

In the Court of Appeal of Alberta

Citation: R. v. Kroon, 1989 ABCA 319

Date: 19891208
Docket: 11050
Registry: Calgary

Between:

Her Majesty the Queen

Respondent

- and -

Henk Kroon and
Diane Shelly Kroon

Appellants

The Court:

The Honourable Mr. Justice Haddad
The Honourable Mr. Justice Foisy
The Honourable Mr. Justice Irving

Memorandum of Judgment

COUNSEL:

L. MacDonald, for the Respondent

B.N. Clark, for the Appellants

MEMORANDUM OF JUDGMENT

THE COURT:

[1] The Appellants were charged that they during May, 1988,

"did wilfully and without lawful excuse place poison in such a position that it may easily be consumed by cats, that was (sic) kept for a lawful purpose"

contrary to s. 401(B) of the **Criminal Code**.

[2] The Appellants' home was located in Calgary several doors from the home of the Complainant, who kept two Siamese cats as house pets. Occasionally these cats roamed around the neighbourhood, including sorties into the Appellants' fenced back yard. Not quite a year before the offence, the Appellants alerted the Complainant that the cats were coming onto their property and that the Appellants proposed to trap them using humane traps. They caught both cats, and returned them to the Complainant with the request that the cats be so controlled to keep them out of the Appellants' property. In response, the Complainant suggested that the Appellants should hose the cats with water if they returned. The Complainant also took the precaution of placing a cat repellant substance along the top of the Appellants' fence to discourage passage of cats. The evidence in the appeal book also suggests that some other neighbours were restive over the cats coming on their properties.

[3] On May 2, 1988, the Complainant's cats became ill and died from consuming fish impregnated with antifreeze, which is an odourless poison. The Complainant searched the neighbourhood for the source of the poison and discovered a dish of fish just inside the Appellants' rear yard, placed on a retaining wall supporting the fence. On analysis, the fish was found to be impregnated with the same antifreeze poison which had killed the cats.

[4] The Provincial Court trial judge found beyond a reasonable doubt that both Appellants had wilfully placed the dish of poisoned fish, but he acquitted the Appellants on two grounds:

- (a) that because the poisoned fish was placed inside their rear yard "which was completely fenced and ordinarily accessible only through a typical fence gate", it was not placed in such a position that it might easily be consumed by cats, and
- (b) because the cats were occasionally allowed outside which permitted them to roam somewhat, they were no longer "kept for a lawful purpose" while roaming because their keeper did not have constant control over them.

[5] The Crown appealed the acquittals to the Court of Queen's Bench which allowed the appeals on the basis that the Trial Judge had made an unreasonable finding that poisoned food inside the fenced back yard of the Appellants was not for that reason in a position that it might be easily consumed by the cats; also that the Trial Judge had made an error in law in holding that because the cats were given some freedom to roam, they were no longer "kept for a lawful purpose".

[6] The Appellants strongly attacked the conclusion of the Appeal Judge. However, in view of the question of identification, which is discussed below, we find it unnecessary to consider these other novel and interesting issues.

[7] At trial the Appellants had argued that there was no evidence identifying either of them as the person placing the poison. Indeed, there was no evidence identifying either of the Appellants as the poisoners. While the poison was found inside their property, there was no evidence showing who placed it there. The Trial Judge had stated that he was "drawn irresistibly to the conclusion..... that the poisoned fish was placed..... by the two accused..... personally..... or by someone under their direction....."

[8] When the Crown appealed the acquittal to the Court of Queen's Bench, the Appellants sought to challenge this finding that they were the poisoners. However, counsel informed us that the appeal judge refused to consider this argument because the Appellants had failed to file any cross-appeal from their acquittal on this issue.

[9] Before us, Crown counsel very fairly conceded that the Appellants should have been permitted to pursue this argument, and indeed now concedes that there was no admissible evidence that the male Appellant committed the offence. Crown counsel does, however, urge that the Court must infer that the female Appellant placed the poison, because it was urged that no one else would have done so. The female Appellant had been seen in or about her house on the day of the poisoning.

[10] While the circumstances are highly suspicious, there are other possible explanations. The evidence suggested others in the neighbourhood objected to cat intrusions. A gate permitted entry of others into the Appellants' back yard. In our view, to hold that either Appellant was the poisoner was conjecture. While all persons must feel revulsion against animal poisoners, such revulsion must not be permitted to relax the evidential requirement of proof beyond a reasonable doubt.

[11] Additionally, the Trial Judge had concluded that both Appellants, or someone under their direction, placed the poison. Evidence which comes down equally against several suspects is conclusive identification of neither.

[12] For these reasons, we will allow the appeal, and the convictions are set aside.

DATED at Calgary, Alberta
this 8th day of December,
1989.