

R. v. Sparshu
Between
Her Majesty the Queen, and
Gary Sparshu

[1996] A.J. No. 828
44 Alta. L.R. (3d) 303
32 W.C.B. (2d) 107

Docket No. 50427921P10101

Alberta Provincial Court
Criminal Division - Didsbury, Alberta

Gilbert Prov. Ct. J.

Judgment: filed September 18, 1996.

1 GILBERT PROV. CT. J.:— The Accused, Gary Sparshu, stands charged that he:

"On or about the 6th day of March, 1995, at or near Bergen in the Province of Alberta, did cause or permit animals, to wit: Cattle, of which he is the owner or person ordinarily in charge, to be or continue to be, in distress, contrary to Section 2(1) of the Animal Protection Act of Alberta."

2 It is necessary to set forth the facts in some considerable detail so that the issue of credibility can be fully weighed.

3 On March 6, 1995, in response to a complaint concerning cattle, Constable Roy Jorawsky attended at a quarter section near Bergen, in the Province of Alberta, (the Bergen quarter) and found 24 head of cattle, which in his opinion, appeared to be in poor body condition. Specifically he noted that:

- one animal had a bad limp;
- one cow had afterbirth hanging from its rear end from which a very foul rotting smell was emanating (having recently aborted a calf);
- most of the cattle were very thin - their hip bones and pin bones were showing - their spines were sticking up and they were caved in around the sides behind the ribs;
- the photos F to I inclusive taken by Constable Jorawsky on March 7, bear witness to his descriptions of the condition of these cattle.

4 Constable Jorawsky has held an appointment for the last 5 1/2 years as a special constable with the Society for the Prevention of Cruelty to Animals. His immediate impression from the condition of and reaction of the cattle in gathering around his truck and bawling, was that they were hungry. He left and returned with some hay bales which the cattle started pulling off his

truck even before he could disembark. He inspected the whole of the property and could find no feed and only 1/2 of a salt block and the cardboard exterior of a mineral block with mere traces of the mineral supplement. There was no natural feed or grazing available to the cattle on the land on which they were fenced as it was 'grazed-off'.

5 At this time, he did not know who owned the land or cattle. Having formed the opinion they were in distress, the very next day he seized the cattle, arranged for them to be taken to a caretaker and requested a veterinarian, Dr. Paul Owen, to examine and evaluate the cattle.

6 The Constable testified that on March 8th he received a phone call from the accused, Mr. Sparshu, who acknowledged it was his cattle that were seized, and informed him that he had a man feeding the cattle and that he and this man had been out to the land on March 3rd with mineral blocks and 50 bales of hay. Mr. Sparshu also acknowledged that the bull was thin "because he has foot rot". When asked the name of the person feeding the cattle, the accused replied, "I'd rather not. I can check with him and see if it's okay."

7 During the evening of March 13th, Constable Jorowsky again spoke to Mr. Sparshu, telling him the sale of his cattle was imminent, but not telling him the sale was set for the following day. When again asked, Mr. Sparshu refused to give the name of the person helping him feed the cattle. Later, on March 28th, Mr. Sparshu gave Constable Jorowsky the last name of this person but refused to give him a first name, a phone number, or an address. On March 14th, Mr. Sparshu had faxed a letter to the Constable which stated that H. Schultz was the person feeding and caring for the cattle.

8 Dr. Paul Owen was qualified as a doctor of veterinary medicine to give opinion evidence concerning the diagnosis and treatment of injury and disease in animals and the diagnosis of animals as to their body condition including cattle. Dr. Owen examined the cattle on March 8th and his evaluation of the herd was based on a visual examination of all 24 head and a physical examination of 5 cows through a field technique called "body condition scoring" which involves palpation and hand feeling of the body of the animal to determine both muscle and fat cover. This technique rates the animal from #1 where the animal is very thin or emaciated involving a loss of body condition to the point where it threatens the animal's life to #5 very obese - a very over-conditioned animal. It was clear from his testimony that the difference between each level from 1 through 5 is quite marked. His findings were as follows:

a) One cow, the thinnest was scored at 1.0 - virtually no fat cover. The bones stood out from lack of muscle and fat cover. She had a severe lice infection and he found 20 to 30 lice in one square inch. They were identified as sucking lice, which feed on blood, and stated that that degree of infestation leads to a cow being run down, with muscle wasting and loss of fat cover. The cow was close to the end of her reserves to the point where her life was endangered. She also had a retained placenta which was badly infected "and required treatment with antibiotics. He estimated that the placenta had been retained some 10 to 14 days and that the cow would have been in discomfort and pain:

b) One cow was lame due to overgrown claws on her hind feet, which was painful to some degree.

