SC CR 77 007

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

Appeal No. 1611

IKEY EVALIK,

Appellant

- and -

HER MAJESTY THE QUEEN,

Respondent

Appeal No. 1610

JAMES HANILIAK,

Appellant

- and -

HER MAJESTY THE QUEEN,

Respondent

---

ppeals Heard at Cambridge Bay, N.W.T. February 8, 1977

udgment of the Court Filed March 3, 1977.

eave Granted to Enter Pleas of Not Guilty

---

easons for Judgment by:

The Honourable Mr. Justice C. F. Tallis

unsel on the Hearing:

Mr. R. S. Kimmerly, for the Appellants

Mr. B. Fontaine, for the Crown, Respondent

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

Appeal No. 1611

IKEY EVALIK,

Appellant

- and -

HER MAJESTY THE QUEEN,

Respondent

Appeal No. 1610

JAMES HANILIAK,

Appellant

- and -

HER MAJESTY THE QUEEN,

Respondent

Counsel on the Hearing:

Mr. R. S. Kimmerly, for the Appellants

Mr. B. Fontaine for the Crown, Respondent

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE C. F. TALLIS

These two Appeals came on for hearing before this Court at Cambridge Bay in the Northwest Territories on February 8, 1977. In view of the fact that the two cases are closely related learned Counsel made submissions that are applicable to both Appeals.

The Appellant Ikey Evalik was charged that he did on or about the 19th day of August, A.D. 1976 "at or near Cambridge Bay in the Northwest Territories, unlawfully hunt musk-ox contrary to

Section 54(1) of the Game Ordinance." He appeared without Counsel before William Zawadiak, Justice of the Peace at Cambridge Bay, Northwest Territories on September 21, 1976, pleaded guilty and was sentenced to a fine of $1,000.00 and in default to imprisonment for two months.

On or about October 5, 1976 the Appellant launched an Appeal without the assistance of Counsel. This Appeal basically involved an appeal from the sentence imposed.

The Appellant James Haniliak was also charged separately with the same offence and the above recital of the formal proceedings apply in identical terms to his Appeal to this Court.

When these Appeals came on before me at Cambridge Bay, Northwest Territories each of the Appellants was represented by Counsel. At the opening of these Appeals learned Counsel for the Appellants applied in each case to amend the Notice of Appeal to set up specific grounds of appeal and also to incorporate therein a specific request that leave be granted to withdraw the plea of guilty entered in the Court below and a plea of not guilty entered in this Court on a trial de novo.

Learned Counsel for the Crown did not oppose this application. I accordingly granted leave to amend the Notice of Appeal in each of these cases. These Appeals were then formally entered and set down for hearing at Cambridge Bay, Northwest Territories.

Where an Application is before the Court to withdraw a plea of guilty, the procedure at the commencement of the hearing is succinctly stated by Ritchie, J. in *Regina v. Bamsey* 1960 S.C.R.

at 298 where he says:

> "... In my view, if a man who has entered a guilty plea before the magistrate is able to comply with the requirements of s. 722 then his appeal "shall be set down for hearing before the Appeal Court", and when he enters that Court he is in exactly the same position procedurally as he was immediately after pleading "guilty" before the magistrate and before he had been convicted. This being so, he may change his plea if he can satisfy the Appeal Court that there are valid grounds for his being permitted to do so. See *Thibodeau v. The Queen*, 1955 S.C.R. 646."

Learned Counsel for the Appellants and the Crown agreed that the facts and circumstances of each case must be carefully considered by the Court where an application is made to withdraw a plea of guilty. I accordingly heard evidence dealing with the circumstances under which the plea of guilty was entered.

Each of the Appellants were called as witnesses and gave evidence on their own behalf. The Crown called Constable Reinhardt. All of the witnesses gave evidence with commendable frankness so that there is really no dispute as to the facts.

Constable Reinhardt was the informant in the proceedings against each of the Appellants. He was personally present in Court on the day when the Appellants appeared and pleaded guilty. He was acting as prosecutor in the Court below. There is no record of the proceedings other than the usual formal entries dealing with the plea entered and sentence imposed. Constable Reinhardt was not able to recall any specific comments that were made in Court. However, prior to the Court appearance he did tell them about the

maximum penalty of $5,000.00 by way of a fine. He told them about this after he had obtained "warned" statements. In his evidence he also stated that he never advised the Appellants to obtain the services of a lawyer or obtain legal advice.

It should be noted that Cambridge Bay is a relatively small community located about 535 air miles from Yellowknife. The nearest law office would be at Yellowknife.

