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R. v. Higgins

Between
Deborah Powers, an officer of the Society for the Prevention of Cruelty to Animals, appellant, and
Bart Higgins, respondent

[1996] N.J. No. 237

144 Nfld. & P.E.I.R. 295

32 W.C.B. (2d) 81

1995 St. J. No. 731

Newfoundland Supreme Court - Trial Division

Green J.

Heard: June 18, 1996.
Judgment: filed September 6, 1996.

(13 pp.)

Criminal law -- Wilful acts respecting property -- Cruelty to animals -- Causing unnecessary pain and suffering.

This was an appeal from an acquittal on a charge of causing unnecessary pain, suffering or injury to an animal. The respondent, Higgins, discovered that his cat knocked over a garbage can in his kitchen. He swung a broom at the cat and chased it into another room. The cat broke its leg in the chase. Higgins conceded that the broom may have struck the cat. The trial judge acquitted Higgins on the basis that he did not intentionally cause the injury. His only intention was to scare the cat. The Crown appealed the acquittal. The Crown argued that the trial judge erred in interpreting the requirement of wilfully causing injury. It argued that the trial judge failed to consider the reckless nature of Higgins's actions and the likelihood that he knew that the cat would be injured.

HELD: The appeal was dismissed. The trial judge did not err in interpreting the offence. The trial judge took Higgins' recklessness into account in determining his intent. The onus of proof of intent fell on the Crown. There was sufficient evidence to sustain the trial judge's finding that Higgins did not intend to injure the cat.

Statutes, Regulations and Rules Cited:

Criminal Code, ss. 429(1), 446(1)(a), 446(3), 813(b).

Counsel:

David Buffett, for the appellant.
Thomas Burke, for the respondent.

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1 **GREEN J.**:-- When Sammy the cat overturned the kitchen garbage can, little did he know that he was setting in motion a chain of events which would lead to a broken leg, surgery, eight weeks' convalescence in a veterinary hospital and placement in a cat foster home.

2 The respondent Higgins was charged with wilfully causing unnecessary pain, suffering or injury to an animal contrary to Section 446(1)(a) of the Criminal Code. He was acquitted at trial. The prosecutor appeals to this court as a summary conviction appeal court, under Section 813(b) of the Criminal Code.

BACKGROUND

3 Mr. Higgins left his downstairs home office to investigate a loud bang in the kitchen. He found the garbage container tipped over and garbage all over the floor. Sammy was arrogantly standing nearby. Believing that Sammy was the culprit, Mr. Higgins decided to teach him a lesson. He took the broom he was using to sweep up the garbage and started to shoo Sammy with it. The startled cat began to run with the respondent in hot pursuit, remonstrating with him all the while. He ran upstairs into the bedroom. Mr. Higgins followed and started rooting at him under the bed with the broom. When Sammy made a break for it at, to use Mr. Higgins words, "very high speed" (also colourfully described by Mr. Higgins as "he went zoop, zoop"), he was pursued down the stairs and into other parts of the house. Essentially, the chase continued throughout the whole house until Sammy ran into the furnace room and stayed there.

4 Mr. Higgins then left the cat alone, finished cleaning up the garbage and went back to his work in the basement. Mr. Higgins says that he had no idea that the cat had been injured. When his daughter, Emily, came home from school he told her that he had shooed the cat but hadn't seen him since. Emily brought Sam's supper to him in the furnace room but he would not come to the food. Later in the night she checked on him again and reported to her father that something appeared to be wrong because he was limping. They both examined the cat who, in Mr. Higgins words, appeared "freaked out" and preferred them not to lift him.

5 When the limp was still present the next morning, Mr. Higgins brought Sammy to the vet. He explained the events of the chase and told the vet that the bristles of the broom had made contact with Sammy once or twice. The examination disclosed a broken leg. The vet suspected abuse and informed the Society for the Prevention of Cruelty to Animals. Their investigation led to the charge which is the subject of this appeal.