c) The remaining 4 animals he physically examined and conducted the body condition scoring upon were 1.0 to 1.5 body condition. They were thin, they had poor hair coats, with patches of hair loss with indications this poor hair condition and loss was caused by a combination of lice infestation, mange and poor nutrition as a result of inadequate food intake.

d) One cow was lame on the left front leg - there was a marked swelling around the left shoulder, either an old fracture or a severe sprain of the shoulder joint. It was a condition Dr. Owen felt was sore and that it had been so for at least a month, perhaps several months.

e) As to the remaining 20 animals, the body condition of the majority was 1.0 to 1.5 with 3 or 4 of a body condition of 2.0 and there were 6 yearlings with a 2.5 body score which Dr. Owen termed an adequate condition. Dr. Owen testified that the normal body condition of cattle in March of the year, having come through a winter and assuming proper and adequate feeding, would be 2.5.

9 Dr. Owen concluded that the degree of muscle wasting that he observed in these cattle was far greater, on a herd basis, than would be caused from an infectious or diseased state and to his mind clearly indicated a severe lack of proper energy and protein. That is, not enough food intake to meet their body needs producing muscle wasting and weight loss. He likewise ruled out extreme cold as being responsible for the marked decrease in the condition of the cattle.

10 Gary Sparshu has owned livestock since he was 10 or 12 years old and has maintained an active interest in livestock ever since. He has been around cattle all his life and is clearly experienced with cattle. He knows what cows that are in good condition should look like and as an auctioneer since 1982, has auctioned livestock, including cattle, some 30 to 40 times. Caring for cattle is not a sideline business for him and he stated he knew how to feed cows according to their body needs and weather. He agreed these cattle were both purebred and valuable and referred to them as "exotic cattle". Mr. Sparshu was cross-examined about a previous conviction and answered truthfully.

11 Mr. Sparshu testified that he had pastured his cattle in the summer of 1993 at the Bergen Quarter after he sold his farm. In the fall of 1993 he moved them to Mr. Birdsell's place for winter caretaking from November 1993 to May 1994 when they were moved back to the Bergen Quarter. During the summer of 1993, Mr. Sparshu himself cared for the cattle and they foraged on the natural grass contained within the Bergen Quarter. A neighbour and the owners of the Bergen Quarter had his phone number to call him if the cattle got out of the fenced enclosure. As Mr. Sparshu decided that Mr. Birdsell's farm was no longer suitable for caring for his cattle for the winter of 1994 and 1995 he advertised locally for someone to winter his cattle.

12 Mr. Sparshu received 2 calls offering to winter his cattle, the first of which he felt unsuitable as the location had no shelter. The second call he stated was from a Mr. H. Schultz, whom he took to visit the Bergen Quarter. Mr. Sparshu related the following events: Two options were discussed - the first was to feed the cattle at the Bergen Quarter which was 5 minutes from where Mr. Schultz worked and the second was to take the cattle to Mr. Schultz' in-

law's place at Carstairs where he had his own cattle and where Mr. Schultz farmed with his in-laws. Mr. Sparshu left the options with Mr. Schultz to think over and a couple of weeks later Mr. Schultz called him electing to feed the cattle at the Bergen Quarter. During that telephone call, the arrangement agreed upon was that when Mr. Schultz needed to deliver a load of hay to the cattle, he would telephone Mr. Sparshu, arrange to meet him at the Bergen Quarter where they would unload and stack the bales. Mr. Schultz would be paid \$2.25 per bale, cash on delivery. The bales would then periodically be fed by Mr. Schultz to the cattle as they required. During that same telephone discussion, they agreed to meet at the Bergen Quarter on October 13th. At that meeting, Mr. Schultz arrived with a large flat bed truck loaded with 610 bales, together with truck driver, Ron White. Mr. Schultz produced a typewritten contract dated October 10th, which was signed October 13th by the parties, including Ron White as witness. Cash of \$1,372.00 was paid to Mr. Schultz for which he gave Mr. Sparshu a written receipt. Identical arrangements and procedures were carried out on November 28th (300 bales), December 22nd (340 bales) and finally February 9th, 1995 (625 bales). On this last occasion Mr. Sparshu took some mineral supplements and a salt block to the cattle.

