IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Robinson,*
2014 BCSC 1463

Date: 20140801
Docket: 93023
Registry: Kamloops

Between:

Her Majesty the Queen

Respondent

And:

Ruth Patricia Robinson

Appellant

Before: The Honourable Madam Justice Donegan

On appeal from: A decision of the Provincial Court of British Columbia, dated July 29, 2013 (unreported), Kamloops Registry 93023

Reasons for Judgment

Counsel for the Appellant:	J.J. Blazina
Counsel for the Respondent:	I. Currie
Place and Date of Hearing:	Kamloops, B.C. May 1, 2014
Place and Date of Judgment:	Kamloops, B.C. August 1, 2014

Contents

INTRODUCTION

[1] On June 5, 2011, rancher Ruth Patricia Robinson (the "Appellant") shot and killed her neighbour's dog. She was subsequently charged with killing that dog, contrary to s. 445(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*].

[2] At trial, the Appellant claimed the dog attacked her cattle and relied upon s. 11.1(2) of the *Livestock Act*, R.S.B.C. 1996, c. 270 [*LA*], and s. 39 of the *Code* as legal justifications for her actions. A provincial court judge rejected those defences and convicted the Appellant. The Appellant appeals her conviction on a number of grounds, namely:

1. the learned trial judge erred in law by misapprehending the evidence at trial;

2. the learned trial judge erred in law by misdirecting himself on whether the Appellant acted without legal justification or colour of right; and

3. the verdict was unreasonable and not supported by the evidence.

[3] For the reasons that follow, I conclude that the conviction must be set aside and a new trial ordered.

EVIDENCE AT TRIAL

[4] Although not lengthy, this trial was somewhat protracted. It commenced on March 19, 2013, continued on May 30, 2013, and was followed by written submissions filed on June 13, 2013. Reasons for judgment were handed down on July 29, 2013.

[5] The Crown called two witnesses: Constable Matthew Hartwig, the investigating officer, and Wayne Beck, the owner of the dog. Through the officer, the Crown tendered two statements made by the Appellant. By consent, the statements were admitted for the truth of their contents. The first statement, a verbal one, was made to Constable Hartwig on the day of the shooting. The second statement, a written one, was provided to Constable Hartwig approximately four months later.

[6] The defence called two witnesses: the Appellant and David Broswick, a boater who saw part of the incident.

Constable Hartwig and the Appellant's Two Statements

[7] Constable Hartwig was the only witness to testify on the first day of trial. On June 5, 2011, he attended at the Appellant's home shortly after the shooting occurred. The Appellant told him that she had been down at the lake on her property and heard her neighbour's dog barking. She saw the dog then chase her cattle into a fenced pen on her property. She retrieved a .22 caliber rifle and shot the dog. The Appellant also said that the dog's owner fired a shot from his property and had threatened to shoot her dogs.

[8] The Appellant attended the Clinton RCMP detachment on October 17, 2011 to provide her fingerprints. While there, she gave Constable Hartwig a typed statement detailing her recollections of the events of June 5, 2011. This statement was marked as Exhibit 2 at trial, and I shall refer to it as such.

[9] Exhibit 2 reads:

> As remembered by Ruth Robinson October 12, 2011 - The events of June 5, 2011
>
> I had gone to the field at the end of the lake with Jim in the morning as we were getting ready to start seeding grass that day. I wasn't gone long then came home to cut the grass in the yard. I had my two border collie dogs with me. An animal (possibly an otter) had been dragging squaw fish out of the lake and up the bank onto the edge of our lawn. I had a plastic bag and was just finished picking up about 10 fish and was walking back towards our house. I heard Wayne Beck's dog barking and looked over towards his place (South). I saw our cattle (34 breeding heifers, 1 cow with a calf, 1 pregnant heifer heavy in calf, and a bull) in the pasture moving along the fence beside the crown access heading towards the lake (East to West). I saw Wayne Beck and his dog inside his property along his fence beside the crown access. The dog was barking and Wayne was encouraging it to bark saying "that's it" "good dog". …The cattle were moving inside of our fence across the crown access from where Wayne and his dog were standing. Then I saw Wayne's dog running across the crown access and under the fence into our pasture in front of the cattle. The dog viciously ran at them, the cattle turned and took off running with the dog chasing after them (East and then North). I heard Wayne repeatedly calling the dog but the dog ignored him each time and kept charging at the cattle. The cattle dangerously stampeded across the pasture and crowded through a 14" gate into a second much smaller pen, across the pen and were trapped against the fence and a gate on the North side. The massive 200 lb dog was attacking by jumping and biting at them and the cattle were desperately trying to get away. They were running into and over each other and smashing into the fence and gate. They were at risk of injury, broken necks or legs, which would have caused them to be destroyed.
>
> One of my dogs saw this happening and he started barking, this distracted Wayne's dog from its rampage of attacking the cattle. The dog looked over at me and my dogs and refocused, he started to come towards us from about 30 yards East of where I was standing. Wayne's dog was a huge mastiff type animal, and he was out of control, he would not respond to Wayne calling him back. I have been in a previous incident where my dog was attacked by another dog. Wayne's dog had refocused on us and I was terrified. Wayne's dog had just viciously attacked 38 cattle that were 5 to 6 times bigger than he was. I was afraid that Wayne's dog, who was three to four times larger than my 50 lb Border Collies was now going to attack my dogs or myself and I would not be able to stop him. I yelled at my dogs to "come" and took them over to the quad parked in front of the shop (25 yards North). As I hurried towards the shop I anticipated that if Wayne's dog attacked us from behind at any second I would feel the dogs teeth sink into the back of my leg or that I would see one or both of my dogs hauled down and killed while I was defenseless to help them. When I got to the shop I told my dogs to get on the quad and "stay!!".
>
> I ran into the shop and grabbed a .22 and a box of shells off of the bench then back to the quad with the rifle so that I could protect my dogs. At this

> point I didn't know where Wayne's dog was. I laid the gun on the rack at the back of the quad, opened the box of shells and shook some into my hand. Six shells came out, I put three into the tube magazine on the gun and the other three shells into my pocket. I told my dogs again to “stay!!” on the quad and hurried to the high point of land by our house looking for Wayne's dog. I went around to the front of the house to see if the dog was going home. I heard Wayne yell at me “he’s right behind you”, as I knew Wayne could not control his dog, I perceived that Wayne had warned me that the dog was a threat. I turned around and saw that the dog had flanked me and was standing about 25 yards away (North), he had paused to sniff where some fish had been laying. I heard Wayne yell again “if you shoot that dog I'll shoot both of yours”. I was worried for my safety, I fired two quick shots but don't think that I hit the dog. I am usually a good shot but on this occasion I was so stressed that I missed. Then I was shocked and horrified when I heard a loud gun shot behind me. Wayne's dog still made no attempt to leave my property, he was positioned to easily regain his attack on the cattle in the pasture, attack my dogs, or attack me. I fired a third time, the dog yelped and started to run towards me, it ran by me along the side of our house and laid down a short distance behind the propane tank at the back of our house (South and East about 20 yards). I reloaded the gun where I was standing and walked towards where the dog lay. I fired three more times from about 10 yards and was sure that the dog was dead and not suffering. I knew that Wayne had threatened to shoot my dogs and I had heard a loud gun shot. I put the .22 in the house and rushed to check that my dogs were still alive and that the cattle were safe. I was terribly upset and emotional. I waited about 10 minutes before I called the Clinton RCMP.
>
> As a result of the threat to my livestock, my dogs and myself I made the decision to shoot Wayne's dog.
>
> (distances have been paced out and are not exact)
>
> *R. Robinson*
> *Oct 17, 2011*

Mr. Beck - the Dog’s Owner

[10] The trial resumed over two months later. The Crown called its second and final witness, the Appellant’s neighbour, Mr. Beck. He and the Appellant had been neighbours for approximately seven years at the time of the shooting. Their properties are adjacent to one another, separated by a fenced Crown right of way, providing access to the lake.