SCOPE OF APPEAL

6 The scope of the powers of a summary appeal judge on a prosecutor's appeal from an acquittal in a summary conviction offence was dealt with by the Newfoundland Court of Appeal in R. v. Sall (1990), 54 C.C.C. (3d) 48 and R. v. Giles (1990), 54 C.C.C. (3d) 66. Those cases establish that although Section 813 permits an appeal by the prosecutor on a question of fact, the scope of such an appeal is a limited one. In Saul, it was held that if there is evidence to support the expressed conclusion of the trial judge, the appeal judge is powerless to interfere. Where the trial judge has chosen to accept the testimony of some witnesses over others, it is generally impossible for the appeal judge to reverse that finding since the trial judge has had the benefit of observing the demeanour of the witnesses and assessing their credibility in the witness box.

7 In Giles, Goodridge, C.J.N. referred with approval to the judgment of Estey, J. in Harper v. The Queen (1982), 65

C.C.C. (2d) 193 (S.C.C.) at p. 210 as follows:

> "An appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. The duty of the appellate tribunal does, however, include a review of the record below in order to determine whether the trial court has properly directed itself to all the evidence bearing on the relevant issues. Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede."

Goodridge, C.J.N. commented at p. 76 in Giles:

> "Appeal courts have traditionally been reluctant to disturb findings of fact. The judge who hears and sees the witnesses testify is in a better position to assess their credibility than an appeal tribunal. ...
>
> The appeal judge retried the case and assessed the evidence, having neither seen nor heard the witnesses. This he cannot do. An appeal judge cannot retry a case and make his own assessment of the evidence."

THE TRIAL DECISION

8 The trial judge found as a fact that the injury to Sammy was caused by Mr. Higgins. He stated the issue to be whether the act was done "wilfully". He referred to Section 429 of the Criminal Code, which contains a statutory definition of "wilfully" for the purposes of proceedings under subsection 446(1). Subsection 429(1) provides as follows:

> "429(1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, "wilfully" to have caused the occurrence of the event."

9 Applying this provision to the case, the trial judge concluded:

> "... the individual who does the act knowingly must do the act or must do the act knowing that the act will probably cause the occurrence of the event. So this requires some knowledge that the action being undertaken would probably cause the occurrence of the event and that incorporates the commission of the offence. So there has to be an awareness or knowledge that the activity being engaged in would probably cause the consequences.
>
> So in terms of looking at the situation here the issue becomes whether or not Mr. Higgins, in terms of giving chase to the cat and shooing it with the broom, would have knowledge that the action would probably cause the occurrence of the event, the injury to the cat. In terms of the Court's looking at the evidence in regard to that, I feel that the evidence here fails to meet an awareness of consequences. I think Mr. Higgins was chasing the cat and he was chasing it with the broom and he swiped at the cat in one manner or another with the broom. But certainly I don't think there was an awareness of the consequences in terms of the damage that he was about to inflict. ...
>
> ... When he gave chase to the cat with the broom his intention basically was to scare the cat and to give it an aversion to dealing with the garbage which was what he suspected the cat had done.

> ... I don't think there was any thought in his mind at all that by giving chase and shooing the cat with the broom that the thought occurred to him, I don't think the thought occurred to him at all that he might injure the cat. In terms of the matter, therefore, I don't find that there's any knowledge that his actions would bring about an occurrence of the event or the consequences."

GROUNDS OF APPEAL

10 From this decision, the prosecutor appeals on essentially four grounds:

1. The trial judge erred in his interpretation of the word "wilfully" and failed to recognize that it included recklessness.
2. The trial judge erred in holding that "wilfully", properly interpreted, required knowledge that the specific pain, suffering or injury which did occur would probably have occurred, instead of holding that all that was required was a more generalized knowledge of the probability of some pain, suffering or injury occurring.
3. The trial judge erred in failing to apply the presumption in Subsection 446(3).
4. The trial judge erred in failing to conclude that it was a necessary inference from the circumstances that the respondent wilfully caused pain, suffering and injury to the cat.