The Appellant Ikey Evalik in giving his evidence frankly acknowledged that he along with the Appellant James Haniliak shot and killed a muskox on the date in question. He is an Inuit (Eskimo) and is 22 years of age. He came to Cambridge Bay in 1961. His family resides in that community. He obtained his Grade XII and now works for Municipal Services at Cambridge Bay in a managerial capacity. He speaks his native tongue and English.

Most of the meat of the muskox was used by the families or friends of the Appellants.

At the time he entered a plea of guilty the Appellant Ikey Evalik did not have the benefit of legal advice. Shortly after his appearance in Court, a friend of the Appellant Jimmy Haniliak was in Yellowknife and ascertained than an appeal could be launched. The Appellant then obtained a printed form of Notice of Appeal which was available in one of the Territorial Government offices at Cambridge Bay and accordingly the Appeal was launched.

In this particular case the Appellant indicated that while he admitted shooting the muskox, he was not aware of the ingredients

of the offence. In this connection reference should be made to the judgment of Sissons, J. in *R. v. Koonungnak* (1964) 42 C.R. 143; 45 W.W.R. 282 (N.W.T.).

The Appellant Jimmy Haniliak gave evidence before me and his position is similar to the Appellant Ikey Evalik. It should be noted that he is 22 years of age with Grade VII which he obtained at Cambridge Bay. He is an Inuit (Eskimo). He speaks his native tongue and English. He is not employed and lives mainly off hunting and fishing. His family lives in the Cambridge Bay District.

He did not have any legal advice before pleading guilty and this appeal was launched after a friend of his obtained advice and assistance for him in Yellowknife. He then signed a printed form of Notice of Appeal and mailed it to the Clerk of this Court.

After hearing the evidence on the issue of withdrawing the plea of guilty, learned Counsel for the Appellants indicated that if the plea of guilty was withdrawn, he would advance two principal grounds of Appeal:

(a) That the information against each Appellant does not disclose an offence known to the Law.

(b) In the alternative, on the admitted facts of the case, it is not an offence for an Eskimo to shoot a muskox under the circumstances disclosed where the meat was used in the manner described in evidence.

Learned Counsel for the Crown contended that these grounds of Appeal did not have any merit.

After hearing the submissions of Counsel I am satisfied that the Appellants do have an arguable case which is one of complexity. I do not think that these two Appellants could be expected to appreciate the complexity of the situation at the time they were charged and under the circumstances I grant leave to each appellant to withdraw the plea of guilty.

In coming to this conclusion I want to make it quite clear that I am not criticizing either the Summary Conviction Court or the Prosecutor in the Court below.

I would like to express my appreciation to Counsel for their careful submissions on this issue and in deciding this issue I have considered the following, inter alia, authorities:

(a) *R. v. Barr* (1968) 64 W.W.R. 57;

(b) *Rex v. Milina* (1946) 2 W.W.R. 584; 86 C.C.C. 374;

(c) *Regina v. Thomson* (1961) 34 W.W.R. N.S. 190

(d) *Regina v. Haines* (1960) 127 C.C.C. 125;

(e) *Adgey v. The Queen* (1973) 23 C.R.N.S. 298;

(f) *Thibodeau v. The Queen* 1955 S.C.R. 646; (1955) 21 C.R. 265

(g) *R. v. Hohmann* 36 W.W.R. 191; 36 C.R. 257; 130 C.C.C. 410;

(h) *R. v. Gagne* (1957) 20 W.W.R. 401; 25 C.R. 134; 117 C.C.C. 97;

(i) *R. v. Kavanagh* (1956) 22 C.R. 396; 114 C.C.C. 378;

(j) *R. v. Kennedy* (1957) 117 C.C.C. 117;

(k) *R. v. Gallegeer* (1969) 66 W.W.R. 570; 1 D.L.R. (3d) 4;

(l) *Colligan v. R.* (1955) 113 C.C.C. 168; 21 C.R. 120;

(m) *Dore v. R.* (1959) 125 C.C.C. 194;

(n) *R. v. Savory* (1966) 47 C.R. 7;

(o) *Brosseau v. R.* (1969) 3 C.C.C. 129; 5 C.R.N.S. 331;

(p) *R. v. Mann* (1971) 4 C.C.C. (2d) 319; (1971) 5 W.W.R. 84.

Counsel may apply in chambers to fix a date for the resumption of the hearing of these two Appeals.

Dated at Yellowknife, Northwest Territories this 3rd day of March, 1977.

C. F. Tallis

C. F. Tallis, J.S.C.