

2014 BCSC 150
British Columbia Supreme Court

R. v. Cunningham

2014 CarswellBC 236, 2014 BCSC 150, [2014] B.C.W.L.D. 1371, [2014] B.C.J. No. 161, 111 W.C.B. (2d) 785

**Regina, Respondent and Clayton Frederick
Cunningham and David Elson Whiffin, Appellants**

Hinkson C.J.S.C.

Heard: January 15, 2014
Judgment: January 30, 2014
Docket: Victoria 148736-1

Proceedings: affirming *R. v. Cunningham* (2011), 2011 BCPC 358, 2011 CarswellBC 3347 (B.C. Prov. Ct.)

Counsel: D.J. McKay, for Appellants
P.K. Cheema, Q.C., for Crown

Subject: Criminal; Property

Headnote

Criminal law --- Offences — Cruelty to animals — Mistreatment of animals

Two accused appealed their convictions for causing unnecessary pain and suffering to horse — Trial judge entered judicial stay of second count against accused of wilful neglect or failure to provide suitable and adequate food and care for horse during same time period and acquitted accused of third count of killing horse — Horse in question in past had issue wherein it was losing weight, but vet had floated its teeth, apparently fixing issue — One accused was owner of farming property who acquired horse in question for his children to ride — Second accused was hired hand to first and whose duties included tending horses on farm, including horse in question — Special Provincial Constable visited farm in response to anonymous report about emaciated horse — Constable described horse's condition as worse she had seen with regards to body weight — Constable left order for compliance for farm owner's female friend to give to farm owner requiring that he provide necessary foot, nails or hoof care, necessary dental care, and necessary veterinary care for horse — Decision was taken to euthanize horse in what could only be said to be unconventional manner — Appeal dismissed — Accused did not contend that female friend began her care of horse until she moved onto farm, so whether she visited farm as frequently as trial judge found, prior to moving there, was irrelevant — It was open to trial judge to find that female friend's assumption of horse's care was because accused were not providing suitable and adequate food and care for horse, causing it pain and suffering — Accused submitted that causal connection broke when female friend assumed care of horse but trial judge did not base her conviction on accused's treatment or neglect of horse causing it pain and suffering after female friend assumed its care — Trial judge found that criminal liability arose from their failure to properly care for horse from late fall when horse experienced significant weight loss, causing what she concluded was unnecessary pain and suffering — Although trial judge erred in misapprehending evidence of horse's former owner's as to what they told farm owner about its diet, verdict was not based upon evidence of horse's former owners, but rather based upon evidence of female friend that she drew to attention of each of accused her concern that horse was starving, and need to alter his diet — Trial judge found that both accused ignored female friend's advice, and in so doing, caused horse unnecessary pain and suffering.

Table of Authorities

Cases considered by *Hinkson C.J.S.C.*:

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

R. v. M. (R.E.) (2008), [2008] 11 W.W.R. 383, 83 B.C.L.R. (4th) 44, [2008] 3 S.C.R. 3, 2008 CarswellBC 2037, 2008 CarswellBC 2038, 2008 SCC 51, 235 C.C.C. (3d) 290, 60 C.R. (6th) 1, 297 D.L.R. (4th) 577, 380 N.R. 47, 439 W.A.C. 40, 260 B.C.A.C. 40 (S.C.C.) — referred to

R. v. Pomeroy (2007), 41 M.V.R. (5th) 272, 2007 CarswellBC 176, 2007 BCSC 142 (B.C. S.C.) — considered

R. v. Vetrovec (1982), [1983] 1 W.W.R. 193, 27 C.R. (3d) 304, 136 D.L.R. (3d) 89, 41 N.R. 606, 1982 CarswellBC 663, [1982] 1 S.C.R. 811, (sub nom. *R. v. Gaja*) 67 C.C.C. (2d) 1, 1982 CarswellBC 682 (S.C.C.) — followed

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

s. 444 — referred to

s. 445.1(1)(a) [en. 2008, c. 12, s. 1] — referred to

s. 446(1)(b) — referred to

APPEAL by accused from judgment reported at, *R. v. Cunningham* (2011), 2011 BCPC 358, 2011 CarswellBC 3347 (B.C. Prov. Ct.), convicting accused of causing unnecessary pain and suffering to horse.