"WILFULLY"

11 As to the first ground of appeal, it is true that the extended definition of "wilfully" in subsection 429(1) includes an element of recklessness: R. v. Muma (1989) 51 C.C.C. (3d) 85 (Ont. C.A.); R. v. Schmidtke (1985), 19 C.C.C. (3d) 390 (Ont. C.A.); Regina ex rel Cordwell v. McHugh (1965), 50 C.R. 263 (NSSC, in banco). It cannot be said, however, that the trial judge in this case disregarded this aspect of the definition. Subsection 429(1) requires: (i) knowledge on the part of the actor that the act being undertaken (in this case, the chasing with the broom) will probably cause the occurrence of the impugned event (an injury to the cat) and (ii) recklessness as to whether the event (an injury) occurs or not. These are expressed to be cumulative requirements. Indeed, recklessness in itself requires an awareness that there is a danger that the conduct in question could bring about the results prohibited by the criminal law and a willingness nevertheless to proceed despite the risk: Sansregret v. The Queen [1985] 1 S.C.R. 570. At p.582 McIntyre J. observes:

> "... Recklessness, to form a part of the criminal mens rea, must have an element of the subjective ... It is, in other words, the conduct of one who sees the risk and who takes the chance."

This requirement is reinforced by the language of subsection 429(1). It explicitly spells our the awareness requirement by the use of the word "knowing". This is a subjective element. It does not require measuring the conduct of the accused against the standard of the reasonable person as a basis for liability (although a conclusion that the accused failed to live up to a reasonable standard may well be relevant in assessing the veracity of the accused's assertion of subjective non-awareness).

12 In this case, the trial judge expressly addressed whether Mr. Higgins had the requisite awareness of consequences and concluded on the evidence that he did not. He rightly applied a subjective test and did not judge Mr. Higgins against an objective standard of reasonableness. He committed no error of law. This ground of appeal fails.

DEGREE OF AWARENESS

13 With respect to the second ground of appeal, the prosecutor argues that in holding that Mr. Higgins did not have an awareness of the potential consequences of injury to the cat, the trial judge applied too strict a legal standard. It is argued that the required degree of knowledge is not of the specific pain, suffering or injury that ultimately occurs but only knowledge that some injury, whether of the type that actually occurred or not, would probably result. In R. v. Hughes (1978), 34 N.S.R. (2d) 454 (Cty. Ct.), a case involving the application of the extended definition in subsection

429(1) to a charge of mischief, O'Hearn, C.C.J. stated at p. 457:

> "The jurisprudence on foreknowledge in this instance does not require any appreciation in detail of the consequences, but merely an awareness, possibly not too acute, on the part of the perpetrator that he is taking chances, that there is danger of damage of some kind likely to result from his conduct."

14 I accept the proposition that it is not necessary that the accused advert to the very type of injury that ultimately occurs. The degree of advertence need be no more than an awareness that the impugned conduct would probably cause the occurrence of some pain, suffering or injury of the general type that ultimately materializes. Nevertheless, on the facts of this case, there is an express conclusion by the trial judge that there was no knowledge on the part of Mr. Higgins "that this actions would bring about an occurrence of the event or the consequences". When considered in the context of the judge's overall decision, I do not read his comments as limiting himself to an examination of whether or not there was an awareness of the specific injury that occurred, namely a broken leg. The judge's comments that "when he gave chase to the cat with the broom his intention basically was to scare the cat and to give it an aversion to dealing with the garbage" and "I don't think the thought occurred to him at all that he might injure the cat" [emphasis added], indicate that his conclusion respecting Mr. Higgins' non-awareness of the consequences encompassed a non-awareness that his actions would cause any injury to the cat. That being so, the trial judge did not apply too narrow an interpretation of subsection 429(1) with respect to awareness of consequences and this ground of appeal must also fail.

