IN THE PROVINCIAL COURT OF SASKATCHEWAN

Citation: 2011 SKPC 180

Date: November 21, 2011
Information: 24417083
Location: North Battleford, Saskatchewan

Between:

Her Majesty the Queen

- and -

Jesse John McLeod

Appearing:

Brenda Korchinski — For the Crown
Stuart Busse, Q.C. — For the Accused/Applicant

RULING ON EXPUNGEMENT HEARING **V. H. MEEKMA, J**

INTRODUCTION

[1] The accused was represented by counsel when he pleaded guilty to the charge that on or about the 20th day of October, A. D. 2010, at Biggar, in the Province of Saskatchewan, he did wilfully cause unnecessary pain or suffering or injury to a dog by hanging contrary to s. 445.1 of the *Criminal Code*.

[2] A pre-sentence report and psychological assessment were ordered at the request of Crown and defence. Before the accused was sentenced, he retained a new lawyer and applied to expunge his plea on the ground that he did not understand that he was pleading guilty to causing unnecessary pain, suffering or injury to the dog, only that he had killed the dog by hanging it.

[3] His original lawyer advised the Court upon entering the plea that he had complied with s.

606 (1.1). The accused refused to waive solicitor/client privilege, so the lawyer did not testify at the hearing.

FACTS

[4] The accused admits through his testimony that he hung the family dog in a tree in the following manner: "I threw the rope over a branch, just like the old western movies, and pulled the dog up from the other end." He was intoxicated at the time and had had a fight with his girlfriend. The dog was out when he came home. He took the dog in his truck, drove 10 to 15 minutes out of Biggar on a country road, and hung the dog in the bush using what he described as "a proper slip knot".

[5] The accused says that he hung the dog because it was aggressive. He had not agreed to his girlfriend bringing the dog home in the first place, and referred to his actions as a display of "tough love".

[6] The accused did not tell his girlfriend what he had done and she proceeded to put up posters and search for the dog until it was located 11 days later still hanging in the tree where he had left it.

[7] The accused testified that from personal experience of being choked himself when he was 13 years old and carrying a little cousin around while hanging onto his neck, that you don't really feel anything, you just feel a little bit of pressure in your head and black out. He also referred to the experience of having a slip knot around his own neck and when asked, "You don't really know how much suffering you caused the animal, do you?", he responded, "I do. It takes about five seconds and everything goes black and you get scared and you pull your weight up off that rope".

[8] The extent of the suffering of the animal is only relevant to the inquiry into whether or not the action was necessary, as noted in *R. v. Menard* (1978), 43 C.C.C. (2d) 458 (Que. C.A.), at paras. 46 and 47:

> ...the amount of pain is of no importance in *itself* from the moment it is inflicted wilfully, 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).
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> Without importance in itself, the extent of the suffering finds its place, on the other hand, in the appreciation of the "necessity". It is sometimes necessary to make an animal suffer for its own good or again to save a human life. Certain experiments, alas, inevitably very painful for the animal, prove necessary to discover or test remedies which will save a great number of human lives. Section 402(1)(a) does not prohibit these incidents, but at the same time condemns the person who, for example, will leave a dog or a horse without water and without food for a few days, through carelessness or negligence or for reasons of profit or again in order to avoid the costs of a temporary board and lodging, notwithstanding that these animals would suffer much less than certain animals used as guinea pigs. Everything is therefore according to the circumstances, the quantification of the suffering being only one of the factors in the appreciation of what is, in the final analysis, necessary.
> [Emphasis in original]

[9] When he pleaded guilty before me in Biggar on February 2, 2011, the accused was present and represented by Brent Little. Mr. Little is known to the Court as a criminal lawyer with some experience who was a Crown attorney in North Battleford and Saskatoon before entering private practice. The transcript from February 2, 2011, discloses the following exchange:

> MR. LITTLE: Your Honour, my last matter is Jesse McLeod. I'm actually, Your Honour, working without – without any file yet. I didn't look at the Crown's file, but I did take the disclosure package.
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> That being said, I did have time to go through it with Mr. McLeod and I do have instructions to enter a guilty plea to that information –
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> THE COURT: Mmhmm.