13 Between October 14th and November 27th inclusive, Mr. Sparshu never visited the quarter, nor did he between November 29th and December 21st inclusive, nor did he receive any reports from Mr. Schultz except to arrange a further delivery. He did, however, receive a call from a lady co-owner of the Bergen Quarter as a result of which in the latter part of December he went and treated his bull for foot rot. Mr. Sparshu did not offer any explanation as to why Mr. Schultz had not contacted him regarding the bull nor why Mr. Schultz did not treat the bull or arrange for treatment, notwithstanding that the written contract makes it clear that Mr. Schultz is responsible for "checking for sickness, etc." and "calling a vet if and when needed." Finally, there is no evidence Mr. Sparshu attended at the Bergen Quarter between the latter part of December and March 1st, except to help unload bales on February 9th.

14 Mr. Sparshu said he received a telephone call from Mr. Schultz March 8th and learned that he had been unable to reach the cattle for a couple of days in the snow storm due to his rig being dismantled and moved and that he had arrived with 50 bales only to find the cattle seized and gone. Mr. Sparshu stated that Mr. Schultz said he unloaded the hay and called Mr. Sparshu but then refused to give any information which would assist Mr. Sparshu in getting a hold of him and informed him he would not be coming to Court. From this point on, Mr. Sparshu testified Mr. Schultz was uncooperative. Thus, Mr. Sparshu had no direct means of contacting Mr. Schultz, having misplaced his cellular phone number after Christmas and having failed thereafter to get Mr. Schultz' number again. Later, after Mr. Sparshu's April court appearance, Mr. Schultz called and Mr. Sparshu told him the matter was going to trial in August and gave him an address to send the seizure documents to. These documents arrived with a rather detailed letter dated August 10th, 1995, which, considering that it comes from someone who refused to give Mr. Sparshu any means to contact him and who refused to come to court on his behalf, goes to considerable length to explain the many questions that remained unanswered in Mr. Schultz's absence.

15 At the conclusion of trial, defence counsel applied for a judicial stay of proceedings under ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms submitting that Mr. Sparshu had been denied the right to make full answer and defence. The grounds in support are that pursuant to s. 7 of The Animal Protection Act, an animal may be disposed of within 3 days, but in the case of a purebred animal the time limit for disposal is 10 days. In this case Constable Jorowsky arranged a sale by auction of the cattle 7 days after seizure. Mr. Sparshu contends that by virtue of the Constable's actions, he was denied the right to examine and evaluate the cattle.

16 Mr. Sparshu never did ask to see the cattle though he did ask where they were located. This Court was provided with a description of the cattle by the Constable and numerous photographs taken by him as well as a very detailed evaluation by Dr. Owen. The sale of the cattle on March 14th may, and I make no finding on this point, have been premature but I fail to see how this possibility without more entitles Mr. Sparshu to a stay of proceedings. In *R. v. D.J.B.* (1993) 16 C.R.R. (2d) 381, a case cited by the defence, the Ontario Court of Appeal had this to say where the Accused's statements to the police in 1980 were no longer available:

"What must be demonstrated on a balance of probabilities is that the missing evidence creates a prejudice of such magnitude and importance that it can be fairly said to amount to a deprivation of the opportunity to make full answer and defence."

17 Having heard all of the evidence concerning the cattle, I am satisfied there was no real prejudice to Mr. Sparshu nor compromise of his right to make full answer and defence. The Application for a stay is denied.

18 Dealing with the charge itself the issues arise from the very wording of the subsection, that is:

(1) were the cattle in distress, and

(2) was the Accused the owner or person ordinarily in charge, which if answered "Yes", necessarily includes the sub-issue of whether the Accused acted with due diligence in all of the circumstances.

19 The short answer to the first issue, is that the cattle were very clearly in distress. Distress is defined in the Animal Protection Act, S.A. 1988, CA-42 Section 1(2) as follows:

"For the purposes of this Act, an animal is in distress if it is

(a) deprived of adequate food, water, care or shelter,

(b) injured, sick, in pain or suffering, or

(c) abused or subjected to undue hardship, privation, or neglect."

20 Dr. Owen testified that in his expert opinion, the cattle had not been adequately fed or cared for in the many weeks, if not months, before March 8th. He testified that the physically injured cows - including the lame cow with the overgrown claws on its hind feet, the cow with the shoulder injury, and the cow with the retained placenta and severe lice infestation - were all in pain and discomfort and had been for some time. He testified that the whole herd was infected

with lice of the blood sucking variety and all had varying degrees of hair loss due in part to this infestation. All of the cattle were thin and all, except for the 6 yearlings, suffered acute loss of fat cover and muscle wasting - some more severely than others. His diagnosis was "improper intake of energy and protein, of food. Not enough food intake to meet their body needs, producing muscle wasting and weight loss." Asked if this would be called starvation, he answered, "To the degree saw in the herd, yes." The photographs graphically depict the condition attested to by Dr. Owen and on cross-examination, Mr. Sparshu could not dispute the very clear image of cattle in the process of starvation.