[11] Mr. Beck described his dog, Bud, as a “huge, massive” dog. He sought such a sizeable dog so that it could defend itself from predators in the area. He initially estimated his dog’s weight at 115 to 120 pounds, but later agreed that he once

estimated it to be 150 to 160 pounds. Mr. Beck also described his dog as a gentle family dog, but one that did not always obey his commands.

[12] On the afternoon of June 5, 2011, Mr. Beck testified that he and his dog were on his property down by the lake. The dog was off-leash and was a "little rambunctious", so Mr. Beck kept an eye on him. The dog suddenly "took off", running up the length of Mr. Beck's property. He lost sight of him after approximately 20 or 30 feet. He started to search and called out his name, but received no response. He walked up to the top of his property and looked across onto the Appellant's property, but he still could not find his dog. He walked back down to the lake and continued to search. At this point, Mr. Beck saw movement up towards the Appellant's house. He saw the Appellant carrying a rifle.

[13] Believing there was a chance his dog was about to be killed, Mr. Beck went into his cabin to retrieve his rifle. Looking through its scope, Mr. Beck saw his dog "coming up the hill at the front" on the Appellant's property. He estimated that the dog was approximately 150 to 200 feet from the Appellant's cattle when he saw the Appellant raise her rifle. Mr. Beck testified that he discharged his rifle up into the air. He did this for two reasons: first, to warn the Appellant not to shoot his dog and, second, to get rid of the pressure that was building inside of him. He denied shooting in the Appellant's direction. He initially denied saying any words to the Appellant, but in cross-examination admitted to yelling something like "If you hurt my dog, I'll hurt yours". He then saw the Appellant shoot his dog.

[14] Mr. Beck did not see any of the interactions between his dog and the Appellant's cattle.

Mr. Broswick

[15] Mr. Broswick was the first defence witness to testify. At the time of the incident, he did not know the Appellant or Mr. Beck. He was fishing on Sharpe Lake that afternoon, approximately 200 metres from shore in front of the two properties. He observed part of the incident through his binoculars.

[16] Mr. Broswick saw the Appellant doing yard work and then heard a dog barking. He saw the dog go through Mr. Beck's fence onto the Appellant's property. At that time, approximately 40 cattle were walking along the Appellant's fence line down toward the lake. He saw the dog, at a "dead run", chase the cattle back up the fence line and toward the branding shed on the Appellant's property. During this time, he heard Mr. Beck "hollering" at his dog to come back, but the dog was not responding. Due to the lay of the land, the cattle and the dog then travelled out of Mr. Broswick's line of sight.

[17] Mr. Broswick next saw the dog on the other side of the Appellant's house. He heard Mr. Beck say "If you shoot my dog, I'll shoot both of yours". He saw the Appellant with a rifle in her hand. He glanced back and saw Mr. Beck leaning across the top of a fence railing on the right of way, holding a rifle as well. Mr. Broswick saw Mr. Beck shoot the rifle directly in line with the Appellant's property, not in the air. He then saw the Appellant shoot the dog in what he described as a "safe manner". The dog was shot at a time when it was "wandering" and headed in the direction of the bull paddock, where the bulls were heard to be making noise. Mr. Broswick estimated the duration of the entire incident at less than a minute.

The Appellant

[18] The Appellant chose to testify. She has been a rancher for most of her adult life, owning and operating Sharpe Lake Ranch for approximately ten years at the time of the incident. She owned approximately 400 head of cattle. Each animal was worth approximately $1,100.00. The Appellant explained that in her industry, protection of one's livestock is critical. In her experience, potential harm to the livestock comes from three main sources - disease, predation and accident. When asked, in general terms, what sort of damage a dog chasing cattle could occasion, she testified as follows:

> A Cattle, when they are chased by dogs that are out of control, become very stressed. They become panicked and their normal activities are drastically changed by the stress involved in the actual pursuit. Cattle under stress can, you know, suffer from dehydration, from reduced

> milk production, from, you know, maternal dysfunctions with their calves, all kinds of things.
>
> Q So is there any - - in addition to the -- the effects of stress on cattle, is there any physical harm that can come to cattle?
>
> A For sure. I mean, there's the injuries that can be caused by the dog itself predating the cattle, attacking it and biting. There's the danger of the cattle hurting each other from the stress related trying to escape. There's the danger of, you know, smashing into fences and anything else in the way.
>
> Q So if a cow smashed into a fence, what could happen to it?
>
> A Broken legs, broken neck, um --
>
> Q And the effect of a broken leg on a cow, what -- what effect does that have on a cow?
>
> A Well, cattle have to be destroyed when their legs are broken. Veterinarian assistance is not economically practical.

[19] The day of the shooting was not the first time the Appellant and Mr. Beck had experienced difficulties with one another. The Appellant recalled that in one of their first conversations years before, she told Mr. Beck that his dog (a previous dog) could not run at large on his property. Following this, she observed Mr. Beck to continually harass her livestock using his dog and a club or a shovel. She recalled a prior occasion when Mr. Beck chased one of her bulls with a shovel while his dog (again, a previous dog) was loose. She yelled at him to stop, but Mr. Beck ignored her. On that occasion, the Appellant told Mr. Beck that if she ever saw his dog chasing her livestock again, she would shoot it. The Appellant also testified that she had seen Mr. Beck encouraging his former dog to chase her livestock on more than one occasion. She had asked him repeatedly to stop this behaviour. Over the years, numerous calls were made to the RCMP.

[20] With respect to the dog she encountered on June 5, 2011, the Appellant testified that she believed it had only lived with Mr. Beck for approximately one month. On the day the dog arrived, she saw it run away from Mr. Beck. However, she had never seen the dog chase her cattle before June 5, 2011.

[21] The Appellant testified that earlier on the day in question, she turned out most of her cattle onto the range with their calves. She held back approximately 40 in the

fenced horse pasture area near her home. While she was doing yard work, she heard Mr. Beck's dog barking. Her 40 head of cattle were walking along her fence line, down toward the lake at the time. She saw Mr. Beck with his dog, unleashed, on Mr. Beck's property. The dog was barking at the cattle. She testified that she could hear Mr. Beck saying "Yeah, that's it, good dog". To her mind, these words were spoken to encourage the dog to continue to bark at the cattle.

[22] The Appellant then saw the dog cross the right of way between their properties and enter her property. The cattle stopped. The dog immediately "jumped - started running at them". The cattle reacted by turning around and "stampeding" off. The cattle travelled back up the fence line and across the pasture, eventually running through a small, 14-foot wide gate into a pen. The dog followed them. The Appellant saw the cattle pinned up against the fence. They were "rattling the fences pretty good and the dog was amongst them". The cattle were trying to get away. One of her dogs then barked, prompting Mr. Beck's dog to stop. It turned toward the Appellant. The Appellant then "hustled" to her shop to retrieve her rifle and get her two dogs to safety.

[23] The Appellant then loaded her rifle and looked for Mr. Beck's dog. While she was looking, she heard Mr. Beck yell "He's right behind you". Believing he was warning her about the dog, she turned around.

[24] The Appellant stood approximately 75 feet away from the dog. It was the first time she had seen him stop moving since she had first spotted him. Feeling it was a "fairly safe shot", she fired twice. She missed. The dog did not move. The Appellant then heard a big "boom" behind her, which was the shot fired by Mr. Beck. The Appellant then moved closer to the dog and fired again, this time striking him. At this point, the dog was approximately 150 to 200 feet away from the cattle. After the dog was shot, it walked a distance and laid down. The Appellant shot it again, to end its suffering.

[25] The Appellant estimated that the time from when the chase began until she shot the dog was approximately a minute to a minute and a half. At one point during

this short timeframe, she recalled Mr. Beck yelling “If you shoot my dog, I’ll shoot both of yours”.

