QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2022 SKQB 192**

Date: **2022 08 16**
Docket: CRM-SA-00092-2021
Judicial Centre: Saskatoon

BETWEEN:

NINGNAN ZHANG

APPELLANT

- and –

HER MAJESTY THE QUEEN

RESPONDENT

Counsel:

Ningnan Zhang	appearing on his own behalf
Tamara A. Denluck	for the respondent (Crown)

JUDGMENT
August 16, 2022

GABRIELSON J.

Introduction

[1] This is a summary conviction appeal brought by the appellant, Ningnan Zhang [Zhang], who appeals the conviction and sentence rendered by the learned Provincial Court judge in an oral decision rendered March 19, 2021, in respect to the following charges:

> (a) wilfully and without lawful cause kill a cat, contrary to s. 445(1)(a) of the *Criminal Code*, RSC 1985, c C-46; and

(b) wilfully and without lawful cause seriously wound a cat, contrary to s. 445(1)(a) of the *Criminal Code*.

[2] Following a three-day trial, Zhang was convicted and sentenced to a five-month conditional sentence.

Facts

[3] On May 28, 2019, Zhang and the complainant were then in a relationship of approximately four years duration and had two children together, ages 2 and 1. The complainant left home in the morning and was gone all day. Remaining in the home were Zhang, the two children and two cats.

[4] When the complainant arrived home at approximately 6:00 p.m., she found one cat dead and the other cat injured. The police were then called, and Constable Morton and Constable Walker attended.

[5] Constable Walker spoke to the complainant and Constable Morton spoke to Zhang. Zhang told Constable Morton that he was fighting with the cats while giving them a bath and that they had scratched him.

[6] While Constable Morton was speaking with Zhang, Constable Walker entered the room and advised Zhang that he was under arrest for animal cruelty and placed handcuffs on Zhang.

[7] At trial, five witnesses were called by the Crown, the complainant, Constables Morton, Constable Walker, Dr. Erin Zachar, an expert in animal pathology, and Dr. Anthony Carr, an expert in the veterinarian care of domestic animals, who testified he had treated the injured cat. The complainant testified that Zhang told her that he did not

know that the cat would die from him hitting the cat.

[8] After the Crown concluded its case, the defence called no evidence.

[9] The Court considered the evidence and found there were only three people in the home between the time that the complainant left and when she returned, Zhang and the two children. The Court found that based on the medical evidence regarding the injuries suffered by the cats, the injuries could not have been caused by the one or the two-year old. The statement made by Zhang to Constable Morton, that he was fighting with the cats while giving them a bath, supported the conclusion that Zhang was the individual who caused the injuries. There was no evidence to suggest otherwise.

[10] As a result, the trial judge found Zhang guilty of the two counts; killing one cat and seriously wounding the other. The trial judge, therefore, convicted Zhang and sentenced him to a community-based sentence, equivalent to a five-month conditional sentence order.

[11] Zhang filed an amended notice of appeal on April 21, 2022, in which the grounds of appeal listed were as follows:

> 1. Legal counsel was inadequate on the grounds of two lawyers attempting to represent the case, failure to follow the instructions of the client, and failing to apply for disclosure and the Jordan Matter which could have altered the trial.
>
> 2. Judge erred in taking into consideration the circumstances of the offense and the nature and history of the accused.
>
> 3. The Appellant is appealing the sentence and the conviction imposed based on the errors of the judge providing ample reasoning to justify a conviction beyond a reasonable doubt as well as inadequate legal counsel and representation.

[12] When the matter came before me for a hearing of the appeal on June 29, 2022, Zhang stated that there were four points of error:

(1) inadequate representation;

(2) lack of an interpreter for the whole trial;

(3) the judge failed to give proper reasons for the conviction; and

(4) s. 11(b) of the *Canadian Charter of Rights and Freedoms* was not complied with as there was unreasonable delay – *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631 [*Jordan*].

Standard of Review

[13] Section 812(1)(d) of the *Criminal Code* directs that summary conviction appeals in Saskatchewan are to be heard and determined by the Court of Queen's Bench. The appellant may, pursuant to s. 813(a)(i) and (ii) appeal from conviction, sentence or both.

