In the Court of Appeal of Alberta

Citation: R v Sanaee, 2016 ABCA 289

Date: 20160928
Docket: 1503-0140-A
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent

- and -

Ali Sanaee

Appellant

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice J.D. Bruce McDonald

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Judge F.E. LeReverend
Dated the 6th day of May, 2015
(Docket: 140906538P1)

Memorandum of Judgment

The Court:

Introduction

[1] The appellant appeals his two convictions for causing unnecessary pain, suffering or injury to an animal, contrary to section 445.1(i)(a) of the *Criminal Code*. The appeal was dismissed with reasons to follow. These are the reasons.

Background Facts

[2] The appellant was the owner and operator of a day boarding facility or daycare center for dogs. He also provided dog training to assist with behavioral issues. Witnesses testified that on two different occasions the appellant used a cattle prod on dogs, causing them pain, in circumstances where it did not seem necessary.

[3] The first instance occurred in October 2012 when the appellant went to the home of K.R., who hired him to help train her large dog from displaying unwanted food aggression towards her other dog. K.R. testified that the appellant put dog food on the floor as part of the training exercise, and when the dog displayed aggression towards the smaller dog, the appellant used an activated cattle prod on him.

[4] She further testified that her dog yelped, ran to the living room, jumped onto the couch and began attacking another dog there, which was very out of character. The appellant once again used the activated cattle prod on the dog, who again yelped and ran into the bathroom, where he stayed for 10 minutes with his tail between his legs. K.R. also testified that the appellant advised her to purchase a cattle prod to deal with her dogs when they fought.

[5] The second instance occurred in May 2013 when the appellant was leading a group of people on a community walk with their dogs through a park. The appellant was leading several dogs, including a pitbull. S.E. and her friend N.K. were both walking their own dogs in the park at the same time, and while talking to the appellant, witnessed him use a cattle prod multiple times on the pitbull. Both testified that the pitbull yelped or cringed and appeared to be in a lot of pain each time the cattle prod was used on it. Both witnesses also testified that prior to use of the cattle prod, the pitbull was not displaying any signs of violence or aggressive behavior.

[6] The Crown also called expert evidence. Dr. Karen Lange, a veterinarian, was qualified to give expert opinion testimony on the appropriate discipline of small animals such as dogs. In her opinion, a cattle prod was not an appropriate training device for dogs as it produces an excessive amount of pain due to being designed for adult cattle, which are much larger and have thicker skin. Kristin McKenna, an animal behavioral consultant, was also qualified to give an expert opinion on

appropriate training and discipline for animal behavior. It was her opinion that a cattle prod was not appropriate for use on dogs and is not considered a tool for dog training.

[7] The appellant testified that with respect to the first incident, he did not even bring a cattle prod with him to K.R.'s residence. Regarding the second incident, he testified that although he carried a cattle prod with him on the walk, he did not discharge it on the pitbull but only used it as a stick to poke the dog when she showed signs that she was about to lunge at another dog. The appellant further testified that he would only use a cattle prod in emergencies, not for training situations, and he did not believe in using pain or negative reinforcement with animals.

Decision of the Trial Judge

[8] The trial judge rejected the appellant's evidence, and accepted K.R.'s evidence regarding the incident with her dog. With respect to the second incident, the trial judge accepted the evidence of S.E. and N.K. that the pitbull was sitting quietly on the ground when the appellant poked her with the live cattle prod, causing obvious pain. The trial judge found that using a cattle prod on a dog produces extreme pain and in the circumstances it was completely unnecessary for the appellant to have used a cattle prod on K.R.'s dog and the pitbull. Although the trial judge referred to the expert evidence, she expressly stated that that she did not need any expert evidence to find that a cattle prod should not have been used on a dog.

[9] The trial judge imposed a sentence of six months on each count, to be served concurrently. In addition, the appellant was prohibited for a period of five years from owning, possessing, or controlling any pets or from residing in any residence that has pets.

Grounds of Appeal

[10] In his factum, the appellant submits that the trial judge erred by:

(a) relying upon expert opinion evidence which was outside the scope of the purported expert's expertise; and

(b) by not considering whether the appellant acted without a colour of right.

Standard of Review

[11] A judge's decision to admit evidence may raise extricable questions of law reviewable on the standard of correctness. However, some decisions to admit evidence are discretionary and reviewable on the standard of palpable and overriding error: *R v Mousseau*, 2007 MBCA 5, 212 ManR (2d) 308 at para 11.

[12] The trial judge has a duty to consider all defences which have an air of reality. Failure to consider a defence which arises from the evidence amounts to an error in law: *R v Cinous*, [2002] 2 SCR 29.

Analysis and Decision

Did the trial judge err in admitting the expert opinion evidence?