Hinkson C.J.S.C.:

1 On December 13, 2011, the appellants were summarily convicted in the Provincial Court of causing unnecessary pain and suffering to a horse between May 1, 2009 and September 15, 2009, contrary to s. 445.1(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46. The trial judge entered a judicial stay of a second count against the appellants of wilful neglect or failure to provide suitable and adequate food and care for the horse during the same time period, contrary to s. 446(1)(b) of the *Criminal Code*, and acquitted the appellants of a third count of killing the horse, contrary to s. 444 of the *Criminal Code*.

2 The appellants appeal their convictions.

Background

3 The appellant Mr. Whiffin is the owner of a farming property. Sometime in the fall of 2008, he determined that he would purchase a horse to be kept on his farm for his children to ride. In his search for a suitable horse, Mr. Whiffin asked his friend, Ms. Sherry Sabourin, to accompany him, as his knowledge of horses was limited whereas she had significant experience with them.

4 An Appaloosa horse named Jalupae was available. Prior to August 2008, Jalupae had been losing weight, so his owners arranged for him to be examined by a veterinarian who "floated" or fixed his teeth, which enabled him to chew his food sufficiently to allow him to swallow it. Thereafter the horse regained some weight. When Jalupae was first seen by Mr. Whiffin and Ms. Sabourin in late October of 2008, he was described by Ms. Sabourin as healthy looking, of good weight with a shiny coat. The horse's age was estimated by its owners to then have been approximately 25 years, and the owners felt he could no longer be used by their riding stable. They agreed to give Jalupae to Mr. Whiffin free of charge, and he was transported to Mr. Whiffin's farm, some two weeks after he was first seen by Mr. Whiffin and Ms. Sabourin.

5 The trial judge found that Ms. Sabourin visited the farm about two or three days later, and found the appearance and weight of the horse the same as when first seen by her.

6 The appellant, Mr. Cunningham, worked for Mr. Whiffin on his farm at the relevant time. His duties included the care of the horses on the farm, including Jalupae.

7 Jalupae did not fare well at Mr. Whiffin's farm. On July 30, 2009, a Special Provincial Constable visited the Whiffin farm in response to an anonymous report about an emaciated horse. As stated by the trial judge, in her evidence the Constable described Jalupae's condition "as being probably the worst she has ever seen in terms of body weight. The horse was very skinny with its ribs and hips sticking out."

8 The Constable left an order for compliance for Ms. Sabourin to give to Mr. Whiffin requiring that he provide necessary foot, nails or hoof care, necessary dental care, and necessary veterinary care for Jalupae.

9 By September of 2009, a decision was taken to euthanize the horse. The horse was killed on September 15, 2009 in what can only be said to be an unconventional manner.

Grounds of Appeal

10 I would describe the grounds of appeal raised by the appellants as follows:

- a) The trial judge misapprehended the evidence of Ms. Sabourin;
- b) The trial judge erred in failing to find that Ms. Sabourin was an unindicted co-accused and by failing to approach her evidence with the caution required pursuant to the decision in *R. v. Vetrovec*, [1982] 1 S.C.R. 811 (S.C.C.);
- c) The trial judge erred by not finding that Ms. Sabourin's assumption of Jalupae's care relieved the appellants of any responsibility for the horse; and
- d) The trial judge misapprehended the factual matrix as it applied to the criminal liability of the appellants.

Discussion

11 As Mr. Justice Romilly observed in *R. v. Pomeroy*, 2007 BCSC 142 (B.C. S.C.) at para. 26:

The function of the summary conviction judge is to determine whether the trial judge could reasonably have reached the conclusion that the appellant was guilty beyond a reasonable doubt: *R. v. W.(R.)*, [1992] 2 S.C.R. 122; *R. v. Grosse* (1996), 29 O.R. (3d) 785 (Ont. C.A.).

a) The evidence of Ms. Sabourin

12 The trial judge found that between the time that Mr. Whiffin acquired Jalupae and the time that Ms. Sabourin moved onto his farm, Ms. Sabourin visited the farm every couple of weeks. That was not what Ms. Sabourin said in her evidence. Ms. Sabourin's evidence was that after her initial visit to Mr. Whiffin's farm, shortly after he acquired Jalupae, the next time that she saw the horse was the week before she moved onto the Whiffin farm on June 7, 2009.

