Court of Queen's Bench of Alberta

Citation: R v Yang, 2019 ABQB 716

Date: 20190916
Docket: 160730354S1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Jun Yang

Accused

Written Reasons for Oral Decision
of the
Honourable Mr. Justice W.N. Renke

[*This is a written version of oral reasons. I had reserved the right to correct grammatical or minor stylistic errors, to complete citations and quotations, and to add headings and a Table of Contents.*]

[1] Following an investigation in April 2016, Dr. Jun Yang was charged with one count of causing unnecessary suffering to an animal under s. 445.1(1)(a) of the *Criminal Code* and 3 offences under the *Animal Protection Act* (APA) for causing animals to be in distress (s. 2(1)), failing to provide adequate food and water (s. 2.1((a)), and failing to provide adequate shelter, ventilation and space (s. 2.1(d)).

[2] The trial proceeded in May 2017 before the Honourable Prov Court Judge LeReverend.

[3] By way of short overview, Dr. Yang was a veterinarian and owner of a veterinary clinic in Edmonton. Two dogs were at the centre of the allegations against Dr. Yang, Heiza, a black female Labrador cross, and Tiggor, a female Staffordshire Terrier cross. [*The dogs were owned by Dr. Yang ("rescued" from previous owners) and lived, for the most part, at his clinic.*]

[4] A complaint was directed to the City of Edmonton Animal Care and Control Section respecting alleged mistreatment of the dogs. An investigation followed, the dogs were seized, and Dr. Yang was charged. At the trial, 11 witnesses testified for the Crown, including two veterinarians and seven individuals who had been employed at Dr. Yang's clinic. The Defence called two clinic employees as witnesses and Dr. Yang testified.

[5] In a decision delivered on June 19, 2017 the Trial Judge convicted Dr. Yang of all the offences. He was sentenced on March 16, 2018. [*This is an appeal of the Trial Judge's conviction decision.*] The sentence has not been appealed.

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I. Grounds of Appeal

[6] Dr. Yang relies on four grounds of appeal from the conviction decision:

> A. The Trial Judge erred in admitting expert opinion evidence without the proper *Mohan* qualification *voir dire*.
>
> B. The Trial Judge failed to properly apply the approach in ***R v W(D)***, [1991] 1 SCR 742 and in so doing erred in assessing the evidence as a whole.
>
> C. The Trial Judge erred in assessing the credibility and reliability of the material Crown witnesses and failed to give sufficient reasons for accepting the evidence of Crown witnesses.
>
> D. The Trial Judge erred by rendering an unreasonable verdict.

II. Standards of Review

[7] Before considering the grounds of appeal, the standards of review to be applied in an appeal from the trial decision must be identified. The standards of review are as follows:

- The standard of review on questions of law is correctness. Questions of law include the admissibility of evidence, including opinion evidence and expert opinion evidence, and whether the trial judge respected the requirement – the constitutional requirement - that the Crown prove the charges against an accused beyond a reasonable doubt.
- The standard of review on questions of fact or respecting findings of fact is palpable and overriding error: ***R v Sirman***, 2019 ABCA 183, Feehan JA at para 22. Whether a witness is credible is a question of fact: ***R v Allale***, 2019 ABCA 154 at para 27; ***R v RP***, 2012 SCC 22 at para 10. In ***Allale*** at para 26, the Court of Appeal confirmed that "[a] trial judge's findings of credibility do not warrant appellate intervention unless the verdict is clearly unreasonable: ***R v W(R)***, [1992] 2 SCR 122 at 131-2, 137 NR 214."
- The standard of review on questions of mixed law and fact is palpable and overriding error unless there is an extricable error of law: ***Stikeman Elliott***

LLP v 2083878 Alberta Ltd, 2019 ABCA 274 at para 29. An extricable error of law is reviewable on the correctness standard.

- A verdict will be overturned as unreasonable only if no properly instructed jury acting judicially could reasonably have rendered the verdict: ***R v Kromah***, 2019 ABCA 255 at para 8; ***R v Cabrera***, 2019 ABCA 184 at paras 20, 21, 25. At para 24 of ***Allale***, the Court of Appeal wrote that

> Whether a conviction can be said to be unreasonable, or not supported by the evidence, imports in every case the application of a legal standard . . . [which is] enough to make the question a question of law: ***R v Biniaris***, 2000 SCC 15, [2000] 1 SCR 381, 252 NR 204 at para 23. The reviewing court must re-examine the evidence and bring to bear the weight of its judicial experience to determine whether the verdict was a reasonable one: ***R v AG***, 2000 SCC 17, [2000] 1 SCR 439, 252 NR 272 at para 6.

As put by Justice Cromwell in ***R v Villaroman***, 2016 SCC 33 at para 55, "[a]pplying this standard requires the appellate court to re-examine and to some extent reweigh and consider the effect of the evidence: ***R. v. Yebes***, [1987] 2 S.C.R. 168, at p. 186."

III. Issues

A. The Trial Judge erred in admitting expert opinion evidence without the proper *Mohan* qualification *voir dire*.

[8] As this ground of appeal concerns alleged error in admitting evidence, the standard of review is correctness.

[9] This ground of appeal engages rules concerning opinion evidence. Like some other common law evidential rules, the rules begin with exclusion of a type of evidence but then permit the admissibility of this type of evidence in defined circumstances.

[10] Generally, witnesses are to testify about what they observed, rather than about what they infer or conclude about what they observed or about what their opinions are about what they observed. As a starting point, then, opinions are inadmissible.

[11] One exception to this exclusionary rule is that experts may provide opinion evidence on matters requiring specialized knowledge: ***White Burgess Langille Inman v Abbott and Haliburton Co***, 2015 SCC 23, Cromwell J at paras 14 and 15. A useful summary of the test for the admissibility of expert evidence is set out by the Ontario Court of Appeal in ***R v Abbey***, 2017 ONCA 640 at para 48. Part of that test is that the expert be "properly qualified," and that the expert be willing and able to fulfil the duty to the court to provide evidence that is impartial, independent, and unbiased.