15 [It should also be noted at this point that the case was not presented at trial or on appeal on the basis that causing "psychological" trauma to the cat by scaring it constituted, in itself, pain, suffering or injury to the cat. Indeed, although the vet testified that Mr. Higgins' actions would have caused Sammy to be very scared, no evidence was led as to the impact that such fear of injury, as opposed to the physical injury itself, could have on a cat and whether it could constitute "pain or suffering". Nor was the issue addressed as to whether disciplinary tactics of the nature employed by Mr. Higgins would amount to "unnecessary" pain and suffering within subsection 446(1). Such issues are left for another day.]

APPLICABILITY OF SUBSECTION 446(3)

16 The third ground of appeal alleges that the trial judge failed to consider the effect of subsection 446(3) which, it was submitted, would place the burden on Mr. Higgins to establish that the injury was not caused wilfully. Subsection 446(3) provides as follows:

> "446(3). For the purposes of proceedings under paragraph (1)(a) or (b), evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it pain, suffering, damage or injury is, in the absence of any evidence to the contrary, proof that the pain, suffering, damage or injury was caused or was permitted to be caused wilfully or was caused by wilful neglect, as the case may be."

17 The trial judge made no reference to this provision in his decision. No Charter issues with respect to the scope of this provision were raised either at trial or on appeal.

18 No cases were cited as to the meaning and scope of subsection 446(3). While I am inclined to the view, espoused by counsel for the respondent, that this subsection applies normally to a situation where there is a pattern of general conduct indicative of lack of reasonable care which results in injury or suffering and not to a situation where the only evidence relates to the specific act which forms the basis of the charge, it is not necessary to determine this issue here. Subsection 446(3) only applies "in the absence of any evidence to the contrary". Here, the trial judge considered the evidence of the accused, including his explanation of his motivation for his actions and concluded that he did not intend to injure the cat and that he did not have an awareness that his actions might have injurious consequences. On that basis he concluded that any injury was not caused "wilfully" within the meaning of subsection 429(1). That was evidence to

the contrary rendering the application of subsection 446(3) otiose.

EVIDENCE TO SUPPORT THE JUDGE'S FINDINGS

19 The fourth and final ground of appeal is in essence an appeal against a finding of fact that Mr. Higgins did not wilfully cause injury to the cat.

20 I agree with counsel for the appellant that there existed plenty of circumstantial evidence from which it might have been possible to draw the inference that Mr. Higgins must have been aware that a chase of that length and intensity, involving swiping at the cat with a broom, would probably cause injury or suffering to the cat. Had I been sitting as the trial judge it is possible that I might have been persuaded to come to such a conclusion; however, my role is not to retry the case and make my own assessment of the evidence. I did not have the opportunity of seeing and hearing the witnesses, in particular Mr. Higgins, and observing their demeanour. It is obvious from the written transcript of Mr. Higgins' evidence that he is a very intense, expressive and voluble individual. He was very emotional when discussing the events with the vet and SPCA representative who interviewed him. It is obvious from the trial judge's decision that he appeared to accept that Mr. Higgins was sincere in his assertion of both a lack of intention to injure Sammy and a lack of awareness of the potential consequences of his actions. Under these circumstances, it is not appropriate for an appeal court to disturb these crucial findings at trial.

SUMMARY AND DISPOSITION

21 I conclude that the trial judge properly directed himself to the relevant issues and to the evidence bearing thereon. No errors of law are disclosed. There being evidence to support the conclusion of the trial judge on the facts, it cannot be said that the decision discloses a lack of appreciation of relevant evidence or that the acquittal was unreasonable or unsupported by the evidence.

22 In the result, therefore, the appeal is dismissed.

GREEN J.

qp/d/sjr/DRS