Case Name:

R. v. McRae

Between
Her Majesty the Queen, and
Dwayne McRae

[2002] O.J. No. 4987

Court File No. 02-683

Ontario Superior Court of Justice
Stratford, Ontario

McDermid J.

Heard: October 10, 2002.
Judgment: December 19, 2002.

(23 paras.)

Criminal law -- Wilful acts respecting property -- Cruelty to animals -- Causing unnecessary pain and suffering -- Summary conviction proceedings -- Appeals -- Appeal from acquittal (incl. cross-appeal or notice of contention).

Appeal by the Crown from McRae's acquittal on charges of cruelty to animals. Several neighbours testified that McRae had kicked his dog, hit her with a pipe, and thrown her into the house. They claimed that the dog had yelped on these occasions. McRae claimed that he had never hit the dog with a pipe or kicked her. He admitted to throwing her into the house, but alleged that this had not hurt her. The trial judge concluded that there was insufficient evidence that the dog had been caused unnecessary suffering, despite finding that McRae was unduly harsh with her. The Crown argued that the trial judge had misapplied the law.

HELD: Appeal dismissed. The issue was whether McRae had caused pain and suffering to the dog which rose above a minimal level of physical discomfort. The trial judge had not misapplied the proper test. It was open to the judge on the evidence before her to conclude that McRae had not caused the dog unnecessary suffering, despite her acceptance of his harsh treatment. The dog's yelping alone was not conclusive evidence of suffering.

Statutes, Regulations and Rules Cited:

Criminal Code, ss. 429(1), 446(1).

Counsel:

J.D. Iarocci, for Her Majesty the Queen, appellant.

A.J. Bignucolo, for D. McRae, the respondent.

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1 **McDERMID J.** (endorsement):-- The Crown appeals from the respondent's acquittal on 5 counts of wilfully causing unnecessary pain or suffering to his dog contrary to s. 446(1) of the Criminal Code of Canada. Each of the following alleged acts is the subject of a discrete charge:

a. Kicking the dog between June 23 and July 7, 2001.
b. Striking the dog with a tree branch between July 8 and 14, 2001.
c. Throwing the dog on July 15, 2001.
d. Striking the dog with a plastic pipe on July 18, 2001.
e. Throwing the dog on July 19, 2001.

2 The learned trial judge found that the respondent's testimony was "not credible" and was characterized by "a certain degree of animosity toward the neighbours." She accepted the testimony of the 5 neighbours called by the Crown as "credible, subject of course to natural frailties in that evidence in terms of their vantage points." She found the respondent was "unnecessarily rough with the dog."

3 In acquitting the respondent, the trial judge stated in part:

> I am unable to conclude that there is sufficient evidence before me to establish beyond a reasonable doubt that Mr. McRae willfully caused unnecessary pain or suffering. The threshold is a high threshold. The onus of proof is on the Crown. The evidence before me would require me to base a finding of guilt on inferences. The inferences are simply in this case not strong enough. I cannot infer from the sound that someone has heard the dog make that there is, on the evidence before me, unnecessary pain and suffering.

4 I have read the complete transcript of the testimony of the witnesses and the reasons of the trial judge. There was direct evidence from the Crown witnesses that:

a. The respondent kicked the dog in the ribs. Mr. Mountain testified that he saw the respondent's foot come into contact with the dog's ribs. He saw the respondent draw his leg back before kicking the dog and the force used was sufficient to move the dog a couple of feet. The dog yelped when she was kicked. The respondent was swearing at the dog at about the time he kicked her.
b. The respondent picked up the dog and threw her through the air for a distance of perhaps 5 or 6 feet with quite a bit of force, described by Ms. Smith as being "unnecessarily rough." The dog was barking when he picked her up and he was shouting at the dog.
c. The respondent struck at the dog aiming at the area behind its head with something Ms. Hambert assumed to be a tree branch. She did not see the blow land but the dog yelped and was crying. She described the yelp as a "piercing sound."
d. The respondent struck the rear end of the dog several times with an object that appeared to Ms. Smith to be similar to a 4 inch, flexible, corrugated, plastic, perforated drainpipe that was perhaps 5 feet long.
e. When an Inspector for the SPCA removed the dog from the respondent's custody on July 20th, he described her as being extremely submissive and fearful and difficult to approach. When approached, the dog would run away and cower, and lower its body to the ground. This behaviour continued for several weeks. He saw no obvious injuries to the

dog, other than a small bump on the top of her muzzle, which had disappeared by the time of trial on February 12, 2002.

f. According to the Inspector for the SPCA, "typically" when a dog yelps that is a sign of pain, whereas whining might indicate pain, loneliness or attention seeking.

g. The veterinarian who examined the dog on July 25th found no bruises or other abnormalities, other than the small bump on the top of the muzzle, which he felt might possibly have been a bruise, but also might have been part of her normal anatomy. He also found her to be "bright, alert and friendly", in contrast to the testimony of the Inspector from the SPCA regarding his observations some 5 days earlier, and to be "in general" healthy.