MR. LITTLE: – that's before Your Honour – Your Honour. I imagine Crown election would be summarily.

MS. ROBERTSON: That's correct, if it hasn't been made, Your Honour.

[10] Crown counsel at the time, Ms. Robertson, raised the issue of obtaining a pre-sentence report and a psychological assessment and the following appears at pages 3 and 4 of the transcript:

MS. ROBERTSON: Well, Your Honour, it's very obvious from the facts of the offence that Mr. McLeod may have some issues that would go to sentencing, and our goal here is to address some of those issues on a rehabilitative basis. And I think we need to have that type of information.

The allegation is essentially hanging a dog and for a number of reasons, that is concerning to both Mr. Little and myself.

THE COURT: Mmhmm.

MS. ROBERTSON: And I don't think a pre-sentence report is really going to get to the heart of the issues here.

MR. LITTLE: I am in agreement with that, Your Honour. I – I've talked to Mr. McLeod. He's prepared to enter a plea, 606(1) --

THE COURT: Mmhmm.

MR. LITTLE: – has been complied with, and he perhaps sees this as an opportunity to use some of the resources of the state that he just simply does not have –-

THE COURT: Mmhmm.

MR. LITTLE: – as an individual, but recognizes he needs. So we are willing to consent to that and – and do think it would be in the interest of justice for the Court to have.

[11] During cross-examination at the expungement hearing the accused was questioned as follows:

Q And then Mr. Little indicates: "I'm in agreement. I've talked to Mr. McLeod. He's prepared to enter a plea, 606.1 has been complied with." And what we have, and actually Section 606 of the *Code* meant – actually 606.1.1 is a plea comprehension provision. A Court may accept a plea of guilty only if it is satisfied the accused is making the plea voluntarily, and – understands that the plea is an admission of the essential elements of the offence and the nature and consequences of the plea, and that the Court is not bound by any agreement made between the accused and the prosecutor. So Mr. Little indicates he – basically, he complied with that Section 606, so Mr. Little would have discussed the elements of the offence with you, correct?

A We touched the topic on a little bit, but we didn't get too deep into it. We –

Q So –

A – we did have another appointment set up that we were going to talk more about it, but – and then he withdrew.

Q So your – and discussed the nature and consequences of the plea, and – and one thing you would have discussed with Mr. Little is maybe getting a mental health assessment?

A And a –

[12] At this point Mr. Busse, counsel for the accused, objected on the basis of solicitor/client

privilege and that line of questioning ended.

ANALYSIS

[13] In an expungement hearing, the onus is on the accused to establish on a balance of probabilities that his guilty plea was not voluntary, unequivocal or informed, or that for some other valid reason it should be expunged, or that a miscarriage of justice is likely to occur. Where the accused is represented by counsel, the burden on the accused is a heavy one. (See *R. v. Ivan Darrel McLeod*, 2006 SKPC 47, where I reviewed these principles and the cases supporting them.)

[14] That the evidence suggested no viable defence was considered a factor in *R. v. Eide*, 2011 SKCA 81 (see para. 12). Certainly, that would apply here. Nothing in Mr. McLeod's evidence discloses a defence. He admits hanging the animal by putting a noose around its neck and then pulling the rope up over a tree branch until the animal strangled to death, a procedure which he concedes would have taken at least several seconds and acknowledged would have caused distress from his own experience ("everything goes black and you get scared").

[15] There was a longstanding presumption in common law, now described as a reasonable inference which may be drawn, that a person intends the natural consequences of his actions (see reference to the inference in *Seymour v. R.* (1996), 106 C.C.C. (3d) 520 (S.C.C.)).

