Citation: R. v. Ragnanan, 2014 MBCA 1 Date: 20140106
Docket: AR 13-30-08036

IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***E. G. Zazelenchuk***
HER MAJESTY THE QUEEN	)	*for the Applicant*
	)	
(Respondent) Respondent	)	***S. R. Sass***
	)	*for the Respondent*
	)	
- and -	)	
	)	*Chambers motion heard:*
	)	***November 21, 2013***
PRESILLA RAGNANAN	)	
	)	*Decision pronounced:*
(Accused) (Appellant) Applicant	)	***January 6, 2014***

HAMILTON J.A.

[1] Pursuant to s. 839(1) of the *Criminal Code* (the *Code*), the

applicant seeks leave to appeal the dismissal of her summary conviction appeal of convictions under *The Animal Care Act*, C.C.S.M., c. A84 (the *Act*), as amended by *The Animal Care Amendment Act*, S.M., 2009, c. 4. The convictions relate to the care and housing of dogs on property that she owned with her co-accused, David John Nikkel (Nikkel).

[2] The applicant was tried jointly with Nikkel on eight counts of various breaches of the *Act* and the *Animal Care Regulation*, Man. Reg. 126/98 (the *Regulation*). The trial judge found them guilty of four counts and imposed fines on each count. They appealed their convictions and sentences to the Court of Queen's Bench. The Court of Queen's Bench judge, acting as a summary conviction appeal judge (the SCA judge), dismissed their appeals.

[3] The applicant filed an application for leave to appeal the dismissal of her summary conviction appeal (the SCA appeal), as did Nikkel.

[4] Nikkel passed away just prior to the date set for the hearing of the applications. As a result, Nikkel's application is moot and cannot proceed without permission of the court on motion by his personal representative or an interested party. See *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385.

[5] Accordingly, only the applicant's leave application proceeded.

[6] The threshold for granting leave to appeal a summary conviction appeal is a high one and will be granted only in exceptional circumstances. I have concluded that, in addition to other criteria not being met, there are no exceptional circumstances to warrant a second-level appeal.

Criteria for Leave to Appeal

[7] The criteria, and high threshold, for granting leave to appeal from a summary conviction appeal was explained in *R. v. Mitchell (R.)*, 2012 MBCA 59 (at paras. 6-8):

> An applicant seeking leave to appeal from a summary conviction appeal decision must satisfy the following criteria:
>
> 1. the ground of appeal must involve a question of law alone;
>
> 2. the ground of appeal must raise an arguable matter of substance; and
>
> 3. the arguable matter must be of sufficient importance to merit the attention of the full court.
>
> See *R. v. Jacob*, 2012 MBCA 19, *R. v. R.W.M.*, 2011 MBCA 74, 270 Man.R. (2d) 29, and *R. v. Dickson (W.A.)*, 2012 MBCA 2, 275 Man.R. (2d) 38.
>
> As for the third criterion, this court has adopted the reasoning of Doherty J.A. in *R. v. R. (R.)*, 2008 ONCA 497, 90 O.R. (3d) 641. In that decision, he explained that, because this is a second-level appeal, "[a]ccess to this court for a second appeal should be limited to those cases in which the applicant can demonstrate some exceptional circumstance justifying a further appeal" (at para. 27).
>
> In *Dickson*, Scott C.J.M. summarized the guiding principles for granting leave to appeal on a second-level appeal from a decision of an appeal judge on a summary conviction offence (at para. 14):
>
> …
> (1) Leave to appeal will ordinarily be granted only in exceptional circumstances, which will rarely occur. This is because an appeal to this court is the third level of court involved in the proceedings (unlike more serious indictable