5 Apart from the testimony of the Inspector from the SPCA, upon which the trial judge did not comment, and the evidence from the veterinarian, I conclude that the trial judge accepted this evidence because she found the testimony of the respondents' neighbours who were called by the Crown to be credible.

6 The respondent denied that he ever kicked his dog or hit her with a plastic drainpipe or a tree branch. He said he once slammed the pipe down about a foot and a half from "behind her rear end" but never struck her body with the pipe. He said he played a game with the dog involving a tree branch where he would rub it on her nose and then throw it for her to fetch, which actions were repeated about 5 times. He admitted that he once "tossed" the dog about 3 feet into his house one day when she wanted to go for a walk and that she yelped when she landed inside the house. He added that she also yelped when he played with her in his backyard or when she walked down the street.

7 He agreed on cross-examination that he became angry and frustrated with the dog and swore at her when she "was barking continuously" but denied that he ever purposely caused pain, suffering or injury to her. He did admit that on more than one occasion, he lost his temper with his dog and that when he did so his behaviour was sometimes uncontrolled. However, he again denied ever kicking, hitting, throwing her, or beating her with a tree branch or drainpipe on such occasions.

8 On cross-examination, he agreed in effect that if he hit the dog with the drainpipe, it would hurt her and would be a totally inappropriate and unnecessary thing to do. He also agreed that if he kicked the dog, it would be totally unnecessary and inappropriate and would cause pain to the dog. He agreed further that it would be wilful and unnecessary.

9 Therefore, the defence was not that he used force to discipline his dog, but that he never kicked or struck her and that he never caused her any pain or suffering even on the one occasion when he admitted to throwing her inside his house.

10 In order to secure a conviction, the onus was on the Crown to prove beyond a reasonable doubt that:

a. The alleged offences occurred on date and at the place named in the indictment, which seem not to have been challenged.

b. The respondent respectively kicked the dog, struck her with a tree branch, threw her on 2 separate occasions and struck her with a plastic pipe.

c. He did so wilfully. In this connection see s. 429(1) of the Criminal Code of Canada.

d. He caused pain or suffering to the dog.

e. The pain or suffering he caused the dog was unnecessary.

f. He caused the pain or suffering without justification, legal excuse or colour of right. In this connection, see s. 429(2) of the Criminal Code of Canada.

11 Counsel for the appellant relies upon R. v. Menard (1978), 43 C.C.C. (2d) 458, a decision of the Quebec Court of Appeal, delivered by Lamer J.A., as he then was. Leave to appeal this decision to the Supreme Court of Canada was

refused. The wording of then s. 402(1)(a) of the Criminal Code of Canada is the same as the present section under which the respondent was charged. The facts were markedly different but some general principles were enunciated, which I believe may be applied to the facts of this case. They are as follows:

a. The accused must be identified beyond a reasonable doubt as the person who caused the pain, suffering or injury to the animal or permitted it to be caused.
b. There are circumstances in which it is not a criminal offence to cause pain, suffering or injury to an animal.
c. The pain, suffering or injury must be caused wilfully, that is, voluntarily and intentionally or as provided by s. 429(1) of the Criminal Code of Canada.
d. With respect to the degree of pain or suffering caused to an animal by an accused, the Crown need prove beyond a reasonable doubt only that it caused the animal something more than "the least physical discomfort."
e. Once that threshold has been met, then one must consider the means by which and the purpose for which the pain, suffering or injury was caused to decide whether it was caused "unnecessarily."
f. In determining whether or not pain, suffering or injury was caused to an animal "unnecessarily", it is appropriate to consider both the means employed and the purpose for which the pain, suffering or injury was caused, and also the relation between the purpose and the means.
g. In some cases, the purpose may be legitimate, but the means employed may not be.
h. This determination should involve a consideration of all the surrounding circumstances.

12 From the evidence at trial, one might reasonably conclude that if the accused caused pain or suffering to his dog:

(a) he did so wilfully;
(b) the means he employed were not necessary;
(c) he lacked a legitimate purpose for causing pain or suffering to his dog; and
(d) he had no legal justification or excuse for doing so.

13 Although the trial judge did not overtly follow this method of analysis, she identified the central issue in her mind as being whether or not the accused caused any unnecessary pain or suffering to his dog. As noted in the excerpt from her reasons as set out above, she found the threshold to be a high one and that she lacked sufficient evidence to be satisfied beyond a reasonable doubt that the respondent caused unnecessary pain or suffering to his dog.