[26] The Appellant testified that she shot the dog because she did not know what it would do next. When asked what she meant by this, the Appellant testified:

> A I thought he could easily go back to the cattle. There was bulls further down the ridge. There was my dogs, there was me. And the dog was on the loose and he was out of control.
>
> Q And what did you think that dog could do to the bulls, the cattle or your dogs?
>
> A All of the things that I described earlier in predation. Broken legs, broken necks, injuries from bites, injuries from fences and tearing skin and flesh. I mean, there’s so many things that can go sideways.

[27] In cross-examination, the Appellant agreed that the only time the dog was barking was when it was on Mr. Beck’s property. It was not barking while it chased the cattle.

POSITIONS OF THE PARTIES AT TRIAL

[28] Counsels’ submissions at trial focussed exclusively on two statutory defences: s. 11.1(2) of the *LA* and s. 39 of the *Code*. Section 39 was found not to apply and is no longer pursued. Counsel agreed that the burden rests with the Crown to prove that those defences do not apply. No credibility issues were raised or argued. Crown counsel indicated that she did not take any issue with the “version of events put forth by Mrs. Robinson”.

[29] Section 11.1(2) of the *LA* reads:

> (2) A person may kill a dog if the person finds the dog
>
> (a) running at large, and
>
> (b) attacking or viciously pursuing livestock.

[30] Counsel for the Appellant at trial approached his submissions from the position that it was undisputed that the dog was “running at large” and was “attacking or viciously pursuing livestock”. He focused his submissions nearly

entirely on the proper interpretation and application of the word “finds”, as it is used in that subsection.

[31] Crown counsel agreed that the dog had been “running at large”, but did take issue with the assertion that it was “attacking or viciously pursuing livestock”. In this regard, the Crown briefly submitted at pages 58 and 59 of the transcript:

> Now, with respect to this, I take no issue that the animal was running at large, that seems clear on the facts. However, in my submission there isn't -- there isn't evidence before the court that the animal was attacking or viciously pursuing livestock. There's clearly evidence that Bud was pursuing the cows, he was chasing them, but Mrs. Robinson testified that there was -- he was not barking, he wasn't growling. There's no evidence before the court that he was biting them or striking at them, just simply that he was chasing them and running around in between them. Now, might that cause them damage? Absolutely. But that's not what the *Livestock Act* refers to. The *Livestock Act* refers to attacking or viciously pursuing. So I'd ask Your Honour to consider whether that definition has been met in this case and in my submission, it hasn't. [Emphasis added.]

[32] As with defence submissions, the balance of Crown counsel’s submissions focused on the interpretation and application of the word “finds”. However, in her summary, Crown counsel again submitted at page 68 of the transcript:

> …there's no evidence before this court that the dog was attacking or viciously pursuing the livestock. I'd certainly agree that it was chasing the livestock or even pursuing it, but there's no evidence of attacking by way of biting or snapping even. [Emphasis added]

[33] Both counsel relied upon the Appellant’s *viva voce* evidence in making their submissions. Neither counsel referred to the Appellant’s oral statement given to Constable Hartwig on June 5, 2011, or to Exhibit 2, both of which had been clearly tendered for their truth.

[34] At the conclusion of submissions, the learned trial judge invited further written submissions regarding the applicability of s. 39 of the *Code*. I have obtained those written submissions. Crown counsel focussed her submissions on the applicability of s. 39 and also raised a new potential justification - the common law doctrine of defence of property. Defence counsel took the opportunity to make all of his

submissions regarding s. 11.1(2) of the *LA* and s. 39 of the *Code* again, but did not discuss the common law doctrine of defence of property.

THE DECISION

[35] Although the parties identified the significant issue as the interpretation of the word “finds”, the learned trial judge identified the significant issue to be whether the dog was “attacking or viciously pursuing livestock.” In finding that there was “no merit to the argument” that the dog was attacking or viciously pursuing livestock, the learned trial judge made the following findings:

> [85] Mr. [Broswick] saw Bud, at a dead run, chase the cattle, until he lost sight of both the cattle and Bud. He later saw Bud near the lake. Mr. [Broswick’s] estimate of the total distance Bud ran from the time he first saw him, to where he was shot is approximately 100 metres. All of this occurred in less than one minute.
>
> [86] I do not know from Ms. Robinson’s evidence the distance Bud chased the cattle. Ms. Robinson’s evidence is that Bud was approximately 150 to 200 feet away from the cattle when she shot at him the first time. Her time estimate for the entire event is one to one and one-half minutes, which is similar to Mr. [Broswick’s] time estimate.
>
> [87] From the evidence of both Ms. Robinson and Mr. [Broswick], and the sketch, Exhibit 3 (which is not to scale), it must be the case that Bud chased the cattle for less than one minute (some of the time being accounted for in the actual shooting) and perhaps for approximately 150 feet (some of the distance being accounted for when Bud left the pen and went towards the lake).
>
> [88] Ms. Robinson saw the cattle “stampede” across the field with Bud following them. A very short time later the cattle were pressed up against the fence and Bud was amongst them.
>
> [89] There is no reliable evidence that Bud was barking when he chased the cattle.
>
> [90] There is also no evidence that Bud nipped, bit, or injured any of the cattle. This is not a case like ***Prebushewski****,* which was a second occasion, and where the cattle were exhausted, with their tongues hanging out.
>
> [91] When one of Ms. Robinson’s dogs barked, the chase ended. Clearly, Bud was easily distracted. At that point, Bud came towards Ms. Robinson and her two dogs.
>
> [92] When I give the words “attacked” and “viciously” their ordinary dictionary meaning, there is no merit to the argument that Ms. Robinson found Bud attacking or viciously pursuing her livestock. In my view, Bud spooked and chased the cattle, over both a short distance and duration.
>
> [Emphasis added]

[36] Although unnecessary given the above finding, the learned trial judge went on to conclude regarding the words "finds" there is "…no substance to the position advocated by [counsel for the Appellant at trial] that the attack was ongoing or that this was one continuous chain of events". He held:

> [95] The evidence is that after Bud stopped chasing the cattle, he left the pen and came towards Ms. Robinson and her two dogs. There is no evidence that he charged at them.
>
> [96] At the point Bud started to come towards Ms. Robinson and her dogs, Ms. Robinson took steps to ensure the safety of her dogs, and took possession of the .22 rifle.
>
> [97] Ms. Robinson searched for Bud, and only saw him after Mr. Beck yelled and told her that he was behind her. She turned and saw Bud standing with his head down sniffing at the scent of a dead fish. Bud did not move from this spot. He continued to sniff the ground, even when Ms. Robinson fired two shots at him. He was not a threat to anything or anyone at that point.
>
> [98] This was only the second time that Ms. Robinson had seen Bud. As far as she knew, Bud had never chased her cattle. It is pure speculation on the part of Ms. Robinson that Bud was capable of going back at her livestock, or interested in her two dogs. Even if I am mistaken on this point, Bud had not attacked or viciously pursued any animals.
>
> [99] Before shooting at Bud, Ms. Robinson had other options open to her. She could have yelled at Bud to scare him off, called out to him, or told Mr. Beck to remove his dog.
>
> [100] The facts in the case before me are somewhat similar to the ***Klijn*** decision, where the trial judge found that the accused was frustrated by other livestock losses, and acted prematurely when he shot and killed a dog.
>
> [101] Ms. Robinson, likely because of the longstanding animosity with Mr. Beck, which I can understand, acted prematurely when she shot and killed Bud.
>
> [102] In his submissions, Mr. Hughes very forcefully argued that this case is an opportunity for the court to make a significant finding which would give some clear guidance to ranchers. I do not agree with that submission. At the time Ms. Robinson shot and killed Bud, he posed no danger to Ms. Robinson, her dogs, or her cattle. It is more likely that Bud had moved on to his next adventure, at the time Ms. Robinson shot him. This case is like many of the others referred to me in argument, it turns on its own limited facts. It is more a question of common sense than a significant legal ruling.
>
> [103] To conclude this aspect of the case, the *Livestock Act* offers no protection to Ms. Robinson.