> offences). In this regard, the role of a provincial appellate court is akin to that of the Supreme Court of Canada when dealing with an appeal from a conviction on an indictable offence. See **R. v. Suberu (M.)** (2007), 220 O.A.C. 322; 2007 ONCA 60; 85 O.R. (3d) 127, at para. 67, affd. [2009] 2 S.C.R. 460; 390 N.R. 303; 252 O.A.C. 340; 2009 SCC 33.
>
> (2) For leave to appeal to be granted, the decision should be one that has a significant impact beyond the facts of the particular case.
>
> (3) It follows then that not all errors in law will merit the granting of leave.
>
> (4) Critically, the question whether there are exceptional or compelling reasons for the granting of leave refers to the significance of the legal issue; the fact that the issue is unusual or rare is not, in and of itself, compelling. See **R. v. Paterson (D.)**, [2009] O.A.C. Uned. 215; 2009 ONCA 331 at para. 2.
>
> (5) Notwithstanding, if a clear error in law has been identified, leave may be granted even if the significance of the issue for the administration of justice is not high.

Background

[8] In June 2008, Steiner Wamnes (Wamnes), an animal protection officer appointed under the *Act*, received a tip that a lot of dogs were at a location in the R.M. of Ritchot and that a vehicle with the logo "labradoodles for sale" was parked there.

[9] In November 2008, Wamnes saw a truck with the logo "labradoodlesforsale.net" printed on the side of it. His search revealed that Nikkel was the registered owner of the truck and his address was for property in Ste. Agathe, in the R.M. of Ritchot, owned by the applicant and Nikkel (the property).

[10] On December 3, 2008, Wamnes visited the property to check out if there was a kennel being operated from that location and to drop off kennel licensing information. He found a large number of dogs being kept in two sheds on the property. Wamnes testified that he "simply forgot" to leave a notice of inspection contemplated by s. 8(9) of the *Act*, which, at the material time, read as follows:

> **Duty to notify absent occupant**
>
> **8(9)** An animal protection officer who enters an unoccupied place under this section shall leave in the place a notice indicating the animal protection officer's name, the time of entry and the reason for entry.

[11] Wamnes advised his superior, Dr. Terry Whiting (Whiting), of what he saw on the property. Whiting is a veterinarian and also an animal protection officer under the *Act*.

[12] Whiting prepared an information to obtain a search warrant, an affidavit in support and a search warrant, for the purpose of obtaining evidence related to the offence of operating a kennel without a license. The magistrate denied the application for the search warrant.

[13] On December 4, 2008, Whiting sought legal advice and met with a Crown attorney and a member of the Constitutional Law Branch.

[14] On December 5, 2008, Whiting visited the property. The trial judge accepted his evidence, including that he believed that the dogs were part of a commercial operation.

[15] Section 8(1) of the *Act* provided that:

> **Entry and inspection of places and vehicles**
>
> **8(1)** An animal protection officer may, at any reasonable time and where reasonably required to determine compliance with this Act,
>
> (a) enter and inspect any place that is not a dwelling place, or stop and inspect any vehicle, in which the animal protection officer believes on reasonable grounds there is a companion animal in distress or a commercial animal;
> ....

[16] Whiting seized the dogs and removed them from the property. The trial judge accepted Whiting's evidence that he found that the dogs were in distress.

[17] Section 9(1) of the *Act* provided that:

> **Care or seizure of animal in distress**
> **9(1)** An animal protection officer who discovers an animal that the animal protection officer believes on reasonable grounds to be in distress may provide any care the animal protection officer considers necessary to relieve the animal's distress, or may seize the animal.

[18] On December 7, 2008, the applicant was served with a notice of seizure and subsequently charged, along with Nikkel, with eight counts of breaching the *Act* and the *Regulation*.

[19] The trial judge convicted the applicant of the following four counts:

> Count 3 - confining animals in an enclosure (the west shed) without adequate ventilation (s. 2(1)(d)(iii) of the *Act*);
>
> Count 4 - confining animals in an enclosure (the east shed) without adequate ventilation (s. 2(1)(d)(iii) of the *Act*);
>
> Count 5 - confining animals where there is high risk of injury or distress due to inadequate lighting and unsanitary conditions contrary to s. 5(d)(iii) of the *Regulation* (s. 34(1) of the *Act*); and
>
> Count 6 - confining animals in a facility that contains items or debris that constitute a hazard likely to injure the animal contrary to s. 5(c)(i) of the *Regulation* (s. 34(1) of the *Act*).

