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R. v. Heynan

Between
Regina, and
Klaas Heynan

[1992] A.J. No. 1181

136 A.R. 397

18 W.C.B. (2d) 521

Action Nos. 10410800-P1-0101 and 10453678-P1-0101

Alberta Provincial Court
Criminal Division

Patterson A.C.J. Prov. Ct.

Judgment: February 21, 1992.

(4 pp.)

STATUTES, REGULATIONS AND RULES CITED:

Criminal Code, R.S.C. 1985, c. C-46, ss. 21, 429(1).

Criminal law -- Wilful acts respecting property -- Cruelty to animals -- Wilful neglect to provide food for domestic animals -- Mens rea -- Corporations -- Liability of principal owner.

The accused was charged with wilfully neglecting to provide adequate feed for his horses. He operated a guiding business which required horses. The company was owned by himself. The accused contended that he could not be held personally liable, as the horses were owned by the company. He also argued that the Crown could not establish wilful neglect.

HELD: Charges dismissed. The accused being the sole owner of the company, the company could only act through him, and the company's criminal conduct in this regard was the accused's criminal conduct. However, the Crown failed to establish that the horses were wilfully neglected. The accused testified that he did not know that leaving the horses unattended in the pasture over the winter would lead to starvation of the horses. This was sufficient to provide a defence to the charge.

W. Martin and T. Hawkesworth, for the Crown.
R. Lewis, Q.C., for the Accused.

REASONS FOR JUDGMENT

PATTERSON A.C.J. PROV. CT.:-- The accused is an outfitter and guide carrying on business in the Yukon Territory. His assets are in the name of a limited company called Kusawa Outfitters Limited. He is the sole shareholder and officer of the company.

The guiding business requires a number of horses. At the conclusion of the Yukon hunting season in November of 1990, the horses - about two dozen in number - were brought down to the Teepee Creek area of Alberta for wintering. In March of 1991, farmers in the neighbourhood of the horses became alarmed at their condition. Specifically, a Mr. Tom Rycroft was sufficiently concerned that he contacted the R.C.M.P. The accused was notified of the plight of the horses and he made immediate arrangements to have feed provided to the herd. This took place on March 7th, 1991.

On March 19th, the herd and pasture were examined by Dr. Peter Moisan, a veterinarian, and by Morris Airey, a special constable with the Alberta SPCA. They found 21 live and 3 dead horses. Two of the three carcasses were skeletal remains and the third, which had been dead for a period of two or three days, was autopsied by Dr. Moisan. He concluded that it had succumbed to emaciation; that is, it died from a lack of food. He also formed the opinion that a number of the living horses suffered from severe emaciation, although a few were in moderate body condition.

Dr. Moisan also examined the pasture condition. In addition to a significant snow cover, there was a large amount of ice on the field. As a result, most of the hay was more or less inaccessible to the foraging horses. Some grass was sticking out through the ice but this fell far short of what was necessary to prevent starvation in the herd.

The accused began the practise of bringing the horses down from the Yukon some three seasons prior to the one in question. On two occasions he left them with a farmer where apparently they foraged on stubble during the winter; on the other they were wintered on the Kleskun Lake community pasture. In neither case were they given any supplementary feed.

In 1990, he arranged for the purchase of the half section where the animals were found. He described the hay crop on the land in glowing terms. He called it supreme pasture; a Valhalla for the horses. He expressed the belief that they had lots of feed there. He also stated that he came through Grande Prairie on five or six occasions between the time the horses were left in the pasture and the phone call of March 7th. On each occasion he would visit the horses. The last such visit was about 10 days prior to March 7th. His evidence is that the horses looked good. He did admit that in the winter the horses have a heavy growth of hair and that one must get really close to them to examine their ribs. He did not do this on this last occasion.