ISSUES

1. Did the learned trial judge err in law by misapprehending the evidence at trial? If so, did such a misapprehension result in a miscarriage of justice?

2. Did the learned trial judge err by misdirecting himself on whether the Appellant acted without legal justification or colour of right?

3. Was the verdict unreasonable and not supported by the evidence?

ANALYSIS

1. Misapprehension of Evidence

[37] The Appellant submits that her written statement, tendered by the Crown for the truth of its contents, was undisputed and unchallenged at trial. It contained evidence of the dog's viciousness, and its attacking and biting at the cattle. By making critical findings of fact that were "completely at odds" with this evidence, the Appellant asserts that the learned trial judge must have "either completely ignored or completely misapprehended" this evidence. As this evidence went to the central issue at trial, such a misapprehension, if it occurred, would result in a miscarriage of justice.

[38] The Respondent agrees that the learned trial judge did not refer to the Appellant's written statement or any of the evidence contained within it, but submits that it does not necessarily follow that the trial judge must have ignored or misapprehended that evidence. A trial judge is not required to refer to every piece of evidence adduced at trial. The Respondent says that the reasons, read in their entirety and in the context of the submissions made at trial, reflect that the trial judge did not refer to details from Exhibit 2 because that evidence was absent from the Appellant's *viva voce* evidence. It was open to him to conclude that Exhibit 2 would be of no assistance to him. Further, the Respondent submits that even if the trial judge did misapprehend the evidence, it was not material to his findings, nor would it have affected the essential part of his reasoning, at least in any way that would

favour the Appellant. There has thus, the Respondent submits, been no miscarriage of justice.

[39] An appellate court must defer to the treatment of the evidence by a trial judge unless the trial judge has misinterpreted or overlooked relevant evidence. An appellate judge is not to substitute its different view of the evidence absent a palpable and overriding error by the trial judge: *Housen v. Nikolaisen*, 2002 SCC 33.

[40] Once it is established there has been a misapprehension of the evidence, the question is whether this misapprehension created a miscarriage of justice.

[41] In *R. v. Bird*, 2013 BCCA 316 at paras. 55-56, Madam Justice MacKenzie recently discussed when a misapprehension of evidence will result in a miscarriage of justice:

> [55] In *R. v. Morrissey* (1995), 22 O.R. (3d) 514, 97 C.C.C. (3d) 193 (C.A.) at 221, Doherty J.A. explained when a misapprehension of evidence will result in a miscarriage of justice:
>
> > When will a misapprehension of the evidence render a trial unfair and result in a miscarriage of justice? The nature and extent of the misapprehension and its significance to the trial judge's verdict must be considered in light of the fundamental requirement that a verdict must be based exclusively on the evidence adduced at trial. Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction then, in my view, the accused's conviction is not based exclusively on the evidence and is not a "true" verdict. Convictions resting on a misapprehension of the substance of the evidence adduced at trial sit on no firmer foundation than those based on information derived from sources extraneous to the trial. If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction.
> >
> > [Emphasis added.]
>
> [56] The principles set out in *Morrissey* were affirmed in *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732:
>
> > [2] *Morrissey*, it should be emphasized, describes a stringent standard. The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as

> conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".
>
> [Emphasis added.]

[42] The Appellant is the only witness who observed the critical interactions between the animals following the initial chase up the fence line. Her version of events at trial came from three sources:

1) her brief remarks to Constable Hartwig on the day of the shooting;

2) her detailed written statement dated October 17, 2011 marked as Exhibit 2; and

3) her *viva voce* evidence.

[43] Exhibit 2 was consistent with her *viva voce* evidence in many respects, but it differed in some of its detail. For example, Exhibit 2 contained the following evidence:

- the dog ran under two fences and “viciously ran at” the livestock;
- the dog ignored his owner’s calls and “kept charging at the cattle”;
- the cattle “dangerously stampeded across the pasture”;
- the cattle were “trapped” against the fence in the smaller enclosure;
- the “massive” dog was attacking the cattle by jumping and biting at them;
- the dog “viciously attacked” 38 cattle that were 5 to 6 times bigger than it;
- the cattle were desperately trying to get away;
- the cattle were running into and over each other;
- the cattle were smashing into the fence and gate;
- the cattle were at risk of broken legs or necks; and
- there was a heifer heavy with calf and a newborn calf in the herd.

[44] The law is clear that what an accused says in an out-of court statement is not evidence unless the Crown chooses to make it so by using it as part of its case against an accused. In such a circumstance, the accused's statement becomes evidence both for and against the accused: *The King v. Hughes*, [1942] S.C.R. 517, and *R. v. Humphrey* (2003), 172 C.C.C. (3d) 332 (Ont. C.A.).

[45] There is no dispute in this case that the Crown tendered the Appellant's written statement for the truth of its contents.

[46] A trial judge is presumed to know the law, to properly apply it and to have taken into account all aspects of all relevant evidence. Generally speaking, succinct analysis or silence on a particular issue is not an error in law. Where a comment is open to more than one interpretation, the interpretation consistent with the judge's presumed knowledge of the law prevails. That presumption can only be displaced if an error in law is manifest in the judge's comments: *HMTQ v. Pomeroy*, 2007 BCSC 142 at para. 39; *R v. Burns*, [1994] 1 S.C.R. 656 at 664; *R. v. Wigman* (1997), 96 B.C.A.C. 161 at para. 7; *R. v. Manj,* [1995] B.C.J. No. 1059 at paras. 33, 37 & 40 (C.A.), leave to appeal dismissed [1995] S.C.C.A. No. 373.

[47] Here, the learned trial judge did not refer to any of the evidence contained within Exhibit 2. This omission, on its own, would not inevitably lead to the conclusion that the trial judge misapprehended the evidence. An appellate court could presume that the trial judge, instructing himself according to the law, rejected the evidence contained within Exhibit 2 where it was inconsistent with the Appellant's *viva voce* evidence.

[48] However, this presumption can be rebutted and in this case, I find that it is.

[49] When I consider both the broader context of the evidence taken, the submissions made at trial, and certain findings within the judgment, the only reasonable conclusion I can reach is that Exhibit 2 was overlooked.

[50] Exhibit 2 was tendered by the Crown on the first day of trial. The Appellant testified some two months later. Her credibility was not challenged. She was not

cross-examined on Exhibit 2. Both counsel urged the court to accept her evidence. The Appellant's counsel at trial clearly overlooked Exhibit 2, which provided strong support for finding the dog had been "attacking or viciously pursuing" the cattle. Crown counsel relied upon the Appellant's *viva voce* evidence, but appears to have overlooked Exhibit 2 as well. She submitted that there is "no evidence before the court" the dog was biting or striking at the cattle. Evidence of this activity existed in Exhibit 2.

[51] The learned trial judge made findings of fact based solely on the Appellant's *viva voce* evidence. He rejected one aspect of her testimony, that Mr. Beck was encouraging his dog to bark, as her evidence conflicted with the other witnesses. I also note that he accepted one aspect of her evidence where it conflicted with that of Mr. Beck, that Mr. Beck yelled out that his dog was behind her.

[52] Viewed in this broader context, certain specific findings of the learned trial judge take on significance. In deciding s. 11.1(2) of the *LA* was unavailable, two key findings are found at paras. 89-90:

> [89] There is no reliable evidence that Bud was barking when he chased the cattle.
>
> [90] There is also no evidence that Bud nipped, bit, or injured any of the cattle. This is not a case like ***Prebushewski****,* which was a second occasion, and where the cattle were exhausted, with their tongues hanging out.
>
> [Emphasis added.]

[53] In reference to evidence of barking during the chase, the trial judge found "no reliable evidence" that this had occurred. This clearly reflects an assessment and weighing of evidence. In contrast, in reference to evidence of nipping, biting or injuring, the trial judge simply found there to be no evidence. In other words, he found no assessment of evidence necessary because there simply was none.