[20] The trial judge sentenced the applicant to the following fines: count 3 - $2,000; count 4 - $2,000; count 5 - $1,000; and count 6 - $1,000.

The Trial and the Trial Judge's Reasons

[21] At the trial, the Crown called Whiting and Wamnes. Neither the applicant nor Nikkel testified.

[22] In reaching his decision, the trial judge had the benefit of written submissions from the Crown and defence counsel and he referred to them throughout his reasons.

[23] The applicant challenged Whiting's credibility. She argued that the seizure of the dogs was illegal because Whiting had already determined the dogs were likely in distress. She asserted that, in those circumstances, Whiting could only attend the property with a warrant, which he did not have. As a result, the applicant sought an exclusion of the evidence.

[24] The trial judge rejected the applicant's argument. He found Whiting's evidence to be credible, stating that it was "trustworthy, reliable and credible, and [I] reject the challenges to his credibility as a reliable witness raised by the defence." The trial judge concluded that Whiting had the authority to enter the property pursuant to s. 8(1) of the *Act* and to seize the dogs pursuant to s. 9(1) of the *Act*.

[25] In the course of his direct and cross-examinations, Whiting claimed solicitor and client privilege when asked about the legal advice that he received before his attendance at the property on December 5, 2008. The applicant argued that Whiting had waived solicitor and client privilege because he had answered a similar question during an examination for discovery in a related civil matter. The judge ruled that Whiting was entitled to claim solicitor and client privilege.

[26] The trial judge was satisfied beyond a reasonable doubt that the applicant, Ragnanan, charged in the counts because she was the registered owner of the property, she had identified herself to Whiting and accepted service of the summons, and that Whiting identified her in court.

[27] The trial judge addressed the defence submission that the Crown had not proved beyond a reasonable doubt that the applicant had "ownership, possession or control" of the dogs, as required by the *Act*. He considered the definition of possession, care or control in s. 4(3) of the *Code* and several pertinent cases, including *R. v. Brar (G.)*, 2008 MBQB 133, 234 Man.R. (2d) 1. He also noted that:

> As pointed out by the Crown in his submission, there was no evidence that the accused Ragnanan was not the owner of the property or that she did not have knowledge of the animals or that someone else was in charge or in possession in respect of these animals.

The SCA Judge's Reasons

[28] In his written reasons, the SCA judge set out the applicable standards of review: the test from *R. v. Yebes*, [1987] 2 S.C.R. 168, for unreasonable verdict; correctness for a question of law; and palpable and overriding error for findings of fact and inferences drawn from a proven fact.

[29] The SCA judge addressed each of the grounds of appeal and the written submissions of counsel. He concluded that the applicant had not demonstrated any error of law by the trial judge in ruling that the searches and seizures were authorized by law under ss. 8(1) and 9(1) of the *Act*. Important to the SCA judge was the fact that the searches did not involve a dwelling house. He showed deference, as he was required to do, to the trial judge's findings of credibility and facts.

[30] With respect to the challenge to the trial judge's finding that Whiting was credible, the SCA judge wrote that (at para. 54):

> It is obvious from his reasons that the PCJ was alive to the specific challenges raised by the appellants to Whiting's credibility and that he rejected those challenges. The appellants have failed to establish that the PCJ committed any overriding or palpable error in so doing. Moreover, the reasons provided by the PCJ are, in my view, sufficient to inform the parties of the basis of the verdict, to provide public accountability and to permit meaningful appeal.