[12] Two experts testified for Crown, Dr. Heffelfinger and Dr. Lange. The Appellant has taken no issue with the admissibility of their evidence.

1. The Impugned Evidence

[13] The Appellant, however, identified five witnesses who, in the course of the Crown's case, provided opinions without having been qualified as experts. Defence counsel (not counsel on appeal) objected to the admissibility of this type of evidence throughout the trial.

[14] The witnesses identified were Officer Peters, a Peace Officer with the City of Edmonton Animal Care and Control section, Dr. Pimprapar Wongsrikeao (referred to in the trial and these reasons as "Dr. Pim"), Nicole Shaver, Carol-Anne Gautreau, Julie Mitchell, and Daniele Decoste. Their impugned testimony was as follows (references are to the May 2-4, 2017 Trial Transcripts):

Officer Peters

- Both [dogs] appeared very, very thin for their breed type: 11.34-37
- Based on my experience, [Heiza] was a very underweight dog: 12.31-32
- most American Staffordshire Terriers are quite a muscular breed that has ... quite a significant amount of muscle tone: 13.29-31
- tucking their tail between their legs is typically a sign of fear or submission with dogs: 15.8-9 (see also 22.39-41)
- [when asked about Tiggor's appearance in a photograph] I wouldn't exactly call it a bruise, perhaps just a pressure sore, a red mark on her abdomen .... I was concerned for this as it would indicate to me [an] animal lying in a position for a lengthy period of time: 21.21-26

Dr. Pim [*Dr. Pim's English is idiomatic*.]

- Labrador have high energetic kind of dog, they need exercise and I think when sometimes they don't have enough exercise they get bored ... these two breed they are kind of high energy. It really depends on the breed too, but Labrador and Tiggor they are both like high energy dog that I think they need exercise at least an hour a day to keep their muscle: 78.4-6, 16-20.

Nicole Shaver

- Heiza ... was incredibly malnourished, meaning that you could tell that they hadn't been fed or exercised appropriately due to being able to (*sic*) rib cages, vertebras in the spine were able to be observed. Tiggor was far worse, in my opinion. That dog's ribs and spine were super visible .... And then they were confined to a very small cage that was, in my personal opinion, not appropriate for one, let alone both to be contained in on a regular basis ...: 161.31-41.

Carol-Anne Gautreau

- Tiggor I would describe as underweight to emaciated, and Heiza was very underweight .... so there is a body conditioning score chart that we use as veterinary technicians and veterinarians. On that scale ... she was very thin

> to emaciated. She had ribs showing. You could see the majority of the bones in her body very clearly without having to touch her: 220.11-20.

Julie Mitchell

- When I started at the clinic both dogs were skinny, and at the very beginning of February I brought to Dr. Yang's attention the fact that both dogs had lost more weight since I had started, or had lost weight since I started: 120.36-49
- So when they started losing weight … you could see very distinct rib bones, spinal columns, hips, attributes that only underfed or dogs that don't have enough weight displayed: 121.1-5
- [respecting an antibiotics injection prescribed by Dr. Pim for Heiza that was not given by Dr. Yang] It is a course of antibiotics that should be followed and not following them to the full extent of its course … can be dangerous to the dog and the bacteria: 125.30-32.

Daniele Decoste

- Tiggor was very underweight. She was very timid.
- [respecting the physical shape of the dogs when she started work at the clinic] Very underweight. You could feel the ribs on both of them.

[15] The Appellant characterised this evidence as inadmissible opinion evidence of non-expert witnesses.

[16] The Appellant contended that the Trial Judge "failed to specifically disabuse herself" of this inadmissible evidence. There was therefore a risk that this evidence factored into her decision, specifically into the Trial Judge's conclusion that

> It is clear these dogs suffered physically, emotionally, and mentally. It was shown by their whining, barking, defecating, chewing, and banging their head on a cage. It's clear the symptoms from stress was from being too long confined and underfed in a far too small kennel. I convict you of those charges as well: Transcript of Trial Decision (TD) at 7.31-35.

[17] Three aspects of this ground of appeal require consideration:

1) the lay opinion evidence exception to the opinion evidence rule;
2) the role of the opinion evidence in the Trial Judge's decision; and
3) whether, if the Trial Judge erred in admitting any of the impugned evidence, the error is curable under s. 686(1)(b)(iii) of the *Criminal Code*.

2. Lay Opinion Evidence

(a) The Rule

[18] The frequency with which the Crown witnesses in this trial provided opinions speaks not to any malice or effort to skirt proper testimony by the witnesses. Rather, this speaks to our tendency in ordinary discourse to mix observation and opinion without attending to the

distinctions between the two types of statements, to the extent that distinctions can or should be drawn. Further, this speaks to the difficulty that the witnesses had in conveying what had concerned them about the dogs and the circumstances of the dogs without providing opinion.

[19] On the one hand, it is true that the law imposes rules on in-court speech or testimony use in judicial proceedings that are different than the rules governing ordinary discourse. One of those rule-sets concerns the giving of opinion evidence.

[20] On the other hand – and the difficulties the witnesses experienced go to this point - the opinion evidence rule has some latitude to permit non-experts or lay witnesses to provide opinions, in some circumstances. Justice Paciocco and Dean Stuesser write that

> we often let lay witnesses offer opinions or conclusions, but only where there is no other meaningful way for them to communicate ordinary knowledge that they possess …. Permitting [an opinion may allow] for a more effective way to communicate than confining the witness to a mechanistic description of [observations]: *The Law of Evidence in Canada*, 7th ed (2015) at 196.

Paciocco and Stuesser describe the lay opinion exception to the opinion exclusionary rule as follows at 197-198:

> Lay witnesses may present their relevant observations in the form of opinions where
>
> - they are in a better position than the trier of fact to form the conclusion;
> - the conclusion is one that persons of ordinary experience are able to make;
> - the witness, although not expert, has the experiential capacity to make the conclusion; and
> - the opinions being expressed are merely a compendious mode of stating facts that are too subtle or complicated to be narrated as effectively without resort to conclusions.

