



**IN THE PROVINCIAL COURT OF NEWFOUNDLAND AND  
LABRADOR**

**JUDICIAL CENTRE OF ST. JOHN'S**

**Citation:** *R. v. Smith*, 2019 NLPC 0118A03568

**Date:** May 29, 2019

**Docket:** 0118A03568

BETWEEN:

**HER MAJESTY THE QUEEN**

AND:

**CRYSTAL SMITH**

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**Before:** The Honourable Judge Lori Marshall

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**Place of Trial:** St. John's, NL

**Trial Date[s]:** April 26, 2019

**Summary:** Accused was charged with failing to keep her dogs penned or tethered and allowing them to cause a hazard pursuant to ss. 31 and 32(1) of the *Animal Health and Protection Act*. She had let them off leash in a public tennis court and they escaped through a hole in the fence. While they were at large, they killed a cat. Accused found not to have exercised due diligence and found guilty on both counts.

**Appearances:**

Renee Coates  
Alexandra Kindervater

Counsel for Her Majesty the Queen  
Counsel for the Defendant

**Authorities Cited:**

**CASES CONSIDERED:** *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353(S.C.C.); *R. v. Alexander*, [1999] 171 Nfld. & P.E.I.R. 74, 525 A.P.R. 74, 28 C.E.L.R. (N.S.) 217, 1999 Carswell Nfld 19 (NLCA).

**STATUTES CONSIDERED:** *Animal Health and Protection Act*, SNL2010 CHAPTER A-9.1, s. 32 and s. 32(1).

**REASONS FOR JUDGMENT****MARSHALL, PCJ:****INTRODUCTION**

[1] Crystal Smith is charged with the following two offences pursuant to the *Animal Health and Protection Act* :

On or about the 4<sup>th</sup> day of August, 2018 at or near St. John's, NL, being the owner of a companion animal, did unlawfully allow the companion animal to cause a hazard to people, livestock operation, other animals, goods, property or the safe operation of motor vehicles contrary to s. 31 of the *Animal Health and Protection Act*;

And

On or about the 4<sup>th</sup> day of August, 2018 at or near St. John's, NL, being the owner of a dog, did unlawfully fail to keep the said dog tethered or penned up at all times, thereby committing a breach of s. 32(1) of the *Animal Health and Protection Act*;

[2] The trial was heard on April 26, 2019 at which time I heard from the following witnesses:

Constable Justin Day  
Mark Condon

Sabeen Mowlaii  
Crystal Smith

[3] I was also provided with the following exhibits:

- JD#1 – Google map of the area marked by Constable Day
- MC#1 – Google map of the area marked by Mr. Condon
- SM#1 – Google map of the area marked by Ms. Mowlaii
- CS#1 – DNA Certificate for Keiko
- CS#2 – DNA Certificate for Luna

### **FACTS**

[4] Crystal Smith testified that she is the owner of four dogs. On the morning of August 4, 2018, while she was having breakfast, two of those dogs, Luna and Keiko, both American Staffordshire terriers, commonly known as Pitbulls, were whining and running to the door to go outside. Ms. Smith said that she had not intended to walk the dogs that day because she was suffering with a kidney infection. However, when the dogs' behaviour did not relent, she decided to walk from her house on Nascopie Crescent to Stamp's Lane, where she entered a public tennis court and let the dogs off leash. She said that she had brought the dogs there within the last three days and let them off without issue.

[5] She arrived at the tennis court shortly after 9:00 a.m. After taking the leashes off of the dogs, she pulled out her phone to respond to a text message. When she looked up, the dogs were no longer in the tennis court and she noticed that the chain link fence had been pulled back to create another entry point. She said that this would have been done since the last time she had been there.

[6] She said that she panicked when she realized that they were gone, because she knew that the Farmer's Market had just opened and that there are generally a lot of people there. She did not know how her dogs would react without her being present to people or animals, either with their owners or roaming free in the neighbourhood.

[7] She left the tennis court and ran through the soccer field and two baseball fields screaming their names. When she had no success in finding them, she phoned a friend and his son came to the area to help her search. They looked around the baseball field, the Farmer's Market, the Taxation Centre and Terra Nova Road without success, so she returned home to get her vehicle.

[8] On her way home, she made postings on Facebook, animal lost and found pages and her public post about the missing dogs. She also called the City around 9:30 – 9:45 a.m. to see if there had been any reports of two roaming dogs and left her telephone number. She subsequently received a call from the City stating that the dogs had been spotted by the Freshwater Road Apartments. While she was looking in that area, she received a second call that the dogs were on Wishingwell Place and that they had gotten hold of a cat. Her reaction was "Oh my God, if they got a hold of a cat, they'll kill the cat. Poor cat, poor owner."

[9] Sabeen Mowlaii lived at 12 Wishingwell Place and was the owner of a cat, Meshroudi. Meshroudi was outside on the morning of August 4, 2018 while she was getting ready for her 10:00 a.m. shift at work. At about 9:30 a.m., as she prepared to leave, she heard a metallic sound like a chain dangling. When she opened the door, a dog was running on her front stairs.