I accept Dr. Moisan's opinion that horses should not be required to forage for food under snow. He has testified that pasture grass that has overwintered is very low in total digestible nutrients. When one adds to that the variations in winter ground cover which in this country range from bare to deep snow to ice, it is clear that unattended horses may easily perish. I emphasize the unattended aspect. The significant difference between the 1990 - 91 winter season and the two previous seasons when the horses were "boarded" to a local farmer is that in the latter case the condition of horses and feed could be monitored regularly and supplemental feed supplied if required. The inadequacy of Mr. Heynan's supervision in 1991 is highlighted by the evidence of his last inspection. He thought the horses were "looking good". Mr. James Lappenbush, a neighbour who regularly returned those of the accused's horses that had strayed into his feed described them as "thin, really thin". That certainly had to be the condition at the time of the inspection. Yet Mr.

Heynan did not get near enough to see what on closer inspection must have been obvious.

The charge against the accused as amended is that between the 1st day of January, A.D. 1991 and the 7th day of March, A.D. 1991, at or near Teepee Creek in the Province of Alberta, being the owner of domestic animals, to wit: horses, did unlawfully and wilfully neglect to provide suitable and adequate food and care for the said horses, contrary to the provisions of the Criminal Code.

Two defences are urged on behalf of the defendant. The first is that the Information alleges that he is the owner of the horses. In fact, the evidence indicates that the legal owner is the corporate entity Kusawa OutFitters Limited. It is contended that the charge should for this reason be dismissed. In support of that proposition the defence has referred to the Supreme Court of Canada decision in Rosen v. R., (1985) 44 C.R. (3d) 232. In that case, the accused was alleged to have been a trustee of certain funds who converted them to a use not authorized by the trust. The trustee was in fact a corporate entity directed by the accused. The court held that while the accused could have committed the offence pursuant to s. 21 of the Code by causing the trustee to commit the offence, the Crown, by the wording of the charge, undertook to prove the averment that he was the trustee. As it could not do so, the conviction was quashed. The concern of the Court was that the accused was mislead, not as regards the offence he committed, but as regards the actus reus the Crown was undertaking to prove.

In this case, the horses are wholly owned by a limited company which in turn is wholly owned by the accused. The legal concept of ownership casts a much broader net than the legal concept of a trustee with its well defined duties and proscriptions. In Wynne v. Dalby (1913) 16 D.L.R. 710 at 714, Meredith, C.J.O., stated:

> The word "owner" is an elastic term, and the meaning which must be given to it in a statutory enactment depends very much upon the object the enactment is designed to serve.

Moreover, in this case, unlike Rosen the actus reus consists entirely of the acts or omissions of the accused. The company is not involved. In R. v. Paish, [1977] 2 W.W.R. 526, a case remarkably similar to this one, Barnett, Prov. J., concluded that the person having dominion and control over the horses, not the holding company, must be considered the owner. I respectfully agree.

The second argument of the defendant is lack of the requisite mens rea. There can be no doubt that the accused failed to provide suitable and adequate food for his horses. To invoke the sanctions of the Criminal Code, however, the Crown must go further and establish that the conduct of the accused was wilful. S. 429 (1) reads:

> Everyone 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.

The question is therefore whether the evidence establishes that Mr. Heynan knew that leaving the horses unattended in the pasture over the winter would probably result in their not receiving suitable and adequate food. His own evidence is that he believed that the horses would have adequate food. In light of what happened, and the evidence of Dr. Moisan, it is clear that such a belief was incredibly naive. Nevertheless, if such a belief was genuinely and honestly held, the accused would be afforded a defence. In making this assessment, I note that the animals were undoubtedly important to Mr. Heynan's business, and their loss would result in financial deprivation to himself. I note further that when notified by Cst. Pavlov of the plight of the animals, he took immediate steps to remedy the situation. Finally, I note the evidence of Dr. Moisan that he has "necropsied, unfortunately, a large number of horses, cattle and other domestic livestock that have died of starvation ..." While this large incidence of animal neglect has no bearing on the culpability of any one accused, it does indicate that the kind of erroneous beliefs which Mr. Heynan says he held are not uncommon.

Mr. Heynan's conduct is doubtless cause for censure and may constitute an offence under other statutes.

However, the evidence does not indicate that the necessary ingredient of wilfulness has been established, and the Criminal Code charge against the accused must be dismissed.