[21] The leading Supreme Court decision in this area remains ***Graat v The Queen***, [1982] 2 SCR 819, where Justice Dickson, as he then was, writes at 835 that

> The subjects upon which the non-expert witness is allowed to give opinion evidence is a lengthy one. The list mentioned in *Sherrard v. Jacob*, [[1965] N.I.L.R. 151], is by no means exhaustive: (i) the identification of handwriting, persons and things; (ii) apparent age; (iii) the bodily plight or condition of a person, including death and illness; (iv) the emotional state of a person—e.g. whether distressed, angry, aggressive, affectionate or depressed; (v) the condition of things—e.g. worn, shabby, used or new; (vi) certain questions of value; and (vii) estimates of speed and distance.

[22] The "ordinary experience" that supports lay opinion admissibility is not the same as "universal experience." "Experiential capacity" or perhaps better, experiential competence, is not equally distributed. Some people, for example, will have had no exposure to dogs. Others may have had a lifetime's exposure to dogs, not in any expert/subject-of-expertise relationship, but just with dogs as companions and companions of others. Dog people may well know more about dogs than non-dog people. That simply manifests the diversity of ordinary experience and

ordinary competence and does not necessarily require proof of formal expertise before a dog-person's claims are accepted as evidence.

[23] As a corollary and in line with ***Graat***, Officer Peters' experience as an animal care and control officer did not give her any evidential "preference:" Her "credit and accuracy" must be "viewed in the same manner as that of other witnesses and in the light of all the evidence in the case:" at 841.

(b) Application of the Rule

[24] In my opinion, the opinion evidence identified by the Appellant was admissible as lay opinion evidence. The admissible evidence falls into four groups.

[25] First, the references to the dogs being underweight, thin, or skinny: These are conclusions about the bodily plight or condition of a dog, the sort of judgment commonly made by people about dogs, whether their own or others'. Moreover, the witnesses tended to supplement their conclusions by describing the observational foundations for their conclusions – the ability to see ribs or bones of the dogs.

[26] It is true that judgments like "underweight, thin, or skinny" are normative, and presume a comparison to normal weight and appearance. That normal weight and appearance would be for the type of dog or breed of dog in question. There may well be breeds of dogs that normally appear thinner than other dogs. Did the witnesses' judgments about Heiza and Tiggor presuppose some sort of expert knowledge about the weights and appearances of breeds of dog? This presupposition became explicit in Officer Peters' testimony, where she referred to the dogs being thin "for their breed type."

[27] Heiza and Tiggor, though, were not exotic breeds. They were respectively a Labrador cross and a Staffordshire Terrier cross. To adapt Justice Dickson's words in ***Graat***, these are not such exceptional breeds as would require a veterinary expert to diagnose abnormal thinness, especially when ribs and other bones can be discerned.

[28] Early in the trial, the Trial Judge succinctly encapsulated this analysis: "Well, goodness sakes. The dog is underweight because you can see and feel its bones:" Trial Transcripts, May 2-4, 2017, 13.4-5.

[29] Second, general characteristics of Labradors and Staffordshire Terriers: Dr. Pim, for example, referred to these dogs as high energy, who need to exercise about an hour per day. I find that this is a common sense judgment about larger dogs generally, not some sort of opinion about the particular energy output features of particular breeds. Larger dogs need exercise. At least in absolute terms, a Labrador requires more energy-output activities than a small lapdog. Further, dogs like Staffordshire Terriers are known to be muscular, more muscular than, again, small lapdogs.

[30] With respect to any suggestion of exotic background for the dogs, I confirm that there was no evidence, nothing beyond assertion or conjecture (ultimately rejected by the Trial Judge), that Tiggor had greyhound in her background.

[31] Third, signs of fear or submission in dogs, such as the tail going between the legs: It should be kept in mind that humans and dogs have been companions for some 100,000 years. We are not dog-mind readers, any more than we can read other people's minds, but we can discern dogs' emotions, as we can discern humans' emotions – not perfectly in either case. We know that

a dog's tail between its legs indicates fear or submission. This is so well known that we have a common expression, "with his tail between his legs," which we apply by analogy to humans. The expression denotes, for example, defeat or fright. We can be wrong about dogs' emotions just as we can be wrong about humans' emotions, but the reliability of the judgment is a matter of weight not admissibility.

[32] Fourth, apparent veterinary opinions: Ms. Mitchell referred to the ill effects of not following a course of antibiotics. However, our doctors and our prescription labels tell us to complete courses of antibiotics. That is common knowledge. Ms. Mitchell did not purport to recommend prescribing antibiotics. She was attempting to carry out Dr. Pim's instructions concerning the antibiotics Dr. Pim had prescribed.

[33] Officer Peters referred to a red mark on Tiggor's abdomen as indicating an animal lying in a position for a lengthy period of time. We know, as a matter of common experience, how red marks on skin may be caused, particularly by lying too long without moving or by resting on some sort of irregular surface. Officer Peters did refer to a potential cause of the red mark. I understand her comment to be going only to her subjective perspective as she was commencing her investigation. She was "concerned." Her causal remark had no relevance beyond investigatory narrative and after being uttered vanished from consideration in the case.

[34] Ms. Gautreau had referred to the comparison of the dogs to a body conditioning score chart. She was a registered veterinary technician (215.31-32), but her qualifications to use this chart were not explored. One might consider this comparison to be a form of improperly qualified expert opinion evidence.