13 I am unable to see that this error on the part of the trial judge worked to the appellants' disadvantage. The appellants do not contend before me that Ms. Sabourin began her care of Jalupae until she moved onto the Whiffin farm, so whether she visited the farm as frequently as the trial judge found, prior to moving there, is irrelevant.

14 Insofar as the balance of Ms. Sabourin's evidence is concerned, it was open to the trial judge to accept all, some, or none of that evidence. The trial judge recognized that Ms. Sabourin's memory was poor following a motor vehicle accident in early June of 2009, but she based her verdict upon those parts of Ms. Sabourin's evidence that she accepted. In so doing,

she was not required to set out every finding or conclusion in the process of arriving at her verdict: *R. v. M. (R.E.)*, 2008 SCC 51 (S.C.C.) at paras. 17-18.

15 The appellants contend that Ms. Sabourin assumed the care of the horse in June of 2009. While at one point in her evidence Ms. Sabourin stated that she took over Jalupae's care shortly after she moved onto the farm, the balance of her evidence was inconsistent with that assertion. The trial judge found that while Ms. Sabourin encouraged Mr. Cunningham to allow Jalupae to graze on grass, and helped the horse to do so as early as mid-June of 2009, she did not assume Jalupae's care until August of that year. In my opinion, that conclusion was open to the trial judge and is consistent with Ms. Sabourin's evidence that she spoke to each of the appellants on more than one occasion in June and July of 2009 about her concern that Jalupae was starving, and the need to alter his diet. It was open to the trial judge to find that Ms. Sabourin's assumption of the horse's care in August was because the appellants were not providing suitable and adequate food and care for the horse, causing it pain and suffering.

16 The finding by the trial judge to that effect is entitled to deference, absent a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.). No such error has been demonstrated.

17 I would not, therefore, accede to this ground of appeal.

b) Ms. Sabourin as an Unindicted Co-accused

18 This argument was not made to the trial judge, and the appellants concede that it is thus not open to them to advance the argument before me. I therefore reject this ground of appeal.

c) Ms. Sabourin's Assumption of Jalupae's Care

19 Mr. Whiffin concedes that with ownership of an animal comes control of that animal, and if there is any mistreatment or neglect of that animal such that harm comes to it, criminal liability will attach to the owner. Similar liability will attach to an individual who accepts responsibility for the care of an animal if that animal is mistreated or neglected such that harm comes to it.

20 The appellants contend that Ms. Sabourin's assumption of the care of Jalupae in August of 2009 broke the causative link necessary for any criminal liability on their part.

21 At paras. 17, and 19-23 of her reasons for judgment, the trial judge found:

[17] She described Jalupae in that first week of June as being nearly on his death bed, emaciated and that his bones were sticking out. She estimated that he had lost 300 to 400 pounds. The weight loss was easy to see as was the fact that Jalupae was going blind in one eye - it was turning grey. Although no pictures were taken of Jalupae that day, pictures were taken on August 10, 2009. Ms. Sabourin testified that Jalupae looked worse in June than he did in the photos from August [photos 4-7 of Exhibit 1]. She stated that by August Jalupae had filled out somewhat and his coat looked better.

...

[19] In response to seeing Jalupae in this condition Ms. Sabourin spoke to Mr. Cunningham. It was not clear from her testimony whether she saw Jalupae and spoke to Mr. Cunningham on June 7th or earlier that week when she attended the farm to help her roommate move in, but it was sometime during the first week of June 2009. When Ms. [Sabourin] noted Jalupae's condition Mr. Cunningham was on the property - Mr. Whiffin was not. When she brought Jalupae's weight loss to the attention of Mr. Cunningham he responded that all three horses were eating the same thing - hay. Ms. Sabourin was concerned that there might be something wrong with Jalupae's teeth and that he wasn't able to eat the hay. She told Mr. Cunningham that Jalupae needed to be out in the pasture eating grass right away as he was starving. Mr. Cunningham did not seem to be concerned because the horses were all being fed the same thing, the other two were fine, and there was no hay left in the stall.

