

Rex v Fakatava

Supreme Court
Criminal Case No.60/1989

18 September, 1989

Criminal law - unlawfully killing a pig - defence of reasonable action to protect property in immediate danger

Statutes - interpretation - "unlawfully" means without lawful

Justification - reasonable steps taken to protect property honestly believed to be in immediate danger is lawful justification

The defendant was charged with unlawfully killing a pig contrary to section 173 Criminal Offences Act. The evidence showed that the defendant had killed the pig when he saw it eating his manioc.

HELD:

Dismissing the prosecution.

- (i) The term "unlawfully" used in section 173 Criminal Offences Act means without lawful justification.
- (ii) Protection of one's property from immediate danger was lawful justification for reasonable steps to be taken to protect the property from such danger.
- (iii) There was a reasonable doubt that the defendant killed the pig in order to prevent the pig from eating the manioc.

Statutes considered

Criminal Offences Act s.173
Pounds and Animals Act

Martin CJ

Judgment

Taunaholo Fakatava is charged with intentionally and unlawfully killing a pig contrary to section 173 Criminal Offences Act, which reads:

"173. Every person who intentionally and unlawfully kills, maims or wounds any cattle shall be liable to imprisonment for any period not exceeding three years."

"Cattle" is defined to include pigs.

A case of this nature would normally be brought in the Magistrates' Court. It is brought in the Supreme Court to establish a point of law which I understand has troubled Magistrates - whether it can be a defence to this charge that the animal was killed in order to protect property.

The Facts

The Accused admits that he killed the pig intentionally. He has a plantation at Niutoua where he grows manioc, taro, yams and mulberry. His plantation is fenced, but pigs are no respecters of fence; they break through them. He gave a long history of damage to his crops by this and other pigs belonging to Paula Latu. He repeatedly chased them off the land, but they repeatedly came back.

In March 1989 the Accused went to see Paula and asked him to stop his pigs from straying into the crops. Paula agreed to do this, but he did not do so. The Accused was away from his land for two weeks for a family funeral, and when he returned on 13th April 1989 he found that an acre of manioc had been severely damaged by pigs. He saw a pig eating his manioc. He hit it with a hoe and killed it.

The arguments

Mrs Taumoepeau for the Crown argued that the Pounds and Animals Act (Cap 72) lays down the only things that an aggrieved person may do in this situation:

Section 5 empowers him to seize any trespassing animal and take it to the nearest pound;

Section 17 makes the owner civilly liable for any damage done by his trespassing animals; and

Section 18 makes it lawful for a police officer " ... to kill any pig found at large upon any road or public property."

She says that only a police officer may kill a straying pig. Section 18 does not say that, and it does not follow by implication. A police officer may kill a pig on a road or public property and his action will be lawful. It does not say that nobody else may do so in any circumstances. More important in this case, section 18 has no application to private property, which is where this incident occurred.

The Crown says in effect that in this situation all a landholder can do is to chase the pig away, or catch it and take it to the pound, and then take civil proceedings to recover any loss caused by the animals. For reasons which will appear later, I do not agree.

Mr Niu for the defence argued that section 173 is so vague as to be unenforceable, and even unconstitutional because an accused person would not know exactly what he was being charged with. I do not agree with that either. The section is perfectly capable of a sensible and clear construction.

The Law

Where an offence requires that an act be done "... unlawfully ..." the prosecution must prove that it was done without any justification recognised by the law. The common law has long recognised one form of justification for damage to property - the right of a

person to take reasonable steps to protect his own property. If property is in need of immediate protection, and a person does no more than is reasonably necessary for that purpose, he does not act unlawfully, even though his actions cause damage to someone else's property.

I stress the word "immediate". It is not lawful for a person to damage another person's property in order to avoid damage to his own property at sometime in the future. For example, if a dog is attacking livestock and threatening to kill or seriously injure it, the owner of the livestock would be justified in killing the dog at the time because the threat is immediate. He would not be justified in killing that same dog some time later to prevent it from returning on some future occasion and doing further damage.

This being a criminal charge, what matters is the intention of the accused. When assessing that, one has to remember that these things happen very quickly. He is faced with an immediate problem requiring immediate action. He has no time to carefully weigh all the alternatives and to select the most appropriate one. With the benefit of hindsight, it may appear that some other course of action would have been better. But that is not the point. The Court must look into the mind of the Accused, at the time and in those circumstances, and ask:

- (1) did he honestly believe that his property was in need of immediate protection? and if so
- (2) did he believe that what he did was reasonably necessary to protect it?

If he did believe these things, or may have believed these things, he is not guilty of an offence under this section. But if he goes beyond that, and acts out of anger or exasperation, or intending to teach someone a lesson, or in order only to prevent further damage in the future, then he is guilty. What was in the mind of the accused at the relevant time is a question of fact in each case.

There is an evidential burden of proof on the defence. Prima facie it is unlawful to kill an animal belonging to another person. The Court will therefore infer that the killing was unlawful unless the defence raises some evidence to the contrary. That will normally be the evidence of the accused himself about what he thought at the time. Once that has been done, the burden of proof shifts back to the prosecution who must disprove the defence in order to obtain a conviction.

Conclusion

In this case the property was clearly in need of immediate protection - it was being eaten. The only question is whether the Accused thought that the only reasonable way to protect it was to do what he did. He says that he does not know how to trap a pig, and did not think he could catch it. Part of the plantation is covered in bush. He said that if he chased it away it would simply hide in the bush, implying that it would resume its damage as soon as he was away. If so, I would regard that as an immediate continuing threat, and not a risk that damage might be caused at some time in the future.

I am prepared to give the Accused the benefit of the doubt. I think he may well have believed that what he did was reasonably necessary for the protection of his property. The prosecution has not disproved his defence and I therefore find him not guilty.

This case should not be taken as authority that any animal causing damage to another's property may be killed. The case where this defence will succeed will be few, because there is usually another way of protecting crops.