[14] The powers of an appellate court are found in ss. 683 to 689 and are made applicable to summary conviction appeals by virtue of s. 822(1).

[15] Pursuant to s. 686(1) and (2), a court may allow a defendant's appeal where the verdict is unreasonable and cannot be supported by the evidence, was based on a wrong decision on a question of law, or on any ground if there was a miscarriage of justice. However, the defendant's appeal ought to be dismissed where, although not properly convicted on a particular count, he was properly convicted on another count or where there was a legal error made but no substantial wrong or miscarriage of justice occurred.

[16] On factual grounds, the standard of review is whether there is evidence upon which a trier of fact, properly instructed, could reasonably reach the verdict. The appellate court ought not to substitute its own view of the evidence for that of the trial judge. However, the appellate court is entitled to review, re-examine and reweigh the evidence, but only for the purpose of determining if the evidence was reasonably capable of supporting the learned trial judge's conclusion.

[17] On a question of law, the standard of review is correctness, and the appellate court should intervene if the decision is not correct in law, unless, in the case of defence appeals, there has been no substantial wrong or miscarriage of justice has occurred.

[18] The authority for this standard of review is *R v Helm*, 2011 SKQB 32, 368 Sask R 115.

Issues

[19] The issues in this matter are:

(1) Was there inadequate assistance of counsel that led to a miscarriage of justice?

(2) Was the appellant's right to an interpreter pursuant to s. 14 of the *Canadian Charter of Rights and Freedoms* breached?

(3) Did the trial judge fail to adequately consider the evidence and provide reasons for his conclusions?

(4) Was the trial conducted within a reasonable time frame pursuant to the parameters set out in *Jordan*?

(5) Was the sentence imposed reasonable?

Analysis

(1) Was there inadequate assistance of counsel that led to a miscarriage of justice?

[20] The appellant makes several claims regarding the ineffectiveness of counsel. First, that his counsel failed to challenge the voluntariness of his statement given to Constable Morton that he was fighting with the cats while giving them a bath. The Crown's position is that this was a spontaneous utterance.

[21] Section 10 of the *Charter* provides as follows:

> **Arrest or detention**
> **10** Everyone has the right on arrest or detention
>
> **(a)** to be informed promptly of the reasons therefor;
>
> **(b)** to retain and instruct counsel without delay and to be informed of that right; and
>
> **…**

[22] In this case, it is clear from the reading of the transcript, (Transcript of Trial, Provincial Court, Saskatoon, September 8 and 9, 2020, Volume 1), that the trial judge was alive to this issue and held a *voir dire* about the admissibility of the statement. See page T112, line 27, to page T131, line 39, of the transcript. The trial judge held that there was no objective reason for Zhang to feel he was detained when he was in the room with Constable Morton. He also stated that the statement was made not in response to police questions but was spontaneous. He, therefore, held that there was no evidence that the statement was made because Zhang's will was overborne or that the statement was not voluntary in the specific context of the facts before him.

[23] I am satisfied that the statement given was voluntary and that his *Charter* rights pursuant to s. 10(b) were not broken.

[24] Secondly, the appellant also suggests that his trial counsel convinced the appellant not to testify. However, the appellant filed no evidence in support of this allegation. Furthermore, the allegation that the appellant's failure to testify was "not necessarily being what the appellant wanted" would, even if true, not be sufficient since there is no evidence that the appellant would have testified but for the advice of counsel or that his failure to testify led to a miscarriage of justice. As was stated in the case of *R v G.D.B.*, 2000 SCC 22 at para 27, [2000] 1 SCR 520:

> 27 … The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

[25] The use of the terms "not necessarily being what the appellant wanted" is not a direct statement that the appellant wanted to testify in his own defence but rather that he may have testified if given the opportunity. That is not sufficient.

[26] As was stated in the case of *R v Bear*, 2022 SKCA 69 at para 37:

> **37** The competence of assistance provided by trial counsel is assessed against a standard of reasonableness. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance and the appellant bears the onus of establishing that the acts or omissions of counsel fell outside of that range. The wisdom of hindsight has no part in this assessment …

[27] Finally, the appellant also submits that for the original two days of the trial, September 8 and 9, 2020, he was represented by Ms. T. Talbot, and that on the final day of his trial he was represented by Mr. L. Brisebois, and that as a result, his representation by counsel was inadequate. The appellant also submits that Mr. Brisebois refused to meet with him prior to the continuation of the trial on March 19, 2021, even though he had requested such a meeting.

