., that:

> The Forest Service Act sets forth that every assistant forest ranger is ex officio a deputy game warden under The Game Act, and s. 1(u) of the latter states that in it, unless the context otherwise requires, "warden" or "game warden" includes an ex officio game warden under The Forest Service Act.

This was a true statement of the law until *The Forest Service Act* was amended by c. 34 of the Laws of New Brunswick 1960.

As enacted by R.S.N.B. 1952, c. 93, s. 7 of *The Forest Service Act* provided that:

> Every district forester, assistant forester, forest ranger and assistant forest ranger, has hereby conferred on him all the power and authority of a provincial constable and of a seizing officer under the Crown Lands Act, and he is also ex officio a deputy game warden under The Game Act and a fishery guardian under The Fisheries Act.

The 1960 amendment to *The Forest Service Act* provided for the employment of temporary officers and servants for the purpose of this Act, and it also amended s. 7 as follows:

> Section 7 of the said Act is amended by striking out the words "assistant forester, forest ranger and assistant forest ranger" in the first

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two lines thereof and substituting therefor the words "district forester, assistant district forester, inspector, district forester ranger, extension forest ranger and forest ranger".

Austin Goggin, who was the informant in this case, is described in the Information as an "assistant forest ranger", he testified that he was "an assistant forest ranger", and the Court of Appeal made an express finding that he was "an assistant forest ranger".

It is conceivable that the 1960 amendment merely evidenced a change in the title of "assistant forest ranger" to that of "district forest ranger" or "extension forest ranger" but the Crown's case was closed without any evidence being adduced to show that on December 1, 1961, the informant held any of the positions upon which the authority of a provincial constable or a game warden is conferred by the statute then in force, and the time for explanations is now long past.

Accordingly, the record before us fails to disclose that Austin Goggin was a "peace officer" or that he had any authority to stop a vehicle for search, or that the respondent in acting as he did was committing any offence for which he could be lawfully arrested without a warrant.

It is true that it has been held on more than one occasion that evidence of a person acting in an official capacity may, under certain circumstances, raise a rebuttable presumption of his due appointment to that office, but this is not a rule of universal application and certainly cannot apply so as to clothe Austin Goggin with the authority of a "warden" under *The Game Act,* since he has testified to the fact that he holds an appointment which does not carry that authority with it.

In view of the above, I do not find it necessary to consider the contention that the arrest was unlawful because the respondent was not given notice "of the reason for the arrest", as required by s. 29(2)(*b*) of the *Criminal Code.*

I would accordingly dismiss this appeal.

Appeal dismissed.

Solicitor for the appellant: L. D. D'Arcy, Fredericton.

Solicitor for the respondent: D. E. Rice, Petitcodiac.