[16] It was a natural consequence of the accused strangling the dog in the manner he did that it would cause unnecessary pain, suffering or injury. Choking it to death in this manner was cruel, inhumane and unnecessary, even were the dog becoming aggressive and euthanasia justified. But the evidence supports a more sinister motive on the part of the accused, that of punishing his girlfriend in a manner which he describes as "tough love".

[17] The definition of "wilfully" for the purposes of the relevant section of the *Criminal Code* is found in s. 429(1):

> Wilfully causing event to occur – Every one 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.

This expands on the usual meaning of "wilfully", which is to commit an act purposely, with evil intent.

[18] The circumstances here go further than recklessness. They support evil intention.

[19] The accused was represented by competent counsel when the plea was entered in his presence and counsel expressed to the Court that he had complied with s. 606(1.1). Ordinarily in applications for expungement, solicitor/client privilege is waived. As noted in *R. v. Moise*, 2011 SKQB 53, at paras. 4 and 5:

> In an application to expunge or withdraw a guilty plea previously entered, there are generally two sources of information that are used by the court in coming to its determination. The first is the court record which deals with the various dates and proceedings formally before the court. This record includes the entries by court officials or the presiding judge respecting the dates and activity that occurred, correspondence and applications by counsel on behalf of the Crown and the accused that have been filed with the court, and transcripts of the proceedings before the application for the expungement, where they exist.
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> The second type of evidence before the court usually consists of *viva voce* evidence presented to the court at an expungement hearing. This evidence would be of a more subjective nature and would include the testimony of the applicant's lawyer or lawyers who represented him at the time of the entry of the plea, or other relevant times to the application, evidence from third parties who may have participated with the applicant in the decision to enter the plea, and documentary evidence, most often letters between defence counsel and the Crown or letters between defence counsel and the applicant. The second type of evidence is obviously more subjective and must be analysed more closely on issues of accuracy and credibility.

[20] Another case in which counsel was not called is *R. v. Eastmond*, 2001 CarswellOnt 3911, [2001] O.J. No. 4353, 51 W.C.B. 462 (Ont. C.A.). It was held that it was appropriate for the trial judge to draw the inference that counsel, who it was agreed had acted properly and professionally in representing the appellant on the plea, had taken the necessary steps to ensure that the appellant understood the nature and the consequences of the plea (see para. 7).

[21] In the case at bar there was no suggestion that Mr. Little did not act properly and professionally, and, furthermore, he actually informed the Court that he had complied with s. 606 (1.1).

[22] Even in criminal law, in some cases the failure to call a witness entitles the Court to draw an adverse inference. This area was discussed in chapter 30 of McWilliams' *Canadian Criminal Evidence*, 4th Edition. Reference is made to *R. v. Rooke* (1988), 4 C.C.C. (3d) 484 (B.C.C.A.), which, after reviewing a number of Canadian cases, listed this proposition, among others:

> Where comment on the failure to call a witness is appropriate, the jury may infer that if the witness had been called his testimony would have been unfavourable. That is the only inference which can be drawn.
>
> And Esson J.A. noted:
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> Wigmore, in para. 290(5), *ibid*., suggests that it is "a reasonable rule" that an adverse inference can be drawn only in respect of an issue on which the evidentiary burden rests on the party. (pages 30-3, 30-4)

[23] The onus is on the applicant in an expungement hearing. I infer from his failure to call Mr. Little, or waive solicitor/client privilege so that the Crown could call Mr. Little, that Mr. Little's testimony would have been unfavourable to Mr. McLeod.

CONCLUSION

[24] Mr. McLeod has failed to establish on a balance of probabilities that his guilty plea was not voluntary, unequivocal, or informed. I am satisfied that he understood the nature of the charge, the elements of the offence, the legal effect of the plea and the consequences of the plea. Furthermore, his evidence disclosed no viable defence. The application for expungement is dismissed.

V. H. Meekma, J