[35] An alternative approach was adopted by the Trial Judge. The Trial Judge compared photographs of (e.g.) Tiggor to a 9-point scale for rating body condition that was entered as an exhibit, and found that "[t]he pictures of [Tiggor] more closely resembled the diagram of the 1 to 2 classification:" TD at 5.10-11. The Trial Judge was making an observational judgment, a comparison between two representations, not a diagnosis or a judgment requiring expert opinion. One thing (a photograph) looked like another (a diagram on the scale). A trier of fact is entitled to make this sort of observation of visual evidence. See, e.g., ***R v Nikolovski***, [1996] 3 SCR 1197 at paras 28-32. In any event, the veterinary experts discussed the body condition charts in their testimony along with the weights of the dogs.

[36] I therefore find that the impugned evidence was admissible as lay opinion evidence, or, as in the last instance, as a form of observational evidence. The Trial Judge made no legal error in admitting the impugned evidence.

3. Role of Lay Opinion Evidence in the Decision

[37] Even if some aspects of the testimony of the clinic employees called by the Crown were inadmissible as opinion evidence, the Trial Judge did not rely on lay opinions in her decision.

(a) Underweight

[38] On the issue of whether the dogs were underweight because they were underfed, the trial judge relied on her observations and on the expert evidence of Drs. Heffelfinger and Lange.

[39] The Trial Judge looked to "the disturbingly thin condition of the dogs as shown in the pictures taken upon seizure:" TD at 5.3. She considered video evidence introduced by the

Appellant, depicting the dogs in the spring and summer of 2015. "[T]he dogs were certainly in better condition. You could not see their bones:" TD at 5.4-5. The Trial Judge then made the comparison of Tiggor to the body condition chart referred to above.

[40] The Trial Judge went on to accept the evidence of Drs. Heffelfinger and Lange that the dogs "needed to gain 5 to 6 kilograms." The Trial Judge found that there was "nothing physically wrong with the dogs to account for this underweight condition:" TD at 5.16-18. The only cause of this condition was lack of food.

(b) Kennel Size

[41] On the issue of whether the dogs' kennel was too small and whether the Appellant failed to provide the dogs with adequate shelter, ventilation, and space, the Trial Judge found that the dogs were in the kennel "a minimum of 15 hours from nine in the morning until midnight and from nine Saturday morning until Sunday midnight. They got at most two to three short bathroom breaks:" TD at 4.34-37. These were factual findings.

[42] The Trial Judge stated that

> I accept the following uncontradicted evidence: The kennel in which the dogs were lodged … was 3 feet, 6 inches long; 2 feet, 7 inches high; and 2 feet, 3 inches deep. This gave the dogs approximately 7 square feet of floor space to share. The Canadian Veterinary Medical Association provides that the indoor housing just be sufficient in size and height that permits each dog confined therein to stand normally to its full height, to move about easily for the purpose of adjusting position, and lie down in a fully extended position. A single dog of the size of these would require a kennel of 20 square feet each or 30 if housed together: TD at 4.21-29.

The Trial Judge was relying on evidence from Dr. Heffelfinger (305.33-306.34; 307.26-310.11) and Dr. Lange (359.12-31, particularly 363.1-34).

(c) Reliance on Dr. Pim as an Expert

[43] The Trial Judge wrote that "[t]he Crown did call three veterinarians, including … Dr. Pim … and the defence did not argue that their testimony was suspect:" TD at 6.11-13. The Trial Judge's statement was true. I do not interpret it as meaning that the Trial Judge put Dr. Pim's testimony on the same evidential footing as the testimony of the qualified experts Drs. Heffelfinger and Lange.

[44] The Trial Judge referred only to Drs. Heffelfinger and Lange by name throughout the remainder of the paragraph beginning at TD 6.11 (to 6.28), respecting underweight, inadequate kennelling, muzzelling, and excessive time spent in the kennel issues.

[45] The Trial Judge did report that Dr. Pim testified that Heiza got a head wound by "banging its head on the kennel out of boredom" (see 83.5-12). That was an inference by Dr. Pim. The inference followed from the legitimate premises that as a larger dog, Heiza required exercise, Heiza (on the evidence) was not getting adequate exercise and was left in her kennel for long periods of time, and while in the kennel caused the injury to her head ("she's been keeping in the crate and … she keep banging herself:" 81.1-6). I note that trial counsel for the Appellant did question Dr. Pim on circumstances that would cause a dog anxiety: 89.35-41. The presupposed concession was that Dr. Pim could testify to these sorts of inferences. In any event, the Trial

Judge had found on the basis of the evidence of Dr. Heffelfinger and Dr. Lange that "inadequate kennelling and lack of food would cause behavioural problems, physical and emotional suffering."

(d) The Trial Judge's Conclusion

[46] The Appellant argued that admitting the impugned evidence was an error of law and may have had a material effect on the decision. The Appellant continued that the Trial Judge's application of the evidence to the alleged offences (at least *Criminal Code* s. 445.1(1)(a) and APA s. 2(1)) is encapsulated in the last paragraph of the Trial Judge's decision:

> …. It is clear these dogs suffered physically, emotionally, and mentally. It was shown by their whining, barking, defecating, chewing, and banging their head on a cage. It's clear the symptoms from stress was from being too long confined and underfed in a far too small kennel. I convict you of those charges as well: TD at 7.31-35.

The Appellant stated that the Trial Judge "failed to disabuse herself of the inadmissible evidence of the non-expert witnesses, and there is a risk that this evidence factored in her decision that the animals were suffering 'physically, emotionally and mentally'."

[47] The last paragraph of the decision does not betray any influence of the impugned evidence. The foundation for the symptoms described by the Trial Judge were the dogs being too long confined, underfed, and left in a too small kennel. I reviewed above the evidential basis for the Trial Judge's conclusions about the dogs as underweight and respecting kennel size. The evidence about the dogs being too long confined was observational evidence by staff witnesses and testimony by the Appellant. Lay opinion evidence played no role in establishing the foundation for the symptoms.