21 I specifically adopt the decision of Fradsham, J. in *R. v. Komarnicki* (1991) 116 A.R. 268, who held that s. 2(1) of the Animal Protection Act creates an offence of strict liability following the reasoning of Mr. Justice Dickson, as he then was, in *R. v. City of Sault Ste. Marie* [1978] 2 S.C.R. 1299. Judge Fradsham quotes this line from the *R. v. City of Sault Ste. Marie* case at p. 322:

"Proof of the prohibited act *prima facie* imports the offence, but the accused may avoid liability by proving that he took reasonable care."

22 Having found that the cattle were in distress and Mr. Sparshu having admitted he was the owner, the question remains whether Mr. Sparshu can establish that he took reasonable care. I am mindful of the fact that the legal burden or onus of proving beyond a reasonable doubt the guilt of the accused remains on the Crown throughout and never shifts. However, where as here, the Crown has established a *prima facie* case, the evidentiary burden shifts to the accused. I am also mindful of the instructions of Mr. Justice Cory set forth in *R. v. W. (D)* (1991), 63 C.C.C. (3d) 397.

23 Mr. Sparshu presented himself as an intelligent, well-spoken, business-like person who took care in addressing questions and answers. His testimony however, raises many disturbing concerns, including the following:

1. Mr. Sparshu said that the cattle were in good condition on February 9th, yet on March 6th the majority were near starvation as a result of lack of proper feeding while one had a very lame shoulder injury, one had claw feet, one had a retained placenta requiring immediate medical attention and had a severe lice infestation which was symptomatic of the whole herd.
2. Mr. Sparshu informed Constable Jorawsky by telephone March 8th that he and Mr. Schultz fed the cattle 50 bales of hay on Friday, March 3rd. Mr. Sparshu denied making this statement, but I accept the Constable's evidence over that of Mr. Sparshu on this point.
3. While there was considerable evidence of Mr. Sparshu's efforts to locate Mr. Schultz, there was no evidence at all of any efforts to locate his hired man, the truck driver, Ron White. Yet Mr. Sparshu's evidence is that Mr. White hauled hay to other cattlemen for Mr. Schultz.

4. Mr. Sparshu refused at first request to reveal the name of his caretaker to Constable Jorawsky on March 8th, refused again on March 13 and even as late as March 28th, still refused to reveal a first name.
5. The contract requires Mr. Schultz to check for sickness etc. and to call a vet if needed, and yet, it is from the co-owner of the Bergen Quarter that Mr. Sparshu receives a call concerning his lame bull and it is he, not Mr. Schultz, who attends to the problem.
6. The surname Mr. Schultz has at least 3 different spellings in the written documentation, while Mr. Sparshu's name is spelled 2 different ways. Yet, Mr. Sparshu says he never noticed any differences.
7. The receipt for the hay for November 28th is number 34 while for the earlier date of October 13th the receipt is number 37, for February 9th the receipt is numbered 42 and the December 22nd receipt is number 44.
8. The receipts are of the thin newspaper variety yet are in pristine condition, without wrinkle or blemish when presented in Court though Mr. Sparshu has supposedly held them from as early as October, 1994.
9. The arrangement followed on each of the deliveries of hay in October, November, December and February is that Mr. Schultz telephones Mr. Sparshu and arranges to meet him at the Quarter to unload and receive payment in cash, and yet on March 8th, the very day after the cattle have been seized and removed, Mr. Sparshu's story is that Mr. Schultz arrives unannounced with 50 bales of hay which he unloads and leaves in the corral notwithstanding there are no cattle at the quarter and Mr. Schultz has not received payment.
10. That Mr. Sparshu hires a complete stranger to feed and care for these valuable exotic cattle and in the period October 13th to March 8th Mr. Sparshu has been out to see the cattle only 5 times by his own testimony though he travels frequently between his home in Calmar and his business interests in Calgary.
11. More overwhelming is that, after visiting with and discussing arrangements with Mr. Schultz in September, speaking to him on the phone at least 6 times and unloading hay with him 4 times, he knows scant little of the phantom-like Mr. Schultz. In fact, he professed he did not know which oil company Mr. Schultz worked for as a consultant; where his rig was located, though apparently only 5 miles away; what other cattlemen Mr. Schultz was selling hay to; where his in-laws were located near Carstairs where Mr. Schultz said he farmed and ran his cattle, what the last name of his in-laws was; what Mr. Schultz's permanent address and telephone number was; and that he only had a cell phone number for Mr. Schultz, which he misplaced by Christmas and simply had no reason to obtain again.
12. That Mr. Sparshu made no inquiries of Mr. Schultz as a caretaker of cattle, requested no references and did not check with any other persons to whom Mr. Schultz was selling hay.

