IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Roberts,*
2017 BCSC 2495

Date: 20171220
Docket: 49804
Registry: Vernon

Regina

v.

Gary W. Roberts

Before: The Honourable Mr. Justice N. Smith

On appeal from: Provincial Court of British Columbia, December 19, 2016
(*R. v. Roberts*, Vernon No. 49804-1)

Oral Reasons for Judgment

Counsel for the Crown, appearing by teleconference:	A. Janse
Counsel for the Accused, appearing by teleconference:	M.B. Rankin
Place and Date of Hearing:	Vernon, B.C. December 18, 2017
Place and Date of Judgment:	Vernon, B.C. December 20, 2017

[1] **THE COURT:** This is a summary conviction appeal by Mr. Roberts, who was convicted of wilfully causing suffering to animals contrary to s. 445.1(1)(a) of the *Criminal Code*, and of wilfully neglecting animals contrary to s. 446(1)(b). The animals in question were a herd of horses that Mr. Roberts kept in Armstrong, British Columbia.

[2] The Provincial Court judge found that in December 2013, Special Constable Chapman of the British Columbia Society for Prevention of Cruelty to Animals, attended Mr. Roberts' property and saw that the horses had no access to food and appeared to be underweight and neglected. As a result, he gave the appellant what was then referred to as an "order" (but might more appropriately be considered a notice) containing eight directions. There were also certain recommendations made by a veterinarian at that time.

[3] On December 11, 2014, that is approximately a year later, the SPCA executed a warrant to enter onto the property owned by Mr. Roberts and a veterinarian, Dr. Mills, was present at that time. She determined that the animals were in distress – in particular, that there was insufficient food, water, and shelter, as well as inadequate hoof and veterinary care.

[4] The first ground of appeal concerns the nature of the warrant that was executed on that date. The warrant was pursuant to the *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372. Section 13(2) of that *Act* provides for two different kinds of warrants. Under s. 13(2)(a), the justice may issue a warrant authorizing an authorized agent to enter premises for the purpose of taking any action authorized by the *Act* to relieve the animal's distress. Section 13(2)(b) provides for a warrant authorizing entry of premises for the purpose of searching for and seizing a thing that will afford evidence of an offence under s. 24.

[5] This warrant was issued under s. 13(2)(a), that is a warrant to relieve distress, and that is the first ground of appeal.

[6] In addition to the veterinarian, the officer was accompanied by a photographer who took a number of pictures. Before the Provincial Court judge, defence counsel sought to exclude those photos, because the warrant to enter the property did not include or permit the gathering of evidence. The Provincial Court judge held in a *voir dire* ruling:

> This was not a search. Nothing was seized. This was not a breach of s. 8 of the *Charter*. Even if I am wrong, the seriousness of the breach and its impacts on the rights of Mr. Roberts were nominal. Photographs are real evidence and would assist the court to give accurate and detailed information, particularly when the case has dragged on for so long.

[7] The argument before the Provincial Court judge was focused on the photographs, but Mr. Roberts' position on this appeal was much broader, arguing that all evidence gathered on the property, including evidence of any observations made, should have been excluded because the warrant did not authorize gathering of evidence.

[8] Counsel relies in part on a decision of the Provincial Court in *R. v. Nickason and Lothrop*, 2004 BCPC 316 [*Nickason*]. In that case, the judge said, in relation to a warrant similar to the one issued in this case, at para. 21:

> [21] Taken together, the wording of the statute and the warrant itself make it plain that those who execute the warrant were not intended to go onto the Defendants' property to gather evidence concerning an alleged offence, but solely for the purpose of taking such actions as may be authorized by the *Act* to relieve the distress of any needy animal . . .

And at para. 24:

> [24] It is obvious that the presence of the veterinarian and the trailer operator was necessary for due execution of the warrant. But the presence of photographers and video camera operators cannot be justified as being within the scope of the warrant . . .

[9] The court excluded the photographs and the video evidence, but did allow other evidence obtained at the scene.

[10] *Nickason* was referred to with some approval, although in a somewhat different context, by this court in *Van Dongen v. The Society for the Prevention of Cruelty to Animals*, 2005 BCSC 548.

[11] Mr. Roberts also relied on, before the Provincial Court judge and on this appeal, on *R. v. Huisman*, 2007 BCPC 132 [*Huisman*]. In that case, all evidence was excluded based on a finding of bad faith. The court said at para. 6:

> [6] There is a fine line between addressing the question of relieving distress and collecting evidence. It depends on the facts as to how the officers conducted themselves in the course of the execution of the warrant. There undoubtedly will be situations where the evidence gathered is only incidental to the primary objective of relieving distress. As well, there may be exigent circumstances which militates against obtaining a 13 (2)(b) warrant. However, if the main purpose is to gather evidence then a 13 (2)(b) warrant must be obtained otherwise the legislative scheme of preauthorization would become meaningless. The issue at stake is the individuals' right to be free from the states intrusion into ones privacy. Balanced against this is the pursuit of law enforcement as authorized by the appropriate warrant. This is not unlike a search of a residence where evidence might be revealed which is beyond the scope of the original warrant. ...

[12] As I said, in that case, there was a finding of bad faith which resulted in all of the evidence being excluded.

[13] In *R. v. Haughton*, Kamloops Registry No. 88396, in a decision of the Provincial Court dated July 28, 2011 [*Haughton*]**,** the issue of photographs arose and the Provincial Court judge said at para. 21:

> Photographs and videos taken by parties executing a search warrant are not seized. They are the same as naked eye observations. The purpose of taking photos and video are to assist in the investigation and execution of the search warrant and to document the scene for liability purposes.

