IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R. v. Miller*, 2003 YKSC 64

Date: 20031119
Docket : S.C. 02-AP018
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Appellant

And:

REESE MILLER

Respondent

Before: Mr. Justice P. McIntyre

Appearances:
Emily Hill — For the Appellant
Reese Miller — On his own behalf

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

[1] MCINTYRE J. (Oral): This is an appeal from the decision of Justice of the Peace Cameron who acquitted the respondent of a charge contrary to s. 119 of the Animal Control Bylaw, which states:

> No person shall cause, either directly or by neglect, or permit to be caused unnecessary pain, suffering or injury to an animal.

[2] The learned Justice of the Peace's reasons are found in a separate document

entitled Reasons for Judgment, but it is clear that his Reasons for Judgment actually commence earlier on in the transcript. In fact, from page 81 on of the transcript, he discusses the facts and the issues.

[3] The Reasons for Judgment are then somewhat truncated, that is to say, the document, itself, is somewhat truncated. He deals with first of all what the main issue that was before him. The main issue before him was whether a kicking of the dog in question had occurred.

[4] The main Crown witness had described in graphic detail a vicious couple of kicks by the defendant to the dog, a Rottweiller.

[5] The defendant and his wife took the witness stand and denied that there had been any kicking whatsoever.

[6] The Justice of the Peace, found in paragraph 1 of the document entitled Reasons for Judgment:

> ...I believe that the evidence supports that the kicking took place.

He then goes on, in paragraph 2, to ask himself:

> ...whether or not the kicking would be considered abuse,...

And he does find that it is considered to be abuse.

[7] Now, I have to say that I have been unable to find any reference to that word in the legislation, nor has counsel on behalf of the City. So one of the questions is what did he mean by that?

[8] From paragraph 3 on, he goes on to ask the question as to whether the kicking caused injury, pain or suffering, or he goes exactly to the words of the section:

> "unnecessary pain, suffering, or injury".

[9] In paragraph 4, he went on to say that although he is comfortable in the finding that an abusive action took place, that he was not comfortable with the evidence before him that the abusive action caused unnecessary pain, suffering or injury.

> There is no evidence before me in regards to the dog yelping, or the dog having any difficulty moving after the action to place, to indicate that there was clearly an injury. It is not to say there was not. The vet himself said that there could have been [a] minor injury that would have healed in that 12-day period.

Now I should point out that the word "place" in that quote seems to be either misquoted or misspoken, but I understand, I think, the gist of what the Justice of the Peace was saying.

[10] Now the appellant suggests that the trial judge erred in at least a couple of ways. One of them is that he must have put the pain threshold too high, and that all it has to be is the least physical discomfort or something more than the least physical discomfort to be sufficient. Secondly, the appellant says that the Justice of the Peace should have taken judicial notice that kicking the dog, especially in the manner described in the evidence, must have caused the dog pain.

[11] On the other hand, Mr. Miller says that it is clear on the evidence that the dog was not caused any pain, that there was no evidence to support a finding of pain. He

points out that the main Crown witness did not hear any yelp from the dog. Additionally, that the dog, on the command of Mr. Miller, immediately jumped into the back of the four-by-four truck that he was driving, which was, I understand, at least three feet off the ground. In addition, Mr. Miller called a witness who said that he saw the dog later on in the afternoon. These events were said to have taken place at about 12:30, and the witness, Mr. Decook, saw the dog later on in the afternoon, and the dog appeared to be fine.

[12] In addition, Mr. Miller had the dog inspected by a veterinarian, once he understood that a charge was going ahead or a complaint had been made. He specifically told the veterinarian, on the evidence, what the allegation was, and asked the veterinarian to do a thorough examination of the dog for the purposes of determining whether the dog had been injured or showed any signs of injury (sic, abuse). The veterinarian did not see any signs of injury, although he acknowledged that a mild injury could have healed within 12 days because he saw the dog on August the 14th, these events having taken place on August 2nd, but he also said there were no signs of abuse of the dog.

[13] Now with respect to the case law, in my view, the leading case is *R. v. Menard* (1978), 43 C.C.C. (2d) 458, a decision of the Quebec Court of Appeal given by Mr. Justice Lamer, and leave to appeal to the Supreme Court of Canada was refused.

[14] The *Menard, supra,* case, at page 5 of my printout, states, at the bottom:

> Certainly, the legislator did not intend, as in cases of assault among human beings, to forbid through criminalization the causing to an animal of the least physical discomfort and it is to this extent, but no more, that one may speak of quantification. With the exception

> of these cases, however, the amount of pain is of no importance in itself from the moment it is inflicted willfully, within the meaning of s. 386(1) of the *Criminal Code*, if it was done without necessity according to s. 402(1)(a) and without justification, legal excuse or colour of right within the meaning of s. 386(2).

[15] Now I should point out that in my view, even though we are dealing with a *Criminal Code* section and its interpretation, the wording is now sufficiently close that I can use *Criminal Code* cases in order to assist.

