

SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Millett*, 2019 NSSC 123

Date: 20190403
Docket: CRBW. 480569
Registry: Bridgewater

Between:

Nelson Millett

Appellant

v.

Her Majesty the Queen

Respondent

Decision

Judge: The Honourable Justice C. Richard Coughlan

Heard: January 24, 2019 in Bridgewater, Nova Scotia

Oral Decision: April 3, 2019

Written Decision: May 10, 2019

Counsel: Janice Siobhan Rea for the Respondent
John T. Shanks and Lauren A. Harper for the Appellant

Coughlan, J. (orally)

INTRODUCTION

[1] Nelson Millett was found guilty of willfully neglecting or failure to provide suitable and adequate food, water, shelter and care for animals contrary to s.446 (1)(b) of the Criminal Code and also permitting 31 beef cattle to be in distress pursuant to s.21(2) of the *Animal Protection Act*. Mr. Millett was sentenced by The Honourable Judge Catherine Benton on August 15, 2018 for the charge pursuant to s.446(1)(b) to 60 day's custody to be served intermittently followed by probation for a period of 12 months and a ban pursuant to s.447.1 of the Code prohibiting Mr. Millett from owning, having custody or control or have residing in the same premises any bird or animal for life. For the charge pursuant to s.21(2) of the *Animal Protection Act*, an order of restitution for the benefit of the Department of Agriculture of \$18,900.53 was made.

[2] Mr. Millett appeals the sentence the imposition of the 60 days custodial sentence, probation and prohibition pursuant to s.447.1 of the Code.

[3] The facts filed by both parties identifies the issues as follows:

Issue 1: Whether the lifetime ban on all animals and birds imposed by Judge Benton was a fit and proportionate one given the circumstances, and if not, what the proper sentence should be; and

Issue 2: Whether the 60 day custody to be served intermittently, as imposed by Judge Benton was a fit and proportionate one given the circumstances, and if not what the proper sentence should be.

[4] Section 813(a)(ii) of the Criminal Code provides:

813 Except where otherwise provided by law,

(a) the defendant in proceedings under this Part may appeal to the appeal court

(ii) against a sentence passed on him ...

[5] Section 822(1) of the Code provides the provisions dealing with indictable offences generally apply to summary conviction appeals.

[6] The powers of the Summary Conviction Appeal Court are set out in s.822(6) of the Criminal Code as follows:

822(6) Where an appeal is taken under subsection (4) against sentence, the appeal court shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against and may, on such evidence, if any, as it thinks fit to require or receive, by order,

(a) dismiss the appeal, or

(b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted,

and in making any order under paragraph (b), the appeal court may take into account any time spent in custody by the defendant as a result of the offence.

[7] The standard of review was described by LeBel J., in giving the majority judgment in **R. v. M.(L.)** 2008 SCC 31:

14. In its past decisions, this Court has established that appellate courts must show great deference in reviewing decisions of trial judges where appeals against sentence are concerned. An appellate court may not vary a sentence simply because it would have ordered a different one. The court must be "convinced it is not fit", that is, "that ... the sentence [is] clearly unreasonable" (*R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46, quoted in *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 15). This Court also made the following comment in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90:

... absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

(See also *R. v. W. (G.)*, [1999] 3 S.C.R. 597, at para. 19; A. Manson, *The Law of Sentencing* (2001), at p. 359; and F. Dadour, *De la détermination de la peine: principes et applications* (2007), at p. 298.)

15. Owing to the profoundly contextual nature of the sentencing process, in which the trier of fact has broad discretion, the standard of review to be applied by an appellate court is one based on deference. The sentencing judge has "served on the front lines of our criminal justice system" and possesses unique qualifications in terms of experience and the ability to assess the submissions of the Crown and the offender (*M. (C.A.)*, at para. 91). In sum, in the case at bar, the Court of Appeal was required -- for practical reasons, since the trier of fact was in the best position to determine the appropriate sentence for L.M. -- to show deference to the sentence imposed by the trial judge.

See also **R. v. Murphy** 2015 NSCA 14 at para. 15 and **R. v. Johnston** 2014 NSCA 78 at para. 17.

[8] The trial judge found Mr. Millett was the owner and operator of a farm located in Fraxville , Lunenburg County. He had been engaged in farming for approximately 30 years. He mostly, or his father, provided the care of the cattle. Mr. Millett determined the care given to the cattle, which included the provision of adequate care, food, water and shelter. The judge found the cattle were starving as a result of Mr. Millett's actions, either through not enough food, insufficient nutritional food or no food. The starvation was a longstanding process and did not occur overnight. The herd of cattle and the cattle in the barn were not provided with adequate water.