[54] As there was relevant evidence that the dog was biting and otherwise attacking the cattle to consider, found in Exhibit 2, I am satisfied the Appellant has shown the learned trial judge did misapprehend the evidence. In my opinion, this misapprehension goes to the heart of the issue in this case. Upon reading the

judgment as a whole, it is apparent that the learned trial judge's rejection of s. 11.1(2) of the *LA* as an excuse rested substantially on a finding that the dog was not attacking or viciously pursuing the Appellant's cattle. The overlooked evidence was part of that substantive decision and was, therefore, significant to the learned trial judge's reasoning.

[55] The Respondent submits that even if there was a misapprehension of the evidence that formed part of the reasoning process of the trial judge, there has been, nonetheless, no miscarriage of justice. The Respondent urges me to conclude that it would have been unreasonable for the trial judge to have relied upon Exhibit 2 over the Appellant's *viva voce* evidence in the circumstances of this trial and, therefore, no conclusion other than guilt is possible.

[56] I have concluded that the misapprehended evidence formed a significant part of the trial judge's reasoning, which may well have been different but for the misapprehension. The question now is whether a trier of fact, acting judicially, would be unable to reasonably come to any other conclusion than that the guilt of the accused had been established beyond a reasonable doubt. It is not the function of this court, as a court of review, to weigh the evidence in order to establish guilt or innocence, *de novo*, or to uphold flawed guilty verdicts because those verdicts might have been reached by a trier of fact who had not misapprehended the evidence: *R. v. Baynham*, 2003 BCCA 103 at para. 20.

[57] In my view, the stringent test for finding that a trial judge has misapprehended the evidence outlined in *R. v. Lohrer*, 2004 SCC 80, has been met in this case. I also conclude that a trier of fact, acting judicially, could, on consideration of all of the evidence, come to a conclusion other than that the guilt of the accused had been established beyond a reasonable doubt. The misapprehension of evidence resulted in a miscarriage of justice and a new trial is required.

[58] Although strictly speaking unnecessary, I will go on to consider the next ground of appeal, misdirection on the law, given the lack of judicial consideration of

the various defences raised in this context and the likelihood they will be advanced at a new trial.

2. Misdirection on the Law

[59] The Appellant submits the learned trial judge erred in law in the following ways:

a) by misinterpreting s. 11.1(2) of the *LA*;

b) by failing to consider the common law justification of defence of property; and

c) by failing to consider the defence of colour of right.

[60] From the outset, I must emphasize the distinct differences between what was argued at trial and what is now being argued on appeal.

[61] Leaving aside the now-abandoned defence under s. 39 of the *Code*, the only defence raised at trial was pursuant to s. 11.1(2) of the *LA*. Submissions regarding its interpretation and application were slightly different than they are now.

[62] The defence of colour of right was not raised at trial. Other than in Crown counsel's subsequent written submissions, neither s. 8(3) of the *Code* nor the common law doctrine of defence of property were argued at trial. No objection has been taken with respect to these new issues being raised on appeal.

[63] It is against this very different backdrop that the learned trial judge considered and applied s. 11.1(2) of the *LA*.

[64] In order to determine whether the learned trial judge erred in the manners alleged, or at all, it is necessary to consider all defences that might apply and how they ought to be interpreted in the context of the offence charged.

[65] Section 445 of the *Code* is contained within Part 6, entitled "Wilful and Forbidden Acts in Respect of Certain Property". Section 445(1)(a) reads:

> **Injuring or endangering other animals**
>
> **445**(1) Every one commits an offence who, wilfully and without lawful excuse,
>
> (*a*) kills, maims, wounds, poisons or injures dogs, birds or animals that are not cattle and are kept for a lawful purpose; …

[66] This section makes it an offence to kill (or otherwise harm) a dog (or other named animals) that are lawfully kept. Unlike s. 445.1, which makes it an offence to cause unnecessary suffering to any animal, regardless of ownership, s. 445(1) applies only to animals that are kept for a lawful purpose; that is, they are property. This reinforces the "appropriateness of a property paradigm" in analyzing the actions of persons charged under this provision: *R. v. Murphy*, 2010 NSPC 4 at para. 19.

[67] The Crown is required to prove each element of this offence beyond a reasonable doubt, including that an accused acted without lawful excuse.

[68] Section 429(2) of the *Code* applies to this offence. It reads:

> **Colour of right**
>
> (2) No person shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right.

[69] The word "and" in this section has been judicially edited to an "or" so that there need only be "legal justification" or "colour of right": *R. v. Creaghan* (1982), 1 C.C.C. (3d) 449 (Ont. CA), and *R. v. Pena* (1997), 148 D.L.R. (4th) 372 (B.C.S.C.) [*Pena*].

[70] Both parties agree that, despite the wording of this section, the Crown bears the burden of proving the legal justification or defence raised does not apply. Although I am aware of conflicting jurisprudence in this area, the rule of *stare decisis* as explained in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.), supports that I follow the considered decision of Mr. Justice Josephson in *R. v. Pena* (1997), 45 C.R.R. (2d) 134, declaring the reverse onus provision in s. 429(2) of the *Code* unconstitutional.

[71] It is, therefore, for the Crown to prove the absence of justification or excuse where, as in this case, an accused provides some evidentiary basis to put these in issue. In other words, to use the words of Josephson J., "if the defence is available on the evidence, the accused is entitled to the benefit of any reasonable doubt that may arise": *Pena* at para. 4

[72] The lawful excuses or justifications now raised by the Appellant are threefold:

1) the common law justification of defence or property;

2) section 11.1(2) of the *LA*; and

3) colour of right.

Common Law Justification of Defence of Property

[73] This justification was not specifically raised at trial by the Appellant, but clearly arises on the facts. The Appellant claimed she was justified in shooting her neighbour's dog for the purpose of protecting her property - her cattle.

[74] Section 8(3) of the *Code* provides:

> **Common law principles continued**
>
> (3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.

[75] It is clear the common law justification of defence of property has been preserved by s. 8(3) of the *Code*: *R. v. Etherington*, [1963] 2 C.C.C. 230 (Ont. Mag. Ct.), *R. v. Clouter* (1990), 86 Nfld. & P.E.I.R. 1 (S.C.), and *Murphy.*

[76] In *Murphy*, the accused was charged with maiming a dog contrary to s. 445(1)(a) of the *Code*. At trial, he relied upon the common law justification of defence of property and the defence of necessity. At paras. 15 through 33, Ross P.C.J. thoroughly discussed the common law justification of defence of property. He ultimately applied the principles outlined in Lord Simonds, ed., *Halsbury's Laws of*

England, vol. 1, 3d ed. (London: Butterworth & Co. (Publishing), 1952) at para. 1314, as cited by Barry J. in *Clouter*, which states in part as follows:

> A dog attacking a human being may be shot in self-defence, whether it is of a mischievous disposition or not, but the shooting even of a ferocious dog is not justified after the animal has ceased its attacks.
>
> Where it is sought to justify the shooting on the ground that it was done for the purpose of protecting animals, the defendant must prove that at the time of shooting, the dog either was actually attacking the animals, or, if left at large, would renew the attack so that the animals would be left presently subject to real and imminent danger unless renewal was prevented; he must prove also that either there was in fact no practicable means other than shooting of stopping the present attack or preventing such renewals, or that, having regard to all the circumstances in which he found himself, he acted reasonably in regarding the shooting as necessary for the protection of the animals against attack or renewed attack.
>
> A similar rule exists in criminal cases. It is no defence to a charge of unlawfully and maliciously killing, wounding, or maiming a dog, that it was trespassing at the time; but if the accused proves that he bona fide believed that the act was necessary, and that he could save his property or protect himself in no other way, he is entitled to be acquitted. The true test is whether the accused has acted reasonably.
>
> [Footnotes omitted.]

[77] Ross P.C.J. concluded that the accused had other “less drastic alternatives readily available” or “other practicable means at his disposal” to prevent the dog from attacking his poultry and convicted him.