[48] The Trial Judge found that the dogs suffered physically, emotionally, and mentally. The symptoms of suffering referred to by the Trial Judge were "whining, barking, defecating, chewing, and banging their head on a cage." These were all observed phenomena. As for the link between the foundation and the symptoms, Dr. Heffelfinger had testified that "[i]f dogs don't have freedom a lot of the times, they can feel … confined and start reacting in a negative way:" 309.8-11. Dr. Heffelfinger referred to signs that an animal is in distress, including whimpering, crying, yelping, barking and that the distress is physical and emotional: 312.38-313.4. Dr. Lange testified that the dogs would be "under some emotional distress because they would be hungry basically all the time. Physical distress, you're starting to get into the area where that might be happening:" 365.27-29. Dr. Lange specifically referred to the dogs' kennelling as causing them stress: 369.10-13. The Trial Judge confirmed that "I accept the evidence of Dr. [Lange] and Heffelfinger, who said inadequate kennelling and lack of food would cause behavioural problems, physical and emotional suffering:" TD at 6.17-19. The excessive kennel time and lack of outside time "accounts for the behavioural issues and using the kennel as a bathroom:" TD at 7.14-15.

[49] Further to the factual link between the dogs' suffering and their living conditions, the Trial Judge observed that "[w]e know that [Heiza], who was initially described as a very well trained dog, became a dog who barked, whined, urinated, and defecated in the kennel:" TD at 6.19-21.

[50] I see no influence in this "encapsuling" portion of the decision as showing the influence of any lay opinion evidence.

[51] The Trial Judge did not mention Officer Peters in the decision at all. The Trial Judge did not mention any lay opinion evidence, except for Dr. Pim's claim that boredom lay behind the wound caused by Heiza banging her head on the kennel. The Trial Judge did rely on "the evidence of staff members who saw the accused bent over the dogs, punching them:" TD at 7.23-24.

[52] The Trial Judge intervened at numerous points in the trial to remind witnesses to confine themselves to their observations and to remind trial counsel for the Crown (who was not appellate counsel) to ensure that his questions did not elicit opinion. For example, the Trial Judge said at 167.8-10:

> Okay. Mr. Lim, I am going to get you to restrict your questions to what she saw and what she observed. I really do not want anymore opinions: okay?

What the Trial Judge demonstrated was that she was aware that witnesses were providing opinion evidence, but the manifest weight of the evidence was not significantly advancing the fact-finding project of the trial. The Trial Judge was signalling that she was properly contextualizing this evidence and its probative value within the evidence as a whole. The Trial Judge's lack of reference to lay opinion evidence in her decision confirms that the evidence played no significant role in her assessment of the case against the Appellant.

[53] The Trial Judge set out the evidence supporting her conclusions. She did not refer to lay opinion evidence as supporting her conclusions. My reading of the decision is that the lay opinion evidence had no effect on the Trial Judge's conclusions.

4. Harmless Error

[54] Finally, even if some aspects of the testimony of the clinic employees called by the Crown were inadmissible as opinion evidence, admitting this evidence was harmless error under s. 686(1)(b)(iii) of the *Criminal Code*.

[55] Subsection 686(1) provides as follows:

> 686 (1) On the hearing of an appeal against a conviction …, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that …
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (b) may dismiss the appeal where …
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred ….

[56] The fundamental test under s. 686(1)(b)(iii) is whether there is no reasonable possibility that the verdict would not have been different had the error not been made: ***R v Khan***, 2001 SCC

86, Arbour J at para 28. Put another way, the test is whether "the verdict would have been the same if the error had not been committed:" ***R v Van***, 2009 SCC 22, LeBel J at para 36.

[57] As Justice LeBel explained in ***Van*** at para 34, under s. 686(1)(b)(iii), the Crown bears the burden of establishing that

> the error of law falls into one of two categories. First, that it is an error so harmless or minor that it could not have had any impact on the verdict. In the second category are serious errors that would otherwise justify a new trial or an acquittal, but for the fact that the evidence against the accused was so overwhelming that any other verdict would have been impossible to obtain ….

According to Justice LeBel at para 35,

> An error falling into the first category is an error that is harmless on its face or in its effect. The proviso ensures that an appellate court does not need to overturn a conviction solely on the basis of an error so trivial that it could not have caused any prejudice to the accused, and thus could not have affected the verdict.

With respect to the second category, a court may uphold a conviction respecting

> an error that was *not* minor and that *cannot* be said to have caused no prejudice to the accused, if the case against the accused was so overwhelming that a reasonable and properly instructed jury would inevitably have convicted …: at para 36.

That is, the "inevitable result" would be another conviction: *ibid.*

[58] If any lay opinion evidence was wrongly admitted (and I have found no such error), the error could only have been harmless or minor. As indicated above, the lay opinion evidence did not play a role in supporting the Trial Judge's decision.

[59] Instead, the opinion evidence foundation for the Trial Judge's decision was the evidence of Drs. Heffelfinger and Lange. These witnesses addressed the dogs' weight, kennel size, effects of inadequate outside time, and muzzling, as well as the Appellant's inappropriate use of loud noise as a training method: TD at 7.17-21.

[60] Hence, the verdicts would have been the same even if no lay opinion evidence had been introduced.

[61] This ground of appeal is not established.

B. The Trial Judge failed to properly apply the approach in *R v W(D)*, [1991] 1 SCR 742 and in so doing erred in assessing the evidence as a whole.

[62] The standard of review for this ground of appeal is correctness.

[63] ***W(D)*** did not establish some new and independent principle of law. Rather, in that case Justice Cory attempted to provide guidance for trial judges to ensure that jury instructions did not obscure or mislead respecting a foundational principle: "The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle:" at 758. This passage follows the oft-repeated description of the ***W(D)*** steps. What is critical is that a trial judge and a trial judge's jury instructions respect the presumption of innocence, the

requirements for the Crown to prove the guilt of the accused and for guilt to be established beyond a reasonable doubt on the basis of the whole of the evidence. See ***R v Vuradin***, 2013 SCC 38, Karakatsanis J at para 21.