14 I cannot agree with the trial judge that the threshold is a high one. With respect to the issue of whether the respondent caused any pain or suffering to his dog, the onus was on the Crown to meet the normal onus of proof beyond a reasonable doubt and to establish that by his actions the respondent caused the dog something more than "the least physical discomfort." In other words, the Crown had to prove that the respondent caused "pain or suffering" to his dog that rose above the minimal level of "the least physical discomfort", and attained a level or degree of physical hurt of some greater significance, although it need not be severe. In fact, as noted, once the Crown has established this rather minimal threshold, it need go no further to prove any higher level or degree of pain or suffering. In summary, I do not see this threshold as being a high one, considering the fact that the Crown bears the normal onus of proof of establishing a rather minimal degree of pain or suffering, namely something more than "the least physical discomfort."

15 The trial judge also commented that the evidence would require her to find guilt based on inferences. There is nothing wrong in doing so, provided that the inferences are properly drawn and do not constitute speculation. For example, circumstantial evidence is of such a nature that once a fact is proven, another fact may logically be inferred from it. Circumstantial evidence is as persuasive as direct evidence in many cases and may be even more persuasive in others. Therefore, the fact that a finding of guilt may be based on circumstantial evidence is not unusual. In this case, there was both direct and circumstantial evidence for the trial judge to consider.

16 The basis upon which the trial judge seems to rest her ultimate decision is that she was unable to infer from the evidence about the yelping sound made by the dog that it sustained any unnecessary pain or suffering at the hands of the respondent. I conclude that on the evidence led there was no finding open to the trial judge other than that any pain or suffering that was caused to the dog was unnecessary. The real issue was, "Did the respondent cause any pain or suffering to the dog that rose above the minimal or threshold level, namely something in excess of the least physical discomfort?"

17 The fact that the respondent caused pain or suffering might be inferred from his actions coupled with the reaction of the dog to them. I do not believe the trial judge erred in law in acquitting the respondent on the counts referred to in paragraphs [1] b., c., and e., above. On the evidence adduced, it was open to her to have a reasonable doubt about whether the respondent struck the dog with the tree branch or about whether throwing the dog caused her any pain or suffering beyond the least physical discomfort. Therefore, I find that there are no grounds for interfering with the acquittals on the counts referred to in those paragraphs.

18 However, with respect to the remaining counts, there was evidence from which it might be inferred that the respondent caused the dog some pain or suffering by kicking her and by hitting her with a drainpipe. One might think, for example, that an unfriendly kick with a leg drawn back and then propelled forward, striking a 35 pound dog with sufficient force to move her a couple of feet, might cause some pain or suffering in excess of the least physical discomfort. Moreover, the respondent agreed that if he kicked the dog, it would cause her pain and agreed that if he hit the dog with the drainpipe it would hurt her.

19 However, in the respondent's favour, the veterinarian found no evidence of any injury. I recognize that evidence of injury is not necessary to prove the unnecessary causing of pain or suffering, but I see no error on the part of the trial judge in considering the lack of visible injury. For example, in my opinion, the presence of an injury, especially a serious one, very soon after the application of force would be a circumstance tending to show that the animal sustained pain or suffering. Therefore, I believe the presence or absence of a visible injury may be relevant, subject to whatever weight the trial judge gives it in the circumstances. In making this observation, I also recognize that the accused was not charged with wilfully causing unnecessary injury, which is an alternate way of committing an offence under s. 446(1)(a).

20 While the trial judge may have accepted the testimony of the neighbours of the respondent who were called by the Crown, she does not comment directly upon the evidence of the Inspector from the SPCA. As noted above, he testified that "typically" when a dog yelps that is a sign of pain. He went no further than that. There was, of course, evidence that the dog reacted to some of the respondent's actions by yelping. If indeed one were prepared to infer that, as a result of the actions of the respondent toward the dog and her reaction, she sustained either pain or suffering, one still would have to determine whether it exceeded the minimal threshold of "the least physical discomfort."

21 In all the circumstances, I am unable to find that the trial judge fell into 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. 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. I note that there was no expert evidence with respect to animal behaviour adduced by the Crown about the relationship if any between the causing of pain and a dog's reaction to it, apart from the less than definitive testimony of the Inspector from the SPCA. Moreover, I am not satisfied that the result would have been different if the trial judge had viewed the threshold as lower than she did.

22 In all the circumstances, I believe the trial judge was justified in stating as the basis for her decision, "I cannot infer from the sound that someone has heard the dog make that there is, on the evidence before me, unnecessary pain and suffering." The fact that she found the respondent "unnecessarily rough" with the dog is not the same as being satisfied beyond a reasonable doubt that whatever pain the respondent may have caused his dog exceeded "the least physical discomfort." The fact that the trial judge failed to draw the inferences the appellant says she should have drawn does not constitute an error in law in the circumstances of this case.

23 Accordingly, I dismiss the appeal and affirm the acquittals.

McDERMID J.

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