[20] Ms. Sabourin could not recall if she discussed the possibility of Jalupae balling his hay with Mr. Cunningham that day but she did recall noticing that all three horses shared the same feeding area. If Jalupae was balling his food and it was falling out of his mouth, it was possible the other horses were then eating it, leaving no trace of the "balls".

[21] In early June 2009 Ms. Sabourin worked as an assistant at a veterinary clinic. The day after she first saw Jalupae in this condition she asked the veterinarian at her work about the appropriate food for him. The veterinarian recommended a diet of beet cubes and crushed barley soaked for several hours before feeding with added oil. Ms. Sabourin told both Mr. Cunningham and Mr. Whiffin about the need for the special diet and that Jalupae might need to have his teeth floated. Mr. Whiffin said that he did not wish to spend any money on Jalupae.

[22] After the car accident on June 8, 2009 Ms. Sabourin spent a week in the hospital and was then bedridden at her residence on the Whiffin farm for a further two to four days. When she was mobile she noted that Jalupae was in the same condition as he had been in the beginning of June. She watched Jalupae eat his hay and could see that he was in fact balling it up and wasn't swallowing it. She told this to Mr. Cunningham who responded that it was ok because Jalupae was able to suck the nutrients out of the hay. Ms. Sabourin told him that this wasn't ok and that this was why he had lost weight.

[23] When Ms. Sabourin moved to the property she saw Mr. Whiffin there about once a week. Starting in July of 2009 Mr. Whiffin was living on a boat at the property and she saw him on the farm daily. Ms. Sabourin testified that she told Mr. Whiffin 3 or 4 times that Jalupae needed the special food. He said "ok" but he never bought the food.

22 The trial judge found that Ms. Sabourin took over Jalupae's care in August 2009, until she moved from the farm at the end of that month. She also found that Mr. Whiffin was the owner of Jalupae and that Mr. Cunningham was a person having custody or control of Jalupae, at least from May 1st to the end of July 2009.

23 Even if the appellants' position were correct in law, upon which it is unnecessary for me to make any finding, the trial judge did not base her conviction on the appellants' treatment or neglect of the horse causing it pain and suffering after Ms. Sabourin assumed its care. To the contrary, she found that their criminal liability arose from their failure to properly care for the horse from the late fall of 2008 when the horse experienced a significant weight loss, causing what she concluded was unnecessary pain and suffering to Jalupae.

24 I would not, therefore, accede to this ground of appeal.

d) Misapprehension of the Factual Matrix

25 At paras. 68-72 and 74 of her judgment, the trial judge found that:

[68] The timing of events is important. Ms. Sabourin testified that her memory for some details and dates was affected by the motor vehicle accident on June 8, 2009. For this reason I assessed her evidence with caution particularly where it was contradicted by other evidence. Specifically, I do not accept the evidence of Ms. Sabourin that the Mercers [the then owners] told her Jalupae did not require any special food. Mrs. Mercer was very specific that she advised Mr. Whiffin that Jalupae did need special feed including pellets and that a bag of this feed was delivered along with the horse. I accept the evidence of Mrs. Mercer on this point. Mrs. Mercer and Ms. Sabourin both stated that Jalupae was in good condition for an older horse on the date of the visit to the Mercer farm and I find as a fact that this was the case.

[69] There is no doubt that in photos taken on August 10, 2009 by Cst. Bailey, Jalupae is significantly thinner than in the photos taken in 2005 and 2006, and [in] the photos taken by [Mr. Whiffin's step-daughter] in April of 2009. I accept the evidence of Mrs. Mercer and Ms. Sabourin that those photos from 2005 or 2006 reflect the condition of Jalupae in the fall of 2008. I therefore conclude that Jalupae lost a significant amount of weight between the fall of 2008 and the summer of 2009. I also accept the evidence of Ms. Sabourin that Jalupae was at least as thin as he appeared on August 10, 2009, if not thinner, when she moved onto the farm the first week of June 2009. I am unable to determine exactly how much

weight Jalupae lost or exactly when the weight loss occurred other than to say that it was between the time that Jalupae came to the Whiffin farm in the late fall of 2008 and June of 2009.