[64] As for the "***W(D)*** approach", Justice Peter Martin recognized in ***R v Ryon***, 2019 ABCA 36 at para 20 that "[t]he formula proposed in ***R v. W(D)***, [1991] 1 SCR 742, is, if applied *verbatim* and without explanation, misleading and confusing." Justice Martin went on at para 51 to recast the elements of a ***Charter***-compliant jury instruction.

[65] In any event, the Appellant was tried by judge alone not by judge and jury. Justice Karakatsanis confirmed in ***Vuradin*** that "trial judges are not required to explain in detail the process they followed to reach a verdict." The Court of Appeal confirmed in ***Allale*** at para 34 that

> Judges sitting alone are presumed to know the law and they are not expected or required to provide reasons equivalent to or mimicking a jury instruction: *R v Griffin*, 2018 ABCA 277 at para 12, citing in turn, *R v Sheppard*, 2002 SCC 26 at para 55, [2002] 1 SCR 869.

[66] There is nothing in the decision that would cause me even to consider that an experienced trial judge forgot that the Crown must prove its case beyond a reasonable doubt and that the burden of proof lay on the Crown throughout (given the issues in this case). Nothing suggested that the Trial Judge allocated any burden of proof to the Appellant. In her reasons, the Trial Judge, in brief compass, canvassed the evidence in the case. The Trial Judge reviewed not only the Appellant's evidence, but the other evidence in the case. The Trial Judge did not fail to assess the evidence as a whole.

[67] The presumption of knowledge of the law entails that the presumption can be rebutted only on the basis of some evidence, some textual indication of error. There was no such indication here.

[68] Furthermore, the decision must be read in context: ***Vuradin*** at paras 12, 15, 18, and 26. The Trial Judge began her decision by invoking ***W(D)***. Incidentally, by considering the Appellant's evidence first, the Trial Judge provided perhaps excessively favourable consideration to that evidence: see ***Ryon*** at para 46.

[69] Both trial counsel referred to ***W(D)*** in their submissions, Defence counsel first (May 30, 2017 Trial Transcript at 40.1, 41.26-27), then Crown counsel (47.15, 48.41-49.7).

[70] In my opinion, the Trial Judge considered the evidence as a whole, and respected the requirements that the Crown prove its case against the Appellant beyond a reasonable doubt.

[71] This ground of appeal is not established.

C. The Trial Judge erred in assessing the credibility and reliability of the material Crown witnesses and failed to give sufficient reasons for accepting the evidence of Crown witnesses.

1. The Approach to Credibility Assessment and Reasons

[72] The standard of review for credibility and reliability findings is whether the trial judge made palpable and overriding error.

[73] The test for sufficiency of reasons is whether the reasons impede appellate review or are insufficient to allow meaningful appellate review: ***R v Gordon***, 2015 ABCA 341 at para 6, ***R v Dinardo***, 2008 SCC 24 at para 2.

[74] The Trial Judge was entitled to accept all, some, or none of the evidence of any witness: ***R v WT***, 2016 ONSC 3943, Hill J at para 125; ***R v Beharri***, 2013 ONSC 7753, Hill J at para 103; ***R v REM***, 2008 SCC 51 at para 65; ***R v Francois***, [1994] 2 SCR 827 at para 14.

[75] The Appellant refers to "inadequate reasons with respect to the credibility of witnesses" as a basis for appellate intervention, referring to ***R v Braich***, 2002 SCC 27 at para 23 and ***Dinardo*** at para 26.

[76] However, "inadequacy of reasons is not a stand-alone ground of appeal: ***Kromah*** at para 6. In ***Vuradin***, Justice Karakatsanis wrote that

> [12] Ultimately, appellate courts considering the sufficiency of reasons "should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered": ***R.E.M.***, at para. 16. These purposes "are fulfilled if the reasons, read in context, show why the judge decided as he or she did" (para. 17).
>
> [13] In ***R.E.M.***, this Court also explained that a trial judge's failure to explain why he rejected an accused's plausible denial of the charges does not mean the reasons are deficient as long as the reasons generally demonstrate that, where the complainant's evidence and the accused's evidence conflicted, the trial judge accepted the complainant's evidence. No further explanation for rejecting the accused's evidence is required as the convictions themselves raise a reasonable inference that the accused's denial failed to raise a reasonable doubt (see para. 66).

And at para 15:

> [15] The core question in determining whether the trial judge's reasons are sufficient is the following: Do the reasons, read in context, show why the judge decided as he did on the counts relating to the complainant? ….

2. Reasons for Not Accepting the Appellant's Evidence

[77] The Trial Judge gave reasons for not accepting the Appellant's evidence – keeping in mind that even the total rejection of an accused's testimony does not mean that the accused must be found guilty. Reasonable doubts may arise from other evidence in the case, whether derived from the Crown or Defence evidence.

- The Appellant described Tiggor in clinical records as a pit bull cross. There was "no mention of greyhound:" The Trial Judge stated that "I'm satisfied that that was an afterthought to account for the disturbingly thin condition of the dogs as shown in the pictures taken upon seizure:" TD at 5.1-3.
- The Appellant denied personally muzzling Heiza. The Trial Judge did not accept this claim. "The dog would have to have been muzzled enough to know that the muzzle would be applied if [she] continued barking:" TD at

6.22-24. If the Appellant had not muzzled Heiza, she would not have learned the association been the muzzle and ceasing barking.

- The Appellant claimed that he gave the dogs outside time at night or in the early morning when he was at the clinic. The Trial Judge did not accept this claim: "Dr. [Lange] said dogs do not normally use their kennels as a bathroom. If a dog is required to do so, it would indicate the dog was not given enough time for bathroom breaks:" TD at 6.26-8
- Further, staff frequently found on coming to work that Heiza had relieved herself in the kennel. "The dogs would be covered in urine or faeces." The Trial Judge accepted the Appellant's testimony that he "had the dog tested for urinary tract infection. It also satisfies me that he seldom let the dogs out of the kennel at night:" TD at 6.33-36. This finding was contrary to the Appellant's claim to have exercised the dogs.
- The Appellant claimed that he didn't want the dogs to bond with staff. Yet he permitted Mr. Ivanic to walk the dogs. He permitted staff to walk the dogs on their own time: "If the accused intended to bond with the dogs and take them out at night, there would be no reason to have Mr. Ivanic do that:" TD at 6.38-4. Or to permit other staff to walk the dogs.