13. Why Mr. Sparshu would tell the Constable that he could not reveal the name of his caretaker without checking with him does not make any logical sense when Mr. Schultz had said he would not co-operate. Nor does it make any sense that on March 8th in the early morning hours Mr. Schultz would state he would not be coming to Court when no one, specifically not Mr. Sparshu, had been charged.

14. That even though Mr. Schultz was working on a rig for an oil company 5 minutes away from the quarter from September to March, no inquiries were made by Mr. Sparshu to locate the oil company to obtain information about Mr. Schultz.

15. That Mr. Schultz, who farms at Carstairs and works as consultant to oil companies, apparently disappears completely from the area and goes to Revelstoke, B.C. where there is no oil and gas industry.

16. Notwithstanding Mr. Sparshu's assertion that upon seizure of the cattle Mr. Schultz becomes completely unco-operative, yet mysteriously this man:

a) leaves 50 bales of hay without payment, without first calling Mr. Sparshu and in a field containing no cattle (and in light of the evidence that Mr. Schultz was headed home from work when he went to deliver the hay, why would he not just head home with the hay for which he had not been paid when he knew the cattle had been seized).

b) immediately telephones Mr. Sparshu to inform him what has happened,

c) telephones Mr. Sparshu right after the Mr. Sparshu's first Court appearance in Didsbury in April, and even more helpfully,

d) sends him the seizure papers just before his August trial date, together with a rather "chatty" letter that contains a very friendly "Hi Gary" salutation and goes not an inconsiderable distance to answer the very questions one would ask Mr. Schultz were he disposed to appear in Court.

17. Mr. Sparshu stated that Mr. Schultz would call him when the cattle required more hay and a delivery date would be arranged. There were always 24 head of cattle feeding. Why then is the rate of feeding so variable? That is 610 bales were delivered October 13th, 300 on November 28th, 340 on December 22nd and 625 on February 9th. The feed rate is calculated by dividing the number of days between delivery by the number of bales delivered therefore -

610 bales

46 days = 13.26 bales/day

300 bales

26 days = 11.54 bales/day

340 = 6.94 bales/day

49 days

625 bales

35 expected days = 17.86 bales/day

but on March 6th, there were no bales left, so the actual feed rate is

625 = 25.00 bales/day

25 days

24 The variance is not logical and serves to create considerable doubt as to Mr. Sparshu's story. Why would the cattle eat almost 7 bales of hay per day from December 22nd to February 9th and then 25 bales per day from February 9th to March 6th?

25 Each concern noted above taken in isolation would of itself merely raise some doubt as to the veracity of Mr. Sparshu's story, but taken all together, are sufficient to convince me that Mr. Sparshu's assertion of the arrangement he outlined is simply not worthy of belief. In the end result, I conclude that the Mr. Sparshu's story has no credibility and I do not believe Mr. Sparshu, nor does his testimony raise a reasonable doubt in my mind. Certainly, I can accept that a Mr. Schultz, or a Mr. White, or even Mr. Sparshu delivered hay to the quarter - how else would the cattle have survived even as they did. But not for one minute do I believe that a Mr. Schultz was actually contracted to care for the cattle on a day to day or even bi-daily basis as asserted by Mr. Sparshu. Accordingly, in all of the circumstances, I do not find that the Mr. Sparshu took reasonable care of his cattle and I am satisfied that the Crown has proven the guilt of Mr. Sparshu beyond a reasonable doubt.

26 But even if I accept that Mr. Sparshu had an arrangement with Mr. Schultz, it was not a turn-key operation, for the accused was an integral part of the arrangement. He was there to assist in unloading the hay, he was there to provide and feed the salt and mineral supplements to the herd, he was there to care for the bull when it had foot rot (and was aware that Mr. Schultz had not taken the care nor provided the treatment required), and most importantly he was there on each occasion to assist, supervise and check on the herd in October, November, December, February and on March 3rd. He had not so completely disassociated himself from the care and management of the cattle that he is able to claim that his agent is solely responsible for the appalling condition of the cattle. Even by his own testimony, Mr. Sparshu has not satisfied me that he exercised due diligence.

27 Mr. Sparshu, I find you guilty as charged.

GILBERT PROV. CT. J.