[78] In *Etherington*, the accused was charged with wilfully wounding a dog without lawful excuse contrary to s. 386(a) of the *Code*. Following an incident where he chased his neighbour’s three dogs from his property because they had been “worrying” his sheep, the dogs returned and resumed this behaviour toward another of his flocks. He again chased them away, using some physical force. The accused followed the dogs onto his neighbour’s property where he lost sight of them. He found one dog a short time later. Believing it to be one of the offending dogs, he shot it. The accused raised several defences, including the common law justification of defence of property.

[79] In considering this defence, the court reviewed *Halsbury’s Laws of England* as set out above and several older decisions as well, including *O’Leary v. Therrien*

(1915), 27 D.L.R. 701 (Que. B.R). At 235, the court quoted from the headnote of *O'Leary* as follows:

> A defence to a criminal charge of wilfully killing a dog which was trespassing on the property of the accused is made out if it be shewn that the dog was killed under necessity for the purpose of protecting the defendant's hens in the stable where the dog had gone; and where it is shewn that the defendant's property was in peril from the dog *at the moment when the shot was fired* because of the probability that the dog would attack the hens, it was not obligatory on the defendant to await the actual attack before shooting the trespassing animal. [Emphasis in *Etherington*.]

[80] In rejecting the common law justification of defence of property, the court found, again at 235, that the dog was not "a present danger to the defendant or his stock when shot near its owner's barn."

[81] In *R. v. Klijn*, [1991] O.J. No. 3415 (C.J.), Gowan P.C.J. convicted the accused of killing a dog in circumstances where his neighbour's dog had chased his cattle. The accused fired shots in the air, which stopped the chase, but the dog failed to leave his property. He searched for it on his ATV and, after finding the dog, shot it. In rejecting this defence and convicting the accused, the court considered whether the dog, at the time of the shooting, posed a threat to the cattle. The court also had regard to "what a reasonable and sensible person would have done".

[82] As these authorities demonstrate, the common law justification of defence of property is available as a lawful excuse to a charge under s. 445(1)(a) of the *Code*. In my view, this justification can be articulated as follows:

> At the time of the wilful act causing the killing (or other listed harms):
>
> a) the dog was actually attacking the accused's property, or if left at large, the accused's property would be subject to real and imminent danger the attack would be renewed; and
>
> b) having regard to all of the circumstances in which he found himself, the accused reasonably believed the act was necessary and that he could

> save his property in no other way or no other practical means were readily available to stop the attack or prevent its renewal;

[83] Once raised, the onus is on the Crown to prove this justification does not apply beyond a reasonable doubt.

Section 11.1(2) of the LA

[84] A potential lawful excuse also arises in this case from a provincial statute.

[85] To repeat, s. 11.1(2) of the *LA* reads:

> (2) A person may kill a dog if the person finds the dog
>
> (a) running at large, and
>
> (b) attacking or viciously pursuing livestock.

[86] Section 11.1(1) provides as follows regarding "running at large":

> (1) For the purposes of this section, **"running at large"** does not apply to a dog that is under control by being
>
> (a) on the property of its owner or of another person who has the care and control of the dog,
>
> (b) in direct and continuous charge of a person who is competent to control it,
>
> (c) securely confined within an enclosure, or
>
> (d) securely fastened so that it is unable to roam.

a) Positions of the Parties

[87] The Appellant generally submits the learned trial judge erred by interpreting this provision too narrowly. She says a liberal, contextual interpretation, consistent with aspects of the common law, should have been used. Specifically, the Appellant asserts that the learned trial judge:

1. should have, in keeping with the common law, interpreted the word "attack" in this context beyond its dictionary definition to encompass "a chase which causes any real and present danger of serious harm to animals chased";

2. should have interpreted the word “finds” in the context of an attack or vicious pursuit in a manner consistent with aspects of the common law; and

3. should not have included a requirement that a person must pursue other options before this justification is available.

[88] The Respondent submits the learned trial judge did not err in his interpretation of this provision. It says that a narrow interpretation is required, with reliance on dictionary definitions of the words used and viewed in light of the narrow legislative intent to “carve out a well-defined exception to the otherwise offensive conduct of killing a dog”. Unlike the position taken at trial, the Respondent submits the common law principles with respect to defence of property in the civil context should not be used to inform the court’s interpretation of the section.

b) Approach to Statutory Interpretation

[89] The proper approach to statutory interpretation is to read the words of an act in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the act, the object of the act and the intention of the legislature: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

[90] This approach, referred to as the “modern principle” of statutory interpretation, reflects what has been described as the “complex, multi-dimensional character of statutory interpretation”: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 1.

[91] Entire textbooks and law school courses have been dedicated to the study of these complexities and dimensions. *Sullivan* helpfully distilled the various dimensions into the following categories, discussed summarily at 1-2:

a. textual meaning;

b. legislative intent; and

c. compliance with established legal norms, which form part of the "entire context" of the words used and form an integral part of legislative intent.

[92] Consideration of these aspects of statutory interpretation involves the application of presumptions and established principles. Several of these are of particular importance in this case.

[93] The "grammatical and ordinary sense", or ordinary meaning, of words in a statute is the meaning actually understood by the reader in its immediate context, or the "natural meaning which appears when the provision is simply read through": *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.,* [1993] 3 S.C.R. 724 at 735.

[94] Immediate context has both internal and external aspects. The internal aspect is literary, consisting of as much of the surrounding text as is needed to make sense of the words being read. The external aspect comes from the reader herself - her knowledge of language and her knowledge of the words in general: *Sullivan* at 22.

[95] "Ordinary sense" of a word or phrase is not necessarily its dictionary definition. Dictionaries vary. As well, the definitions contained within them list a full range of potential meanings of a word or how a word may be used in many possible contexts. The concept of "ordinary sense" must go beyond a dictionary definition. It is the meaning a word or phrase bears in the context of a particular sentence, as read by the particular reader: *Sullivan* at 22-23.

[96] "Legislative intent" is comprised of several elements, including:

1. the expressed intention - the intention expressed by the enacted words;
2. the implied intention - the intention that may legitimately be implied from the enacted words;
3. the presumed intention - the intention that the courts will, in the absence of indication to the contrary, impute to Parliament; and
4. the declared intention - the intention that Parliament has said may or may not be imputed to it.

E. A. Driedger*, The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 106.

[97] "Presumed intention" includes the entire body of evolving legal norms which contribute to the legal context in which interpretation occurs. Such legal context includes the common law: *Sullivan* at 2.

[98] In the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing rules of the common law: *Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038.

[99] When used in legislation, common law terms and concepts are presumed to retain their common law meaning: *R. v. Holmes*, [1988] 1 S.C.R. 914 at 929-30.

[100] When considering legislative intent, one is to presume the legislature has knowledge of all relevant laws, including the common law: *2747-3174 Quebec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 at para. 237.

[101] The modern principle of statutory interpretation emphasizes the importance of a purposive analysis. *Sullivan* summarizes the bases of the purposive analysis as follows at 195:

> 1. All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.
> 2. Legislative purpose should be taken into account in every case and at every stage of interpretation, including the determination of a text's meaning.
> 3. Insofar as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.

[102] With respect to purposive analysis, Chief Justice Lamer wrote in *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025 at 1042 as follows:

> In interpreting … an Act, the express words used by Parliament must be interpreted not only in their ordinary sense but also in the context of the scheme and purpose of the legislation … the best approach to the

> interpretation of words in a statute is to place upon them the meaning that best fits the object of the statute, provided that the words themselves can reasonably bear that construction. …

[103] I am also mindful of the remedial construction rule found in s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which provides that:

> **8** Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

c) Analysis

[104] The *LA* governs the keeping of livestock in British Columbia. It sets out various powers, obligations and potential liabilities of persons charged with the keeping of livestock. It also specifies when certain conduct, or failure to perform certain conduct, by those persons will constitute an offence.