[13] The Crown adopted a comprehensive "belt and suspenders" approach to this prosecution. As indicated previously, the Crown called Dr. Karen Lange, a veterinarian who was qualified to give expert opinion testimony on the appropriate discipline of small animals such as dogs. The Crown also called Kristin McKenna, an animal behavioural consultant, who was qualified to give expert opinion testimony on the appropriate training and discipline for animal behaviour. Both Dr. Lange and Kristin McKenna were of the opinion that an activated cattle prod was not appropriate for the use upon dogs and is not considered a tool for dog training.

[14] In his factum, the appellant argues that the use of an activated cattle prod on a dog in the context of a training exercise or for disciplinary purposes must have been shown to go beyond what was reasonable. In other words, "t[he] test is whether the pain goes beyond what was necessary in the circumstances and the accused was acting without a colour of right by invoking that pain". The appellant goes on to argue that the expert evidence ought to have established that the particular cattle prod in question was a device that was capable of delivering a shock of "X amperage and that the expert ought to been able to establish that dogs feel pain at X amperage". The appellant argues that expert evidence is indispensable to a conviction under section 445.1(i)(a) and that the judge erred by stating that she was not required to rely on such evidence to convict the appellant.

[15] There is no need for the Crown to prove the exact technical specifications of the cattle prod or exactly what level of electric shock is excessive. The witnesses testified that the dogs "yelped, the body coiled as in a muscular contraction, and the dog appeared to be in a lot of pain". It is not necessary for the Crown to prove just how the cattle prod caused that pain. A non-expert witness is entitled to give opinions arising from compendious facts, such as bodily plight or condition and emotional state: *R v Graat*, [1982] 2 SCR 819 at p 835. This principle applies to the condition of both persons and animals.

[16] We reject the appellant's argument. It is unreasonable to suggest that a device that is designed to deliver a meaningful shock to an animal many times larger than the dogs in question would not cause unnecessary pain or suffering in light of the testimony of the three Crown witnesses K.R., S.E. and N.K. which the trial judge was entitled to accept.

Did the trial judge err by not considering whether the appellant acted without a colour of right?

[17] In support of this ground of appeal the appellant relies upon section 429(2) of the *Criminal Code*:

> 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.

This argument is raised for the first time on appeal. It was not argued at trial. Accordingly the evidentiary record is incomplete on the issues and the trial judge made no findings of fact that would facilitate meaningful appellate review.

[18] The appellant argues that in order to avail himself of this provision, he must show that he believed in a state of facts which, if they actually existed, would constitute legal justification or excuse: *R v Ninos and Walker*, [1964] 1 CCC 326. The problem with this ground of appeal is that the appellant had testified at trial to the effect that he did **not** use the activated cattle prod on either K.R.'s dog or the pitbull.

[19] Specifically, the appellant testified that he did not even own a cattle prod at the time he dealt with K.R.'s dog in October 2012. Regarding the subsequent incident that occurred in May 2013, the appellant admitted to possessing a cattle prod on that occasion but testified that it was not activated. The appellant further testified that an activated cattle prod was only to be used in an emergency situation and not for dog training.

[20] The trial judge rejected the appellant's trial testimony and held that the appellant had indeed utilized an activated cattle prod on both K.R.'s dog and the pitbull. The trial judge held that the Crown had established its case against the appellant beyond a reasonable doubt without her having to rely upon the evidence of the two expert witnesses.

[21] This ground of appeal advances a defence that had no "air of reality" whatsoever given the appellant's own testimony at trial. It is only a defence if it arises based upon the evidence at trial that can, as a matter of law, have an air of reality: *R v Cinous*, [2002] 2 SCR 29 at para 50. The test for an air of reality is whether there is evidence on the record upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true: *Cinous* at para 49.

[22] When an accused states that the act in question did not occur (which was the situation here) there can be no factual foundation upon which the accused can advance a defence based on honest belief: *R v Poon*, 2012 SKCA 76, 399 SaskR 89 at para 31 citing *Cinous* at paras 47-49.

[23] Belief by the appellant that he was entitled, in law, to inflict unnecessary pain in some circumstances does not create a "colour of right" to do so. This is a mistake of law. Further, even if

a dog owner consented to or acquiesced in the use of the cattle prod, an owner cannot lawfully consent to the infliction of unnecessary pain.

[24] In any event, the defence afforded under section 429(2) of the *Code* did not arise as a matter of law given the appellant's own testimony that he never used an activated cattle prod on either dog. Therefore this amounts to a meritless ground of appeal.

Conclusion

[25] In the result, the appeal is dismissed and the convictions on the two counts are affirmed.

Appeal heard on September 9, 2016

Memorandum filed at Edmonton, Alberta
this 28th day of September, 2016

Berger J.A.

Slatter J.A.

Authorized to sign for: McDonald J.A.

Appearances:

J.R. Russell
for the Respondent

G.N. Lebessis
for the Appellant