[9] The shelter in the barn was clearly inadequate. The cows in the barn did not have adequate shelter. The pen was too small for two cows and two calves. There was no room to move around, turn around, or lay down. The flooring was filled with manure, there were no dry spots. The cow's feet could not be seen as a result of the manure and there was no evidence of recent hay being put down for bedding.

[10] There were 31 cattle affected by Mr. Millett's actions. Thirty cattle were seized and one animal was dead and not seized. One of the animals, a downed bull had to be euthanized immediately to alleviate its suffering. A cow and her calf both of which were seized did not survive. The necropsy of the cow and calf showed severe emaciation, serious atrophy of fat that resulted from chronic starvation over several weeks. The animals were starving over a period of time.

[11] This was not abandonment of the animals by Mr. Millett, but rather insufficient care for them.

[12] Mr. Millett at the time of sentencing was 49 years old. He has a grade 12 education, a common law spouse and two children aged six and two and a half years. He has no prior criminal record.

[13] In reviewing the pre-sentence report, the judge stated Mr. Millett is on the board of directors for the Federation of Agriculture for Lunenburg and Queens Counties. He said he would never intentionally harm the animals. He accepted that perhaps the animals were not cared for in the manner they should have been, but said the situation was not to the degree reported or portrayed by investigators.

[14] In her decision Judge Benton found the following aggravating factors: (a) the number of animals affected, a total of 31 cattle; (b) the degree of harm caused by Mr. Millett; (c) that treatment of the cattle was a longstanding process – it did not occur over a couple of days, and (d) Mr. Millett did not seem to realize to what extent his actions resulted in the suffering of the animals.

[15] As a mitigating factor Judge Benton stated this was not a case of abandonment of the animals, but rather insufficient care.

[16] Judge Benton stated “Animal ownership gives humans a responsibility to treat animals with respect and decency, providing them with care they deserve and require for a healthy lifespan”. She found Mr. Millett was solely responsible for determining the type of care that would be given to the animals.

[17] Mr. Millett was sentenced to 60 days incarceration to be served intermittently followed by a 12 month period of probation.

[18] He submits the trial judge did not properly consider the applicable sentencing factors when sentencing him to 60 days in custody.

[19] In her decision the judge reviewed the purpose and principles of sentencing set out in the Criminal Code. She outlined the aggravating and mitigating factors relating to Mr. Millett and the offence. She considered an offender should not be deprived of liberty if a non-custodial sentence is appropriate. The judge considered rehabilitation. As she must, with a sentence under two years, she considered a sentence to be served in the community stating:

Further, as a result of the circumstances of this case, I am satisfied that the principles and purposes of sentencing, including denunciation and general deterrence, do require a period of incarceration. As I am of the view that a period of custody is necessary in this case, I am mandated to consider the provisions of 742.1 of the Criminal Code. I must ask myself whether a sentence in the community by the way of a conditional sentence order would be consistent with the principles and purposes of sentencing and deterrence and denunciation. I am mindful that a conditional sentence order can provide for denunciation and deterrence, if imposed with the appropriate conditions. However, taking into account the seriousness of the plight of these animals, I do not find that a conditional sentence order in these circumstances would satisfy the principles and purposes of sentencing. The nature of this offence is so serious that the sentence must be proportionate to the gravity of the offence, and Mr. Millett was solely responsible for this offence. Only a sentence of incarceration would be appropriate. This was repeated conduct by Mr. Millett. Saying he did not realize ‘til he saw the photos of the animals in court does not excuse his conduct. I feel that I cannot achieve the promotion of a sense of responsibility in Mr. Millett and the acknowledgement of harm done to the victims and the community, except by imposing a custodial sentence. I would not be achieving a fit and appropriate sentence fulfilling the purposes and principles of sentencing if I were to impose a compun..., a community-based sentence.

[20] The trial judge addressed the principle of restraint. Although she considered the Crown's recommendation of 90 days incarceration was reasonable in the circumstances she reduced the sentence to 60 days.

[21] The sentence is within an acceptable range and entitled to deference.

[22] The judge ordered that pursuant to s.447.1 of the Criminal Code Mr. Millett be prohibited from "owning, having custody or control or have residing in the same premises any animal or bird for life"

[23] Section 447.1(1)(a) provides:

447.1 (1) The court may, in addition to any other sentence that it may impose under subsection 444(2), 445(2), 445.1(2), 446(2) or 447(2),

(a) make an order prohibiting the accused from owning, having the custody or control of or residing in the same premises as an animal or a bird during any period that the court considers appropriate but, in the case of a second or subsequent offence, for a minimum of five years; ...

[24] A lifetime prohibition on owning or residing with any animal or bird is the maximum ban which can be made. Is such a ban demonstrably unfit in the circumstances of this case?