[105] The overall purpose of the *LA* can, I think, be fairly described as providing for the safekeeping of livestock.

[106] Section 11.1 of the *LA* was enacted in 2003 and brought into force effective April 1, 2004, at the same time the *Livestock Protection Act*, R.S.B.C. 1996, c. 273 [*LPA*], was repealed. Section 11.1(2) of the *LA* is nearly identical to s. 6 of the *LPA*, which read:

> 6. A person may kill a dog if the person finds the dog
>
> (a) running at large; and
>
> (b) attacking or viciously pursuing a person or domestic animal

[107] Section 11.1(2) of the *LA* is similarly worded except that it references the attack or pursuit of only livestock. This section of the *LA* is entitled “Dogs causing injury or harm”.

[108] Viewed in this context, one can see that the legislature identified one potential risk to the safekeeping of livestock where a person is justified in eliminating that risk - dogs that are running at large. However, unlike similar legislation in other provinces, our legislature has more narrowly defined the circumstances under which

that risk can be eliminated. In addition to “running at large”, the dog must also be either “attacking” or “viciously pursuing” the livestock.

[109] By providing this guidance to those persons protecting livestock, the overall purpose of the *LA* is maintained, yet is balanced by the need to protect dogs that may come into contact with livestock.

[110] Common law principles have informed interpretation of similar legislation in the past and should, in my view, be similarly used in this case. For example, in *Etherington*, the accused relied upon not only the common law justification of defence of property, but the statutory justification contained within s. 10(c) of what was then the *Dog Tax and Cattle, Sheep and Poultry Protection Act*, R.S.O. 1960, c. 111. This provision, which is clearly broader than the *LA* provision, stated that:

> Any person may kill a dog … that is found straying at any time, and not under the proper control, upon premises where cattle, sheep or poultry are habitually kept.

[111] In interpreting this provision, the court considered common law principles, the objective of the particular act referenced above, the remedial construction principles as set out in the *Interpretation Act*, R.S.O. 1960, c. 191, and the natural meaning of the words used. The court’s analysis is set out at 236-37 as follows:

> There are a limited number of reported decisions on this and similar provincial legislation and I have found none that suggested that such legislation extends the justification beyond that recognized by the rules of the common law.
>
> The subsection in question was considered in *R. ex rel. Mino v. Corliss* (1957), 120 C.C.C. 341, by Judge Kinnear of Haldimand County in reversing a conviction by a Magistrate under the same charge as in the instant case.
>
> The facts as stated in the headnote are that the accused came upon three dogs worrying and biting at his cattle in the middle of the night. He threw a stick at them and two ran off. The other, however, turned and advanced on the accused as if to attack him. Believing himself in peril, accused shot the dog. Unknown to the accused, the three dogs, at the instance of their owners who at the time were still 800 ft. or so away, were hunting and had been engaged in treeing a coon. However, not being versed in coon hunting, in fact it was illegal at that time of year in any event, and the dogs not having any collars, accused believed them to be running at large.
>
> Held that accused acted "with legal justification and with colour of right" under s. 9 (*c*) (now 10 (*c*)) of the Act.

> Considering the section in question, particularly cl. (*a*), the learned Judge says at p. 360:
>
> > "While the dogs must be considered as having embarked on a common venture in worrying and terrifying the calf, the appellant dispersed the dogs by other means than shooting (throwing a stick) and having done that, he cannot rely on s-s.(*a*), *the need for protection of the calf having ended*."
>
> Judge Kinnear is therein applying the principles of the common law in interpreting s. 10(*a*) of the Act, and if a killing off the premises after the protection of the animal endangered has ended, cannot be justified under cl. (*a*), I cannot see that it can under cl. (*c*) as the phraseology is the same -- may kill a dog that is found (*a*) "injuring" -- (*c*) "upon premises".
>
> In considering the object of the Act as directed by the *Interpretation Act*, R.S.O. 1960, c. 191, the sections thereof subsequent to s. 10, and in particular s. 16 set out above, should be considered. The Legislature has thereby provided for destruction of the guilty dog that escapes the premises of the endangered livestock, by order of a Magistrate after a legal determination of the issue. It also provides for compensation to the owner of the livestock by the municipality and recovery thereof from the dog owner.
>
> I have also considered *McNair v. Collins* (1912), 6 D.L.R. 510, 27 O.L.R. 44, wherein the statutory provision was held not to be justification and the word "found" considered, with Riddell, J., dissenting, in the judgment referred to in argument.
>
> I consider that the clear natural meaning to be taken from a reading of s. 10 aforesaid is to restrict the permitted killings to the premises on which the livestock endangered is kept and that the manifest intention of the legislation, the decisions thereon, and the common law background, so indicate.

[112] Aware of the common law justification of defence of property available to owners protecting their property, why would the legislature provide an additional statutory justification in British Columbia specifically for persons protecting livestock?

[113] As I have outlined earlier, the common law justification of defence of property applies to owners of property. It requires that at the moment of the act, the offending dog is actually attacking the owner's property or if left at large, the owner's property would be subject to real and imminent danger the attack would be renewed. It also requires that the owner reasonably believe his act was necessary and that he could save his property in no other way, or that no other practical means were readily available to stop the attack or prevent its renewal.

[114] Section 11.1(2) of the *LA* expands this common law justification when it comes to livestock to make the defence available to all persons, not simply the owners of the at-risk property.

[115] Section 11.1(2) of the *LA* also expands the common law by what it does not say. It contains no requirement, as found in the common law, that the person killing the dog reasonably believe the act is necessary and that he could save or protect the livestock in no other way, or that no other practical means be readily available to stop the attack or prevent its renewal.

[116] In light of the overall purpose of the *LA,* the specific purpose of s. 11.1, and the legislative intent to provide broader protection to keepers of livestock than that afforded to owners at common law, it is my view that the legislature could not have intended the narrow interpretation of “finds” and “attacking or viciously pursuing” advanced by the Respondent.

[117] Such a narrow interpretation would defeat the purpose of the legislation and afford persons in the course of protecting livestock less protection than that afforded at common law. Further, this narrow interpretation would require a person to shoot, or otherwise attempt to stop, a moving target in and amongst the livestock being attacked or in close proximity to the livestock being viciously pursued. This would place the livestock sought to be protected at greater risk of harm and thereby defeat the very purpose of the *LA*.

[118] Rather, a fair and liberal construction, consistent with the common law, the overall object of the *LA*, and the intention of the legislature is required. To my mind, s. 11.1(2) of the *LA* should construed in the same manner as the common law as permitting any person to kill a dog, when at the time of the act of killing, the dog:

a. is running at large; and

b. is actually attacking or viciously pursuing livestock, or, if left running at large, would subject the livestock to a real and imminent danger that the attack or vicious pursuit would be renewed.

[119] Such an interpretation also recognizes that the act of killing a dog is prohibited once the need for protection of the livestock has ended.

[120] To the extent the learned trial judge considered it necessary that the Appellant first avail herself of other options in order for the justification to be available to her, I find this to be an error. No such requirement was included in the legislation. To include a requirement, as found in the common law, that the accused reasonably believe the act is necessary and could save or protect the livestock in no other way or no other practical means are readily available, would, in my view, impermissibly read requirements into the statute that were not intended to apply.

[121] To the extent the learned trial judge relied upon *R. v. Prebushewski* (1 November 2011), Vernon 45065-1 (B.C.P.C.), this was an error. With respect, I consider that *Prebushewski* was wrongly decided. Delivering reasons from the bench, the provincial court judge in *Prebushewski* did not have the opportunity to give full consideration to the interpretation of s. 11.1(2) of the *LA* in the context of the common law. He acquitted the accused in circumstances where, at the time the dogs were killed, they were neither running at large (as defined in s. 11.1(1)) nor attacking or viciously pursuing livestock.

[122] Relying upon the common law definition of “attack”, the Appellant further seeks to have the word “attack” in s. 11.1(2) interpreted broadly to include a “chase which causes any real and present danger or serious harm to the animals chased”: *Cresswell v. Sirl*, [1948] 1 K.B. 241 at 249 (C.A.).