[31] With respect to the Crown's proof of the element of possession, control or ownership by the applicant, the SCA judge wrote (at paras. 75-76):

> The PCJ inferred from [the applicant's] occupying the premises and the existence of a significant number of dogs housed in buildings in the immediate vicinity that she was aware of their presence and therefore exercised a degree of control over the animals.
>
> I find that [the] appellants have failed to demonstrate that the PCJ made an overriding and palpable error in drawing that inference from the facts before him.

[32] With respect to the applicant's argument that the trial judge committed an error of law by not requiring Whiting to testify as to what legal advice he received before attending to the property on December 5, 2008, the SCA judge reviewed the submissions of the parties at some length,

noted the trial judge's ruling and concluded as follows (at paras. 24-25):

> The PCJ concluded that a solicitor/client privilege was in effect and that Whiting had not waived it. While he observed that it might have been in Whiting's best interest to answer the question, he was not prepared to compel him to violate the solicitor/client privilege by doing so.
>
> I find that [the] appellants have failed to demonstrate any error in law on the part of the PCJ in reaching that decision.

Decision

[33] The applicant's notice of motion for leave to appeal cites the following proposed grounds of appeal:

> 1. That the Learned [SCA] Judge erred in law in concluding that once the witness Whiting had waived solicitor/client privilege in an earlier proceeding, he was allowed to claim it in a subsequent proceeding;
>
> 2. That the Learned [SCA] Judge erred in law in concluding that evidence obtained as the result of 2 illegal searches was admissible;
>
> 3. That the Learned [SCA] Judge erred in law in concluding that there was no reversible error in law when the Learned Trial Judge failed to give reasons as to why he found the witness Whiting credible in the face of substantial contradictions and uncertainties in the witness Whiting's evidence;
>
> 4. That the Learned [SCA] Judge erred in law in concluding that the identity of the [applicant] was proved beyond a reasonable doubt;
>
> 5. That the Learned [SCA] Judge erred in law in concluding that there was evidence of possession by the [applicant][; and]
>
> 6. That the Learned [SCA] Judge erred in law in concluding that the Crown had proved its case beyond a reasonable doubt.

[34] At the hearing before me, counsel for the applicant withdrew the sixth proposed ground of appeal.

[35] None of the remaining five proposed grounds of appeal meet the criteria for granting leave to appeal, for the reasons I explain below.

[36] In my view, there are only two proposed grounds of appeal that concern questions of law alone. These are the trial judge's rulings with respect to solicitor and client privilege and the legality of the searches. Therefore, leave on the other grounds of appeal must be denied for the reason that they do not raise a question of law alone.

Waiver of Solicitor and Client Privilege

[37] The SCA judge concluded that the trial judge had not erred in law when he permitted Whiting to claim solicitor and client privilege when testifying at the trial. I see no error in that conclusion. Most importantly, in my view, is the fact that Whiting had not specifically waived solicitor and client privilege during the examination for discovery in the other proceeding, or received any advice in that regard. The trial judge was aware of that. The essence of the trial judge's ruling was that there had been no implied waiver of the privilege. That is a finding of fact, which is entitled to deference and is not reviewable at this level of review. As a result, the trial judge's ruling, and, therefore, the SCA judge's conclusion, do not raise any arguable question of law.

Searches

[38] The trial judge accepted the evidence of Wamnes and Whiting. The SCA judge correctly stated that the trial judge was entitled to accept Whiting's evidence. Their evidence was the foundation for the trial judge's findings that they were entitled to enter and inspect the property pursuant to s. 8(1) of the *Act* and to seize the dogs pursuant to s. 9(1) of the *Act*. I see no arguable ground of appeal with respect to the validity of the searches, seizures and admission of evidence.

High Threshold Not Met

[39] Even if I had concluded that the applicant had raised an arguable question of law, she cannot overcome the high threshold that must be met for leave to appeal to be granted from a summary conviction appeal decision. Simply stated, the applicant has not demonstrated that any of the proposed grounds of appeal raise an exceptional issue to warrant a second level appeal.

Conclusion

[40] It is for these reasons that I dismiss the applicant's motion for leave to appeal.

_____ J.A.