[16] At page 6 of the report, Mr. Justice Lamer points out that the *Criminal Code* changed in the 1953-54 amendments and so that at one time something that required clear evidence of cruelty was no longer the law in Canada. He went on to talk about animals and the hierarchy of our planet and describing, in quite interesting language, the place that animals bear in our society. He concludes at page 7 of the report as follows:

> Thus men, by the rule of s. 402(1)(a), --

And I pause to say, I understand that to be the same as the current *Criminal Code* s. 446:

> -- do not renounce the right given to them by their position as supreme creatures to put animals at their service to satisfy their needs, but impose on themselves a rule of civilization by which they renounce, condemn and repress all infliction of pain, suffering or injury on animals which, while taking place in the pursuit of a legitimate purpose, is not justified by the choice of means employed. "Without necessity" does not mean that man, when a thing is susceptible of causing pain to an animal, must abstain unless it be necessary, but means that man in the pursuit of his purposes as a superior being, in the pursuit of his well-being, is obliged not to inflict on animals pain, suffering or injury which is not inevitable taking into account the purpose sought and the circumstances of the

> particular case.

[17] Now, Mr. Justice Lamer went on to find that the Superior Court Judge who had overturned the original conviction made an error in law in failing to apply the standard that Mr. Justice Lamer thought was applicable.

[18] There is also an Ontario case, *R. v. McRae*, [2002] O.J. No. 4987, where Mr. Justice McDermid upheld the accused's acquittal in circumstances where there was evidence that the accused had kicked the dog and the dog had yelped. Despite that the provincial court judge did not convict the accused, and at paragraph 21, Mr. Justice McDermid said:

> .
> ..that the trial judge [did not fall] into [an] error either in applying the law, apart from her finding that the threshold was a high one, or in failing to draw inferences from the facts in such a way as to find the respondent guilty of any of the charges.

He says, at paragraph 21:

> While it is true that inferences might have been drawn, it cannot be said that the trial judge had to draw them based on the evidence that was led.

[19] So as I understand the threshold, the threshold is something more than the least physical discomfort being inflicted on an animal. I also consider the words to be disjunctive, that is to say, the question is whether there is unnecessary pain, suffering or injury to an animal.

[20] Now when I read the material and heard the argument of counsel for the appellant, in particular, I asked myself the question, how there could have been an acquittal in this case? Surely there must have been pain to the dog. Surely there

must have been something more than the least physical discomfort. But as I thought about this more and listened to the argument, I had to reflect on the question of judicial notice.

[21] The appellant says you have to take judicial notice, that it is only common sense that kicking a dog would cause it pain. There is much to be said for that proposition, but I have to compare it to the testimony in the transcript.

[22] The testimony in the transcript was very vivid. At transcript page 6, line 17, Mr. Thompson, the main Crown witness said:

> ...he grabbed the dog with both hands beside the collar, he hauled off and, Your Honour, with his full force, as hard as he could, he didn't check his swing, he didn't kick that dog in the hind quarters, he didn't kick with the instep of his foot, the side of his foot. He drove that dog with all his force into the ribcage, the stomach area of the dog.

And further at line 27:

> He would up and did the exact same thing again. It was sickening and it was brutal.

[23] In view of that evidence, I have to compare that or contrast it to the evidence that the dog did not yelp, that it immediately jumped into the truck, that some 90 minutes later it seemed fine, and that 12 days later there was no sign of an injury. If I am going to take judicial notice or try to apply common sense to this proposition, I have to ask myself this question: How could a man, who I understand by admission of Mr. Miller, who weighs 195 pounds, and indeed he appears to, before me; how could such a man viciously kick a dog twice in the ribcage and stomach area and not cause the dog injury? How could the dog not cry out immediately? How could the

dog jump right away into the back of the truck? How could the dog even come close or stay close to the person that inflicted such grave injury on him? How could two kicks with steel-toed boots not show up later on, even 12 days later on, when examined by the vet?

[24] So I am driven to the conclusion that the Justice of the Peace must have made a finding of fact that there simply was no evidence that something more than the least physical discomfort was there. On the evidence, there was nothing heard from the dog and nothing seen that would support the proposition that something more than the least physical discomfort had occurred.

[25] So my initial question to myself, how could the dog not have felt pain, is answered by the facts of this case and the evidence that suggests the dog was moving well, immediately after these actions. So I can only conclude that the Justice of the Peace, in his inarticulated findings of fact, must have decided that the force of the kick was not as strong as the main Crown witness had said that it was.

[26] So in assessing, in conclusion, the wording of the Justice of the Peace: he found that kicking had taken place, he used the word "abuse" and "abusive action", and I take that to mean that he meant that it was willful and that it was unnecessary. I am not accepting that he meant that it was painful. So I take that he meant that it was willful and unnecessary, but that on the question of pain, the infliction of pain in particular, that there was no evidence that there had been anything more than the least physical discomfort.

[27] In short, I am going to dismiss the appeal based on the reasons that I have

just given.

[28] Thank you very much, Ms. Hill, for your briefs and your arguments; they were well done.

[29] Thank you, Mr. Miller, for your submissions. Do you want me to explain what has happened?

[30] The City of Whitehorse has been unsuccessful in its appeal. So despite the finding that you kicked the dog, which I know that you do not accept but which I do accept, as I must, at law, you are not guilty, according to law, of the offence with which you were charged.

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MCINTYRE J.