3. Assessment of the Crown Staff Witnesses

[78] The Appellant's main concern is with the credibility of three Crown witnesses whose testimony the Trial Judge found to be false. The Trial Judge found that

> It's clear Sasha could not have seen the accused punch [Heiza] from the window in the surgery through to the kennel room and clear Carol Anne lied when she said she saw the dogs panting in the outside grassy area the summer before she started work. [Daniele DeCoste] … spoke of a leg wound on one of the dogs which wasn't even noticed by anyone else. But this doesn't mean that I am going to dismiss their testimony. I just will be cautious when their testimony differs from that of the accused: TD at 5.35-41.

The Appellant is right that error or falsehood in one area may taint the sincerity or reliability of a witness in another area of testimony or the whole of the witness's testimony – but it may not.

[79] In relation to Sasha Simons, the Trial Judge made no error, was not inconsistent, when she stated "I accept the evidence of staff members who saw the accused bent over the dogs, punching them:" TD at 7.23-24. The Trial Judge had found that Sasha did not see what she claimed to have seen, so she could not have been included among the "staff members who saw the accused bent over the dogs."

[80] Julie Mitchell testified to having seen the Appellant strike Tiggor: 114.38-116.4; 144.6-11. Reese Pura testified to having seen the Appellant strike Tiggor: 190.12-15, 198.10-23, 210.1-36. These witnesses were not found to have been "not completely truthful."

[81] One explanation for the Crown witnesses' complaints would be that the whole of the staff members' testimony was a concoction, a fabrication – they did speak to each other before "they commenced this proceeding:" TD at 5.33-34. The staff members had agreed with the Defence

that the Appellant was difficult to work with. The allegations against him, then, could have been a form of payback.

[82] Another explanation, the explanation accepted by the Trial Judge, was that the Crown witnesses' testimony was corroborated by other evidence – e.g. elements of the testimony of the Appellant, the size of the cages, the veterinarians' testimony, the photographs - and their evidence was true, beyond a reasonable doubt. The Trial Judge said "I'm satisfied they brought this application out of concern for the two dogs and I'm satisfied their concerns were legitimate:" TD at 6.8-9.

4. Reasons for Deciding as She Did

[83] I return to ***Vuradin*** at para 15:

> [15] The core question in determining whether the trial judge's reasons are sufficient is the following: Do the reasons, read in context, show why the judge decided as he did on the counts relating to the complainant?

[84] The APA s. 2.1(d) offence reads as follows:

> 2.1 A person who owns or is in charge of an animal
>
> (d) must provide the animal with adequate shelter, ventilation and space.

The dogs spent months in the kennel, Heiza from July 2015 and Tiggor with her from February 2016: TD at 2.18-24. The Trial Judge's conviction of the Appellant was based on the kennel size and the daily time spent by the dogs in the kennel. The Trial Judge found that the evidence on both of these matters was uncontradicted. As discussed above, the Trial Judge rejected the Appellant's testimony that he regularly exercised the dogs.

[85] I note the Trial Judge's conclusion respecting this charge. "The space is far too small for one dog, it's obscene for two, and I convict you of that charge:" TD at 4.36-37.

[86] The APA s. 2.1(a) offence reads as follows:

> 2.1 A person who owns or is in charge of an animal
>
> (a) must ensure that the animal has adequate food and water ….

As discussed earlier, the Trial Judge founded the conviction for this offence on the evidence of her own senses, based on the video and photographic evidence and on the testimony of the experts respecting the dogs as underweight.

[87] The *Criminal Code* and APA s. 2(1) offences read as follows:

> 445.1(1)(a) Every one commits an offence who
>
> (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal ….
>
> 2(1) No person shall cause or permit an animal of which the person is the owner or the person in charge to be or to continue to be in distress.

These charges were the focus of the unreasonable verdict ground of appeal and I will discuss the Trial Judge's reasons respecting these offences in that context below. My account there applies here as well.

[88] I find that the Appellant has failed to establish that the Trial Judge erred in assessing the credibility or reliability of the witnesses. I find that the Trial Judge's reasons adequately show why she convicted the Appellant.

[89] This ground of appeal is not established.

D. The Trial Judge erred by rendering an unreasonable verdict.

1. The Test

[90] The test for whether a verdict is reasonable, according to Justice Cromwell in ***Villaroman*** at para 55, is whether it is a verdict that "a properly instructed jury acting judicially could reasonably have rendered." A verdict is not unreasonable just because it is possible that another verdict might have been supported by the evidence. Chief Justice Fraser wrote as follows in ***Cabrera*** at para 22:

> [22] Nor should an appellate court find a verdict unreasonable simply because it decides, based upon its own review of the evidence, that it has a reasonable doubt and would not have convicted: *WH*, supra at para 27; *R v Couterielle*, 2017 ABCA 409 at para 15, [2017] AJ No 1293 (QL) [*Couterielle*]; *R v McCracken*, 2016 ONCA 228 at para 24, 348 OAC 267 [*McCracken*]. As the Supreme Court has cautioned: "Trial by jury must not become trial by appellate court on the written record": *WH*, supra at para 34. Hence the need for caution before finding a jury verdict unreasonable ….

2. The Finding of Distress

[91] The focus of the Appellant's unreasonable verdict argument was on the Appellant's convictions for the *Criminal Code* s. 445.1(1)(a) and APA s. 2(1) charges, respecting willfully causing suffering. The Trial Judge found that

> It is clear these dogs suffered physically, emotionally, and mentally. It was shown by their whining, barking, defecating, chewing, and banging their head on a cage. It's clear the symptoms from stress was from being too long confined and underfed in a far too small kennel. I convict you of those charges as well: TD 7.31-35.