[123] In my opinion, it is unnecessary to do so. Aware of the common law definition of “attack” in this context, the legislature specifically chose to differentiate an “attack” from a “vicious pursuit”. By doing so, it made it clear that both are offensive conduct justifying protective measures.

[124] The legislature expressly set this out to ensure clarity in this unique context. Livestock are vulnerable animals. This section ensures that people can protect them from dogs that are attacking them. It also ensures that they can be protected from

conduct by a dog that falls short of what is commonly thought of as an “attack”, but nonetheless has the same potential to cause harm - a “vicious pursuit”.

[125] What does “vicious pursuit” mean? Clearly, not every pursuit of livestock by a dog will justify its killing - only a pursuit that is “vicious” will. Looking at the ordinary meaning of the words, in the overall context of the *LA*, the intent of the legislature and the common law backdrop, it is my view that a “vicious pursuit” means a pursuit which causes a real and present danger or serious harm to the livestock chased. The effects of such a pursuit are precisely the harm the legislature intended to prevent.

[126] In the end then, an expansive definition of “attack” as sought by the Appellant is unnecessary as it is encompassed in the phrase “vicious pursuit”.

Colour of Right

[127] The Appellant submits that the learned trial judge erred by failing to consider the defence of colour of right and whether it applied to justify her actions. Specifically, the Appellant submits that the trial judge fundamentally misdirected himself by asking whether the Appellant’s belief that the dog posed an imminent threat and that she needed to shoot it were objectively reasonable. Rather, she submits the question should have been whether the learned trial judge had a reasonable doubt that the Appellant honestly held those beliefs.

[128] The Respondent agrees this defence was not considered by the learned trial judge, but submits that it is not applicable in this case. It says that if the Appellant had any mistaken beliefs at the time of her actions, they were mistakes about the criminal law, for which no defence can arise.

[129] The defence of colour of right involves a lack of *mens rea*. In *R. v. Hudson*, 2014 BCCA 87, Mr. Justice Frankel, writing for the court, provided a definition of this defence at para. 24:

> [24] As succinctly stated by Madam Justice Levine in *R. v. Manuel*, 2008 BCCA 143 at para. 10, 231 C.C.C. (3d) 468, leave to appeal ref'd [2008] S.C.C.A. No. 265, [2008] 2 S.C.R. x, the defence of colour of right is based

> on "an honest belief in a state of facts or civil law which, if it existed, would negate the *mens rea* for the offence". In *R. v. Dorosh*, 2003 SKCA 134, 183 C.C.C. (3d) 224, Chief Justice Bayda described this defence in the following terms:
>
> > [18] A colour of right can have its basis in either a mistake of civil law (a colour of right provides an exception to s. 19 of the Code; see: *The Law of Theft and Related Offences* [by Winifred H. Holland (Toronto: Carswell, 1998)] p. 153) or in a mistake in a state of facts. The mistake in each case must give rise to either an honest belief in a proprietary or possessory right to the thing which is the subject matter of the alleged theft or an honest belief in the state of facts which if it actually existed would at law justify or excuse the act done.

[130] In *Pena*, Josephson J. considered what constitutes a mistake of law in this context. Relying on several decisions, including, *R. v. Howson,* [1966] 3 C.C.C. 348 (Ont. C.A.), *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369 (Ont. C.A.) and *R. v. Cinq-Mars* (1989), 51 C.C.C. (3d) 248 (Que C.A.), he set out three conditions for the application of the defence of colour of right at para. 22:

> 1. The accused must be mistaken about the state of a private law, not a moral right.
> 2. That law, if it existed, would provide a legal justification or excuse.
> 3. The mistaken belief must be honestly held.

[131] The explanations of the defence of colour of right provided by the Ontario and Quebec Courts of Appeal in the cases cited were highlighted by Josephson J. and are instructive. At paras. 11, 12 and 18, Josephson J. wrote:

> [11] In *R. v. Howson*, [1966] 3 C.C.C. 348, 55 D.L.R. (2d) 582 (Ont. C.A.), a case where a car towing company had been charged with the theft of a car, Porter C.J.O. reviewed the law regarding colour of right and mistake of law, and held, at pp. 356-7:
>
> > In my view the word "right" should be construed broadly. The use of the word cannot be said to exclude a legal right. The word is in its ordinary sense charged with legal implications. I do not think that s. 19 affects s. 269 [now s. 429]. Section 19 only applies where there is an offence. There is no offence if there is colour of right. If upon all the evidence it may fairly be inferred that the accused acted under a genuine misconception of fact or law, there would be no offence of theft committed. The trial tribunal must satisfy itself that the accused has acted upon an honest, but mistaken belief that the right is based upon either fact or law, or mixed fact and law.

> [12] Accordingly, in *R. v. DeMarco* (1974), 13 C.C.C. (2d) 369 (Ont. C.A.) at 372, where the accused had rented a car and not returned it on time because she did not think that she was obliged to, Martin J. held:
>
> > The term "colour of right" generally, although not exclusively, refers to a situation where there is an assertion of a proprietary or possessory right to the thing which is the subject-matter of the alleged theft. One who is honestly asserting what he believes to be an honest claim cannot be said to act "without colour of right", even though it may be unfounded in law or in fact....The term "colour of right" is also used to denote an honest belief in a state of facts which, if it actually existed would at law justify or excuse the act done....The term when used in the latter sense is merely a particular application of the doctrine of mistake of fact.
>
> …
>
> [18] In *R. v. Cinq-Mars* (1989), 51 C.C.C. (3d) 248 (Que C.A.) [p. 251], Vallerand J.A. quoted the following passage from Jacques Fortin and Luise Viau, *Traite de droit penal general* (Les editions Themis Inc., 1982) at 128, which notes this distinction:
>
> > "Colour of right consists of an erroneous belief on the part of the accused that he has a legal right to act as he did...Two fundamental conditions govern colour of right. First, the error must concern a conception of private law; the accused believes that the law recognizes his right to act as he did. Secondly, the right the accused believes he has must be a 'legal right' and not simply a moral right. A legal right, that is a right recognized at private law -- for example, a right to possession...a right of retention. The accused acts under a colour of right if he erroneously thinks that he can rely on this right in the circumstances. The claim of a merely 'moral' right does not constitute colour of right. Belief in a 'moral' right is not based on a conception of law. It rather consists of the affirmation by the accused of his right to act as he does despite the law."

[132] I agree with the Appellant that the defence of colour of right is available to her in these circumstances. The mistake pointed to by the Appellant, if there was one, was a conception of private law, that she believed in a state of facts where the common law doctrine of defence of property and/or the statutory justification pursuant to s. 11.1(2) of the *LA* permitted her to do what she did.

[133] Unfortunately, the Appellant did not argue this defence at trial. As a result, the learned trial judge did not consider it. In these circumstances, it is difficult to consider that the learned trial judge was in error for this failure.

[134] However, it has now been fully argued and could be viewed as sufficiently connected to an issue raised at trial. It is my view that with respect to consideration of the defence of colour of right, the question for a trial judge is not whether the Appellant had the legal right to do what she did. Rather, it is whether she honestly believed in a state of facts that would mean she had such a right. If the Appellant can point to some evidence that raises a reasonable doubt as to whether she honestly believed in a state of facts that, if they existed, would provide her with an excuse or justification either under the common law doctrine of defence of property or pursuant to s. 11.1(2) of the *LA*, she would be entitled to an acquittal as having acted under a colour of right. Whether such an honest belief existed will be for the judge presiding over the new trial to determine.

SUMMARY AND DISPOSITION

[135] Based on the misapprehension of evidence and the misdirection on the law, I would allow the appeal, set aside the conviction and order a new trial. The Appellant is entitled to have all of the evidence germane to all available defences assessed in light of the applicable legal principles.

"S.A. Donegan J."

DONEGAN J.