She went back inside and looked out to see two stocky muscular dogs with big heads, one grey, the other white and brown, running in the cul-de-sac. She said that she is not familiar with breeds, but they looked like Pitbulls or Mastiffs. They were wearing collars, but were not on leashes.

[10] She tried to get Meshroudi in, but he had disappeared from the outside porch of the house. Because she was going to be late for work, she drove away, but she did not like that the dogs were so close to her shed, so she drove back to the house and parked closer to the shed. She blew the horn a number of times at the dogs and called out to them trying to get their attention, but they ignored her. She was afraid to get out of her vehicle to shoo them away.

[11] She had to get to work, so she left the area. She later received a voicemail from her neighbour that Meshroudi had been injured by the dogs.

[12] Mark Condon was in the basement of his house at 6 Wishingwell Place at about 10:00 a.m. when he saw something rush by the window. He went upstairs about 10 – 15 minutes later and he heard barking on the other side of the fence at #4 Wishingwell Place. He went outside and saw two dogs jumping up at a cat on top of the fence. He remembered that one of the dogs had two colours.

[13] He phoned the SPCA, but got no answer, so he called the RNC. He did not receive an answer there either, so he went outside and called out to the dogs, but they did not pay any attention to him. They then came over into his yard and the cat was now on top of the neighbour's fence at the back of his property. The dogs were again jumping up at the cat.

[14] He went back inside and called a friend who advised him to call the City, which he did. He then tried the RNC again and he told them of the situation. He returned outside, where the dogs were continuing to jump at the cat. He called his friend a second time to let him know what was happening, but when he went back outside after the call, the dogs had the cat on the ground and they were mauling him. He could not watch, so he went back into the house and waited until he saw the dogs going toward Terra Nova Road and the Farmers' Market.

[15] He said the City came and collected the dead cat from his backyard.

[16] Constable Justin Day arrived on scene at 11:03 a.m. to assist the Investigating Officer, Constable Martin, with the call. He said that it took from 11:03 to 11:30 for himself, Constable Martin, Crystal Smith and 4 – 6 bystanders to corral the dogs and place them in vehicles. He described the dogs as a white Pitbull and a dark grey Pitbull and that both had fresh abrasions and blood on their faces and paws.

## **LAW**

[17] Section 32(1) of the *Animal Health and Protection Act* states as follows:

### **Dogs to be Penned Up**

**32.** (1) An owner of a dog shall keep it safely tethered or penned up at all times.

[18] Section 31 of the Act states:

### **Duty of Owner**

**31.** The owner of a companion animal or livestock shall not permit the animal or livestock to cause a hazard to people, livestock operations, other animals, goods, property or the safe operation of motor vehicles.

[19] These are not criminal offences. Rather they are public welfare offences prescribed by provincial statute.

[20] In the 1978 Supreme Court of Canada decision of in **R. v. Sault Ste. Marie (City)**, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353 (S.C.C), these types of offences were described as follows:

(2) Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.

[21] Once the Crown has proven the actus reus of a strict liability offence beyond a reasonable doubt, the onus shifts to the accused to show that she exercised reasonable care or due diligence to avoid committing the impugned conduct on a balance of probabilities. The defence of due diligence was also considered in **R. v. Sault Ste Marie** as follows:

This case, and several others like it, speak of the defence as being that of reasonable mistake of fact. The reason is that the offences in question have generally turned on the possession by a person or place of an unlawful status, and the accused's defence was that he reasonably did not know of this status: e.g. permitting an unlicensed person to drive, or lacking a valid licence oneself, or being the owner of property in a dangerous condition. In such cases, negligence consists of an unreasonable failure to know the facts which constitute the offence. It is clear, however, that in the [sic] principle the defence is that all reasonable care was taken. In other circumstances, the issue will be whether the accused's behaviour was negligent in bringing about the forbidden event when he knew the relevant

facts. Once the defence of reasonable mistake of fact is accepted, there is no barrier to acceptance of the other constituent part of a defence of due diligence.

[22] The degree of reasonableness required to establish a defence of due diligence was considered by the Newfoundland and Labrador Court of Appeal in the 1999 decision of **R. v. Alexander**, [1999] 171 Nfld. & P.E.I.R. 74. At paragraph 18, the court stated:

**18** The defence of due diligence requires the acts of diligence to relate to the external elements of the specific offence that is charged. The accused must establish on a balance of probabilities that he or she took reasonable steps to avoid committing the statutorily-barred activity. It is not sufficient simply to act reasonably in the abstract or to take care in a general sense. In *R. v. Kurtzman* (1991), 4 O.R. (3d) 417 (Ont. C.A.), Justice Tarnopolsky observed at p. 429 that "The due diligence defence must relate to the commission of the prohibited act, not some broader notion of acting reasonably."