[25] In **R. v. M.(L.)**, supra, LeBel J. addressed the use of a maximum sentence stating at paragraphs 20 to 22:

20. In *R. v. Cheddesingh*, [2004] 1 S.C.R. 433, 2004 SCC 16, the Court acknowledged the exceptional nature of the maximum sentence, but firmly rejected the argument that it must be reserved for the worst crimes committed in the worst circumstances. Instead, all the relevant factors provided for in the *Criminal Code* must be considered on a case-by-case basis, and if the circumstances warrant imposing the maximum sentence, the judge must impose it and must, in so doing, avoid drawing comparisons with hypothetical cases:

... terms such as "stark horror", "worst offence" and "worst offender" add nothing to the analysis and should be avoided. All relevant factors under the *Criminal Code* ... must be considered. A maximum penalty of any kind will by its very nature be imposed only rarely ... and is only appropriate if the offence is of sufficient gravity and the offender displays sufficient blameworthiness. As is always the case with sentencing, the inquiry must proceed on a case-by-case basis. [para. 1]

21. Even where a maximum sentence is imposed, therefore, regard must be had to the trial judge's discretion, the individualized nature of sentencing and the normative principles set out by Parliament in ss. 718, 718.1 and 718.2 *Cr. C.* There is still a place in criminal law for maximum sentences in appropriate circumstances.

22. Thus, the maximum sentence cannot be reserved for the abstract case of the worst crime committed in the worst circumstances. The trial judge's decision will continue to be dictated by the fundamental principle that a "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (s. 718.1 *Cr. C.*). Proportionality will be achieved by means of a "complicated calculus" whose elements the trier of fact understands better than anyone. The trial judge's position in the sentencing process justifies the respect owed to the reasoned exercise of his or her discretion and the deferential approach that appellate courts should take in such matters (see Manson, at p. 86).

[26] In her sentencing decision the judge reviewed case law dealing with failure to provide food, water, shelter and care for animals.

[27] Counsel in the appeal referred me to additional cases. Sentences and length of prohibition orders varied significantly from case to case.

[28] In **R. v. Way** 2016 ONCJ 514. Ms. Way received a conditional discharge with 12 months probation and a prohibition from owning more than two domestic animals in her care and custody at any given time.

[29] In **R. v. Chrysler** 2013 BCPC 241. Ms. Chrysler was found guilty of being a person responsible for five horses and permitting them to be in distress. Using a body score from 1 to 9 with 1 being emaciated and 9 being morbidly obese, the horses ranged from 1 to 2.5. There was a poor physical environment, a dirty barn and the presence of liquid and dry manure in the barn. There was an absence of any quantity of food and fresh water. Ms. Chrysler was in her 50's with no prior criminal record and on a disability pension. The judge imposed a suspended sentence with two years probation which contained a provision prohibiting residing on any property where a domestic animal was present. She was banned from possessing, owning, caring for or otherwise handling any horse for her lifetime and for a period of five years from owing, possessing, caring for or otherwise having in her custody and control any domestic animals, other than horses. The animals, other than horses, living with Ms. Chrysler, including cats and dogs were not found to be in distress. However, the dogs had inadequate shelter, food was scattered on feces and they had some skin problems, which demonstrated some disregard for their personal circumstances.

[30] In **R. v. Barrett** [2015] N.J. No. 25 and No. 103. Mr. Barrett was found guilty of one count under s.445.1 of the Criminal Code and two counts pursuant to s.76(1) of the *Animal Health and Protection Act*. Mr. Barrett was a 50 year old hobby farmer with no prior criminal record. There were two dogs tied in a yard with no food or water. A third dog was injured and also without food or water. Sheep, ponies and goats were emaciated and covered with lice. There were dead animals found and a number of the remaining animals had to be euthanized. Mr. Barrett starved the animals by not giving them enough to eat. Mr. Barrett said he fed the animals every day or every other day. He did not intend to hurt the animals and did what he could under the circumstances. Mr. Barrett felt he did not commit an offence. Mr. Barrett was sentenced to six months in custody and prohibited from owning, having the custody or control of or residing in the same premises as an animal or bird for life.

[31] Here, Mr. Millett was at the time of sentencing 49 years old. Although a farmer for approximately 30 years, he allowed this situation with his cattle to take place. The neglect and starvation of his animals was a longstanding process which occurred over a period of time. Mr. Millett is on the board of directors of the Federation of Agriculture for Lunenburg and Queens counties.

[32] Given the facts as found by the trial judge I am not satisfied that the prohibition for life ordered is demonstrably unfit.

[33] The appeal is dismissed.

J.