[14] However, at para. 23, the court said the warrant did not extend to permit the SPCA officer to review records or documents contained in a file.

[15] Therefore, on the narrow question of photographs, there appear to be conflicting authorities in the Provincial Court and the judge in this case appears to have followed *Haughton.* In my view, the absence of any physical objects being seized does not make the authority's presence on private property any less of a

search. In a search under s. 13(2)(a) for the purpose of relieving distress, photographs may serve some purpose ancillary to that exercise, if nothing else for internal documentation by the officers, but that does not automatically make them admissible for another purpose that required a different kind of warrant.

[16] I therefore agree with the approach taken in *Nickason* on the question of photographs and find that their use as evidence in a prosecution was a *prima facie* violation of *Charter* rights.

[17] However, it is apparent from the Provincial Court trial judge's final Reasons that those photos, although they were admitted into evidence, played only a minor role in the result. In finding the animals were in pain and suffering and that they had been neglected, the judge relied primarily on the evidence of the veterinarian, Dr. Mills, who examined the animals. No objection to her evidence was taken at trial, although it comes within the broader objection advanced on appeal. Dr. Mills was on Mr. Roberts' property only for the purpose authorized by the warrant and not to gather evidence.

[18] In *Huisman*, the court said that there is a fine line between addressing the question of relieving distress and collecting evidence. This is an example of the fine line and there was no finding of bad faith.

[19] Because the objection to Dr. Mills' evidence was not raised before the Provincial Court judge, I do not find it necessary to make a finding on whether the use of that evidence in this proceeding amounted to a breach of Mr. Roberts' s. 8 *Charter* right to be free against unreasonable search and seizure. Even if it was, I find that this is not a case where the exclusion of the evidence was required under s. 24(2) of the *Charter*.

[20] In *Nickason*, although photographs and video evidence were excluded, other evidence obtained was admitted. Among factors noted by the judge were that the area searched was a farmyard, not a residence, that the evidence was not prescriptive, and there were reasonable grounds for issuance of the warrant.

[21] Since that case was decided, the Supreme Court of Canada has established the *Grant* test which requires the court to consider the seriousness of the *Charter*-infringing state conduct, the impact of the breach of *Charter*-protected interests of the accused, and society's interest in the adjudication of the case on its merits.

[22] I agree with the Crown that those factors favour admission of the evidence in this case. The *Charter*-infringing state conduct was relatively minor with minimal impact on the protected interest of Mr. Roberts. The officers were lawfully on his property pursuant to a warrant, albeit a warrant that was issued for a different purpose. There was no search that was inconsistent with the purpose of that warrant, such as the search of a residence. The observations made by Dr. Mills and which the trial judge relied on were made as part of an examination integral to the purpose for which the warrant was issued.

[23] This is not a case where admission of the evidence would bring the administration of justice into disrepute and I therefore do not accede to the first ground of appeal.

[24] The second ground of appeal is that the trial judge relied on evidence of what took place in December 2013. The submission is that while Mr. Roberts accepts that the prior British Columbia SCPA compliance order was relevant to the issuance of the warrant, it should have played no role in convicting him. Counsel says that the existence of the compliance order and Mr. Roberts' response to it were immaterial for the purpose of determining his guilt or innocence, and reliance on that evidence amounted to a form of inadmissible evidence of bad character.

[25] In my view, the offences charged required the Crown to prove not only the condition of the animals, but that they were wilfully left in that condition. The trial judge referred to the orders given in 2013 and the recommendations made by a veterinarian at that time and noted that the situation had deteriorated a year later. He found that the order made in 2013 and the recommendations made at that time by a veterinarian constituted a warning that conditions would deteriorate if steps were not

taken and found that Mr. Roberts could not have been unaware of the animals' condition.

[26] The judge's reference to that evidence was not in the nature of evidence of bad character or propensity. It was evidence properly relied on in the necessary consideration of whether Mr. Roberts had the necessary *mens rea* of the offence--whether he knew of the animals' condition, knew that the condition was dangerous for them, and whether he acted wilfully in allowing that condition to continue.

[27] I find no error in the judge's reliance on the evidence for that purpose.

[28] The third ground of appeal relates to findings of credibility. Counsel properly concedes that an appellate court is required to give a high degree of deference to credibility findings because the trial judge is in a far better position to make such findings.

[29] In that regard, the trial judge said this at para. 8:

> [8] Mr. Roberts presented as an angry man. In cross-examination he resorted to profanities until cautioned. He gratuitously disparaged the B.C. SPCA and largely blamed them for his difficulties. He was strongminded and contradicted the evidence of or the opinions of Dr. Mills based on things he read and had been told and personal experience, even though, unlike her, he was not qualified to give such opinions.

[30] It is not necessary to parse that paragraph or the evidence to determine if I would have made the same determination, nor should it be assumed that the statement reflects the only basis for the court's credibility finding. In *R. v. Gagnon*, 2006 SCC 17, the Supreme Court of Canada said at para. 20:

> **20** Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

[31] In *R. v. Dinardo*, 2008 SCC 24, the court said at para. 23:

> **23** . . . In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt . . .

[32] I find that the trial judge properly turned his mind to that decisive question of whether Mr. Roberts' evidence raised a reasonable doubt and I do not find anything in his credibility analysis that amounts to a palpable and overriding error.

[33] In summary, the appeal must be dismissed. Thank you, counsel.

[34] MS. JANSE: Thank you, My Lord.

[35] MR. RANKIN: Thank you, My Lord.

"Smith J."