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R. v. Monster

Between

**Her Majesty the Queen, applicant, and
Kevin Monster, respondent**

[2000] O.J. No. 1043

Court File No. 99G2285

Ontario Superior Court of Justice

Tobias J.

Heard: March 15, 2000.

Judgment: March 23, 2000.

(15 paras.)

*Courts -- Jurisdiction -- Justices of the peace -- Jurisdiction -- Criminal law -- Wilful acts respecting property --
Animals -- Neglect -- Cruelty to animals -- Causing unnecessary pain and suffering.*

Application by the Crown for an order of certiorari quashing the decision of the Justice of the Peace which dismissed the application of the Crown for forfeiture under section 490(9) of the Criminal Code for want of jurisdiction. The Crown also applied for an order of mandamus requiring the Justice of the Peace to exercise her jurisdiction pursuant to section 490(9) of the Code. The accused, Monster, faced charges of cruelty to animals and of allowing the animals to fight contrary to section 446(1) of the Code. The Crown applied for an order granting custody of the dogs to the Ontario Provincial Police. The Justice of the Peace determined that she did not have jurisdiction as the dogs were not required to be detained for the purposes of proceeding against Monster and that he was the owner of the dogs. She also found that forfeiture could only be ordered to the Queen and not the Police.

HELD: Application allowed. An order for mandamus was granted quashing the dismissal of the application for forfeiture and the matter was referred back to the Justice of the Peace. The Justice of the Peace failed to hear the evidence that the dogs were used for fighting, were dangerous animals and that the possession of these animals by Monster was contrary to the Criminal Code. She had jurisdiction to consider the matter of forfeiture once the Crown established that Monster owned the dogs and his intention was to use them for an unlawful purpose. The finding that the forfeiture was to the Crown and not the Police was correct.

Statutes, Regulations and Rules Cited:

Criminal Code of Canada, ss. 446(1)(a), 446(1)(c), 446(1)(d), 487, 490(9).

Counsel:

J. Alexander Q.C., for the applicant.

David V. Eisenkrein, for the respondent.

1 TOBIAS J.:-- The Crown applies for an Order in the nature of certiorari quashing the decision of Justice of the Peace Robillard on January 11, 2000, dismissing the Crown's application for forfeiture pursuant to s. 490(9) of the Criminal Code for want of jurisdiction. The Crown also applies for an Order in the nature of mandamus compelling Her Worship Justice of the Peace Robillard to exercise her jurisdiction pursuant to s. 490(9) of the Criminal Code.

2 The respondent faces counts of cruelty to animals for failing to provide suitable and adequate care, aiding or assisting in the fighting of animals, and for being the owner and willfully permitting to be caused unnecessary pain, suffering, and injury by allowing or permitting his animals to fight contrary to s. 446(1)(c), s. 446(1)(d) and s. 446(1)(a) of the Criminal Code.

3 The Crown brought an application before the Justice of the Peace pursuant to section 490(9) of the Criminal Code of Canada for an order granting custody and ownership to the Ontario Provincial Police of eighteen dogs lawfully seized under a Warrant of Search granted pursuant to s. 487 of the Criminal Code of Canada on the 16th of April, 1999, based upon the allegation that the dogs were being kept by the respondent for an unlawful purpose, dog fighting.

4 On the 11th of January, 2000, Justice of the Peace Robillard heard the application at Bradford and dismissed it on the grounds that she did not have jurisdiction.

5 In this application the Crown requests an Order for Mandamus with certiorari in aid to quash this dismissal and compel a Justice of the Peace in the Central East Region to exercise his or her jurisdiction pursuant to s. 490(9) of the Criminal Code of Canada.

6 Prior to hearing any evidence on the application brought by the Crown, Justice of the Peace Robillard considered whether or not she had jurisdiction to make the Order requested by the Crown. She found that the dogs are no longer required to be detained for the purposes of the proceeding against Mr. Monster, and, in addition, that he is the owner of the dogs and that forfeiture may only be ordered to Her Majesty the Queen and not to the Ontario Provincial Police.

7 Section 490(9) of the Criminal Code of Canada states:

(9) Subject to this or any other Act of Parliament, if

- (a) a judge referred to in subsection (7), where a judge ordered the detention of anything seized under subsection (3), or
- (b) a justice, in any other case, is satisfied that the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized have expired and proceedings have not been instituted in which the thing detained may be required or, where those periods have not expired, that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (4), he shall
- (c) if possession of it by the person from whom it was seized is lawful, order it to be returned to that person; or
- (d) if possession of it by the person from whom it was seized is unlawful and the lawful owner or person who is lawfully entitled to its possession is known, order it to be returned

to the lawful owner or to the person who is lawfully entitled to its possession, and may, if possession of it by the person from whom it was seized is unlawful, or if it was seized when it was not in the possession of any person, and the lawful owner or person who is lawfully entitled to its possession is not known, order it to be forfeited to Her Majesty, to be disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law.

8 In her reasons for decision, Her Worship stated:

It is legal to own or possess dogs. Furthermore, it is my view that this section is not designed to consider potential illegal use of items seized. It is designed to consider the ownership or lawful possession by someone other than an owner of the item seized; the unlawful use of something doesn't make per se, the ownership or possession of it unlawful.

9 It is with great respect that I cannot accept the interpretation of the learned Justice of the Peace of Section 490(9)(d) which states, in the last paragraph of this subsection:

... and may, if possession of it by the person from whom it was seized is unlawful, or if it was seized when it was not in the possession of any person and the lawful owner or person who was lawfully entitled to its possession is not known, order it to be forfeited to Her Majesty, to be disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law.
(Emphasis added)

10 The learned Justice of the Peace, in my respectful opinion, failed to hear and consider the evidence which the Crown proposed to call on the application;

- i) that the dogs were fighting dogs;
- ii) that the dogs were used by the respondent for the unlawful purpose of dog fighting, contrary to Section 446(1)(d); and
- iii) that the dogs could not be rehabilitated to domestic use.

11 The transcript of the ruling delivered orally by Her Worship on the 11th of January, 2000, indicates that she did not consider it necessary to hear this critical evidence that the respondent kept eighteen dogs which were used for fighting, that they were dangerous animals, and that the possession of these animals by the respondent was contrary to the Criminal Code.

12 The failure of the learned Justice of the Peace to hear that evidence, and to decide the issue of unlawful possession on the evidence proposed to be called by the Crown, is a fundamental error at law.

13 Section 490 of the Criminal Code clearly establishes jurisdiction in a Justice of the Peace to determine the forfeiture of the dogs of the respondent once the Crown establishes beyond a reasonable doubt that the respondent is the owner of the dogs, and that his only possible intention was to use the dogs for an unlawful purpose. There is no doubt in my mind that Section 490 gives jurisdiction to a Justice of the Peace to decide the issues raised by that section, to make a determination whether or not the animals in question ought to be forfeited to the Crown.

14 I agree with the learned Justice of the Peace that the forfeiture is not to the Ontario Provincial Police, but to Her Majesty the Queen to be disposed of as the Attorney General directs. In the result, an order for mandamus is granted as requested by the Crown, with certiorari in aid, quashing the dismissal by the Justice of the Peace of the Crown's application pursuant to Section 490(9) of the Criminal Code.

15 The Crown's application under Section 490 is hereby referred back to a Justice of the Peace of the Central East Region, other than Justice of the Peace Robillard, to exercise his or her jurisdiction pursuant to Section 490(9) of the

Criminal Code of Canada.

TOBIAS J.

cp/d/qlrme