As discussed respecting the role of lay opinion evidence in the decision, the factual foundation of the conviction had three elements: too long confined, underfed, too small kennel.

[92] The Appellant did not and could not dispute the "too small kennel" element. The Trial Judge wrote that

> I accept the following uncontradicted evidence: The kennel in which the dogs were lodged … was 3 feet, 6 inches long; 2 feet, 7 inches high; and 2 feet, 3 inches deep. This gave the dogs approximately 7 square feet of floor space to share. The Canadian Veterinary Medical Association provides that the indoor housing just be sufficient in size and height that permits each dog confined therein to stand normally to its full height, to move about easily for the purpose of adjusting position, and lie down in a fully extended position. A single dog of the size of these would require a kennel of 20 square feet each or 30 if housed together: TD at 4.21-29.

[93] As for "too long confined," the Trial Judge also stated that it was uncontradicted that the dogs were kept in the kennel "a minimum of 15 hours a day" from "nine in the morning until midnight and from nine Saturday morning until Sunday midnight. They got at most two or three short bathroom breaks:" TD at 4.21-22, 34-37.

[94] The Appellant referred to the cross-examination of Dr. Heffelfinger, who agreed that exercise in the evenings could compensate for lengthy kennelling during the day. However, the size of the kennel implicit in this question was not referred to in the cross-examination. It was not put to Dr. Heffelfinger that lengthy kennelling of two dogs in a space unfit for one dog could be compensated for by evening exercise. Further, perhaps less significantly, kennelling of 10 or 11 hours was referred to in cross-examination, not kennelling for 15 hours.

[95] But most significantly, the cross-examination exposed a possibility only. A mere possibility, a hypothetical state of affairs, must have a foundation in the evidence to raise a reasonable doubt. For exercise to remedy 15 hours confinement, exercise must have occurred and occurred consistently and sufficiently. As indicated above, the Trial Judge considered the evidence to rebut late night or early morning exercise of the dogs by the Appellant.

[96] The Trial Judge stated that Dr. Pim treated Heiza for an ongoing ear infection "which the accused did not discuss," and concluded that "[i]t's clear if he spent time with the dogs, as he alleges he did, he would be aware of that condition:" TD at 7.11-13. The Trial Judge clarified that she was "not saying the accused didn't ever let them out. Of course we have a video of the dogs being outside. I'm satisfied that it was very infrequent, which accounts for the behavioural issues and using the kennel as a bathroom:" TD at 7.13-15.

[97] As for "underfed," the Trial Judge found that "[i]t's clear from the accused's own evidence that the two dogs went from healthy-looking dogs to little more than skin and bones," and referred to "the disturbingly thin condition of the dogs as shown in the pictures taken upon seizure:" TD at 4.40-5.3. The Trial Judge referred to Exhibit 9, the 9-point scale for rating a dog's body condition. The lower the number, the thinner the dog. The Trial Judge stated that "[t]he pictures of [Tiggor] more closely resembled the diagram of the 1 to 2 classification. It is only because Heiza has a longer coat, her bones are not as visible but the ribs are still visible:" TD at 5.10-12.

[98] The Trial Judge then turned to the testimony of Drs. Heffelfinger and Lange. They agreed that the dogs "needed to gain 5 to 6 kilograms:" TD at 5.16. There was no physical cause of the underweight condition: "The only cause is lack of food:" TD at 5.17-18.

[99] Dr. Lange did state that there was a layer of fat on Tiggor. The fat layer could move Tiggor toward the ideal weight point. Dr. Lange clarified, though, that "there was a very, very limited amount of fat layer at all:" 360.3.

[100] It is true that the Trial Judge did not refer to the palpable fat issue. I do not view this omission as undermining the reasonableness of the decision. No claim was made that the dogs were emaciated. They were not at the lowest rung of the body condition scale. They were underfed and underweight. That is not inconsistent with having a "very, very limited amount of fat layer." Put another way, having some palpable fat is not the same as having enough palpable fat to be at or closer to an ideal weight. The probative value of the palpable fat comment was conjectural.

[101] The Appellant pointed out that both dogs were "healthy," according to both Drs. Heffelfinger and Lange. The Trial Judge did not refer to the dogs' lack of physical pathologies in her reasons.

[102] But again, I do not view this omission as undermining the reasonableness of the decision. The suffering experienced by the dogs was not because of physical breakdown from starvation. Their suffering was caused by their confinement in a kennel that was too small, for periods that were too long, without proper breaks or exercise. Being otherwise healthy would not eliminate or mitigate this suffering.

[103] The Crown pointed out, relying on ***R v Menard*** (1978), 43 CCC (2d) 458, 1978 CarswellQue 25 (Que CA), a decision of Justice Lamer, as he then was , at paras 46-47 (CarswellQue), the critical issue is whether an animal's suffering was caused willingly and without necessity, not the level of suffering. In this case, the Trial Judge found that the dogs suffered significantly. Their suffering, as found, was far beyond *de minimis*. The dogs could have suffered more. Their plight could have been worse. That would have aggravated the offence but greater suffering was not required to establish the offence. The evidence did not support a reasonable doubt that the dogs' suffering, considering its degree, was somehow necessary. The Trial Judge too expressly relied on ***Menard***.

[104] In my opinion, far from the Trial Judge's verdicts not being verdicts that a properly instructed jury, acting judicially, could reasonably have rendered, on the evidence, the Trial Judge's verdicts were entirely reasonable.

[105] This ground of appeal is not established.

IV. Conclusion

[106] I have found that the Trial Judge did not err as claimed in the grounds of appeal.

[107] I therefore dismiss Mr. Yang's appeal

Heard on the 22nd day of August, 2019.
Delivered Orally at the City of Edmonton, Alberta the 23rd day of August, 2019.
Signed at the City of Edmonton, Alberta this 16th day of September, 2019.

W.N. Renke
J.C.Q.B.A.

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