[70] ... Mr. Cunningham was the one feeding Jalupae. The only reasonable conclusion from the evidence that I do accept is that Mr. Cunningham was living on the farm and he was in charge of caring for all three horses, including Jalupae.

[71] It was evident to anyone who spent a few moments watching Jalupae eat that he was not able to chew and swallow hay or long grass. This was noted by Ms. Sabourin, [two Special Provincial Constables] and [a veterinarian who saw Jalupae on August 10, 2009]. I accept that this was in fact the case and that it was the result of Jalupae's teeth being too worn down to properly chew the food. Ms. Sabourin first noticed this while recovering from her car accident in June of 2009. I also accept her evidence that she told Mr. Cunningham about this and that she told Mr. Whiffin that Jalupae needed a special diet. Her evidence that Mr. Whiffin moved onto a boat at the farm in the beginning of July 2009 was not contradicted. Nor was there any evidence to contradict that Ms. Sabourin told Mr. Whiffin 3 or 4 times between the beginning of June and the end of July that Jalupae couldn't eat properly and needed a special diet.

[72] I find as a fact that Mr. Cunningham was made aware of the problem Jalupae had eating hay by mid-June 2009 at the latest. I further find as a fact that Mr. Whiffin was also made aware of the problem Jalupae had eating hay by the beginning of July 2009 at the latest.

...

[74] Even if Jalupae had another medical issue that caused him to lose weight, I am satisfied beyond a reasonable doubt that both Mr. Whiffin and Mr. Cunningham failed to provide suitable and adequate food to Jalupae after they had been told that Jalupae couldn't eat the food he was getting. This knowledge satisfies the intent requirement for section 446(1) (b) in that the Crown has proven beyond a reasonable doubt that both wilfully neglected to get Jalupae the proper food. They knew Jalupae couldn't eat and did nothing about it.

26 At paras. 80-81 the trial judge found:

[80] The evidence is overwhelming that Jalupae was not able to eat hay or long grass and that he suffered a dramatic weight loss over a period of a few months. [The veterinarian] testified that Jalupae was hungry but was not able to process his food. It was his opinion that this lack of food caused suffering to Jalupae. It resulted in loss of fat and muscle tissue and would have affected his organs as well.

[81] Mr. Cunningham and Mr. Whiffin argued that because Jalupae was old, he may have had some other ailment that caused him to lose weight. This is irrelevant. The fact is that he was starving and I am satisfied beyond a reasonable doubt that the failure to provide adequate food and care for Jalupae caused unnecessary suffering to him. Both accused were aware of the problem and at a minimum they were reckless as to whether or not Jalupae suffered.

27 The trial judge found that the owners who gave the horse to Mr. Whiffin told him that Jalupae needed geriatric feeding consisting of fine dry hay and pellets. This is somewhat of an overstatement of the owner's evidence. What the female owner said in this regard was:

Q Okay. What — as best you can remember, what did you tell Whiffin about the care of that horse?

A That being an older horse, he may need geriatric feed and that he was currently fed fine, dry hay and 14 percent complete pellets.

Q And did you explain to him what the pellets were?

A What the pellets —

Q What —

A Sorry. I didn't hear the last word.

Q What the pellets were, what they were for?

A Well, the — yes. By saying that they — he — hay needs to go through the horse as roughage, that he's not getting a lot out of that but he needs the pellets as the main feed and he was getting about two pounds in the morning, two pounds in the afternoon.

28 I am unable to find that this error affected the verdict in this case. As I have set out above, the verdict was not based upon the evidence of Jalupae's former owners, but rather based upon the evidence of Ms. Sabourin that she drew to the attention of each of the appellants her concern that the horse was starving, and the need to alter his diet. The trial judge found that both appellants ignored Ms. Sabourin's advice, and in so doing, caused the horse unnecessary pain and suffering.

29 I am thus unable to accede to this ground of appeal either.

Conclusion

30 I dismiss the appeal of each appellant.

Appeal dismissed.

History (2)

Direct History (2)

H 1. [R. v. Cunningham](#) ↗

2011 BCPC 358 , B.C. Prov. Ct. , Dec. 13, 2011

Affirmed by

H 2. [R. v. Cunningham](#) ↗

2014 BCSC 150 , B.C. S.C. , Jan. 30, 2014