### **ANALYSIS AND CONCLUSIONS**

[23] In order to prove that Ms. Smith violated s. 32(1) of the *Animal Health and Protection Act* on August 4, 2018, the following elements must be established beyond reasonable doubt:

1. That she was the owner of the dogs;
2. That she did not have the dogs safely tethered or penned

[24] There is no issue with respect to Ms. Smith's ownership of the dogs. She readily admits that the dogs belong to her.

[25] In regard to the dogs not being safely tethered or penned, there is irrefutable evidence that the dogs were roaming in the area of Wishingwell Place off leash and unattended by Ms. Smith on the day in question.

[26] Consequently, I am satisfied that the actus reus of s. 32(1) has been proven beyond a reasonable doubt. The issue now becomes whether Ms. Smith has shown, on a balance of probabilities that she exercised reasonable care to avoid committing this offence.

[27] In her testimony, Ms. Smith said that she brought the dogs to the tennis court, so she could take them off leash, but still have them safely penned inside the enclosure. She said that she had taken them there recently without incident. However, that morning she did not realize that a gaping hole had been made in the enclosure and while she briefly responded to a text message, the dogs escaped. Her defence is that the breach in the fence would have occurred within the previous 24 hours and that she exercised reasonable care not to fall afoul of s. 32(1) based on her recent knowledge of the tennis court being secure. She also immediately began looking for the dogs and advised the city that they were at large.

[28] Ms. Smith believed that letting her dogs off leash in a public tennis court constituted compliance with s. 32(1) of the *Animal Health and Protection Act*, as they would have been safely penned. However, a tennis court is not constructed for the purpose of containing off leash dogs; it is built for the use and enjoyment of members of the public who wish to play tennis. Any member of the public wishing to play tennis could have entered the court and allowed the dogs to escape. This risk existed independently of a hole having been made in the fence. In addition, Ms. Smith had no

authority or permission to put her dogs in the tennis court, she had no authority to prevent any member of the public from entering the tennis court and she should have been aware of the risk of someone lawfully entering the court and setting the dogs free.

[29] In essence, she was reckless in her assumption that letting her dogs off leash in a public area where she had no authority to take them off leash was in compliance with s. 32(1) of the Act.

[30] Consequently, I am not satisfied on a balance of probabilities that she has established a due diligence defence with respect to the s. 32(1) offence and I am finding her guilty on count # 2.

[31] In regard to the charge pursuant to s. 31 of the *Animal Health and Protection Act*, the Crown must establish beyond a reasonable doubt that Ms. Smith permitted the dogs to cause a hazard to people, other animals, goods, property or the safe operation of motor vehicles.

[32] The evidence of Sabeen Mowlaii and Mark Condon is that 2 pitbull – like dogs were seen off-leash in the area of Wishingwell Place on the morning of August 4, 2018. Ms. Mowlaii saw the dogs on her stairs and around her shed. Mr. Mark Condon saw them barking savagely and jumping up toward a cat on top of the fence, firstly in his neighbour’s yard and then at the back of his property. Both testified that they called out to the dogs and were ignored, but neither was inclined to approach them.

[33] Mr. Condon witnessed the cat pawing at the dogs from the fence and he later saw them with the cat on the ground mauling it. Shortly thereafter,

the cat was found dead in the same place. Ms. Mowlaii confirmed that the cat was Meshroudi.

[34] Constable Day helped corral the dogs which took almost half an hour and he noted fresh abrasions and blood stains on their faces and paws. Ms. Smith confirmed that she was the owner of the two dogs.

[35] Based on this testimony, I am satisfied that the evidence overwhelming supports the conclusion that Ms. Smith allowed Keiko and Luna to create a hazard which resulted in the death of Ms. Mowlaii's cat. Therefore, I find that the crown has proven the actus reus of s. 31 beyond a reasonable doubt.

[36] I must now consider whether she has established a defence of due diligence.

[37] Ms. Smith's evidence clearly discloses that she was fearful of how her dogs would react toward people and other animals without her being present. When she heard that they had gotten a cat, her reaction was panic and she thought "Oh my God if they got a hold of a cat, they'll kill the cat. Poor cat, poor owner." She obviously recognized that her dogs were capable of inflicting great harm.

[38] She says that she made phone calls, internet postings and enlisted the help of friends to find the dogs as quickly as possible. Essentially, her defence is that she tried to close the barn door after the horse had bolted. Obviously, these steps do not constitute reasonable care to prevent the commission of the offence. The hazard was caused when the dogs were

allowed to escape from the tennis court. She knew that the dogs could not be relied upon to behave in a safe manner away from her supervision and she did nothing to eliminate or control that risk through obedience classes or behaviour modification. I also take note that even when she was on the scene, Luna ran after another cat instead of going to her, suggesting that even when she was present, she was not the master of her own dogs.

[39] As a result, I cannot conclude that Ms. Smith took any reasonable steps to prevent her dogs from posing a hazard to people or other animals and as a result, Ms. Mowlaii and her cat, Meshroudi, paid the price.

[40] Consequently, I am also finding her guilty on count # 1.

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Lori Marshall  
Provincial Court Judge