[28] Unfortunately, there is nothing in the court transcript to indicate that the appellant ever requested a meeting with his counsel or that his counsel ever refused such a request. Furthermore, having two counsel represent the appellant is not evidence in and of itself of professional misconduct. As was said before, the onus of proof is upon the appellant and, in my opinion, he has not met this onus.

2. Was the appellant's right to an interpreter pursuant to s. 14 of the *Canadian Charter of Rights and Freedoms* breached?

[29] The appellant submits that there was no interpreter for the whole trial and that he could not understand the nature of the proceedings.

[30] Section 14 of the *Charter* provides as follows:

> **Interpreter**
> **14** A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

[31] The leading case regarding s. 14 of the *Charter* is *R v Tran*, [1994] 2 SCR 951 (QL). At para. 38 of that case, the Court stated:

> **38** The right of an accused person who does not understand or speak the language of the proceedings to obtain the assistance of an interpreter serves several important purposes. First and foremost, the right ensures that a person charged with a criminal offence hears the case against him or her and is given a full opportunity to answer it. Second, the right is one which is intimately related to our basic notions of justice, including the appearance of fairness. As such, the right to interpreter assistance touches on the very integrity of the administration of criminal justice in this country. Third, the right is one which is intimately related to our society's claim to be multicultural, expressed in part through s. 27 of the *Charter*. The magnitude of these interests which are protected by the right to interpreter assistance favours a purposive and liberal interpretation of the right under s. 14 of the *Charter*, and a principled application of the right.

[32] The Saskatchewan Court of Appeal in the case of *R v Gill*, 2017 SKCA 76 at para 50, 356 CCC (3d) 103, stated:

> [50] In *Tran*, the Court set out three requirements that must be met in order to establish a breach of s. 14. First, it must be clear the accused was actually in need of interpreter assistance. Second, assuming interpreter assistance was provided, there must have been a departure from the basic, constitutionally guaranteed standard of interpretation, namely, that the interpretation be continuous, precise, impartial, competent and contemporaneous. Third, "the claimant must establish that the alleged lapse in interpretation occurred in the course of the proceedings themselves when a vital interest of the accused was involved" (*Tran* at 979).

[33] The appellant refers to the case of *R v Mitroi*, 2018 BCCA 236 [*Mitroi*], where the Court stated at para. 42:

> [42] That a third party was able, in the trial judge's words, "to decipher" most of what Mr. Mitroi said and produce a transcript is not pertinent. An accused's right to a fair trial includes the right to have the trier of fact understand what they say or any witness says in the witness box when testifying, not at some later time. It is axiomatic that triers of fact are in the best position to assess the credibility of witnesses. To properly make that assessment, it is necessary for triers to simultaneously observe the witnesses and understand what they are saying, even when that evidence has to be translated to be understood.

[34] In the *Mitroi* case, there was an evidentiary record which confirmed that a trial judge was unable to understand what the witness had said. That is not the situation in this case where the appellant alleges that it was he, himself, who could not understand what was being said by the lawyers at the trial. However, I am satisfied that the appellant had the necessary translation of the evidence at trial as given to him by the interpreter.

[35] Furthermore, it is clear from the transcript that the interpreter was present throughout the giving of evidence. At page T46, line 9, of the March 19, 2021 transcript, the interpreter said she had to leave early and the trial judge asked counsel for the appellant

if now that all the evidence was in, was the appellant happy to continue with argument without translation since the trial judge had observed that the appellant did not appear to be making use of the translator. At page T47, counsel for the appellant stated:

> MR. BRISEBOIS: Your Honour, my client's fine with proceeding in the face of no translator. We, I think, passed the point where they were required for full understanding, we're in the closing parts of the trial and I think it's in everyone's interest to continue on and he – Mr. Zhang appreciates that and has instructed me that he's good with continuing on. If potentially there's any questioning he may have about a specific term needing clarification he would just ask that he can inquire about that. …
>
> (Transcript of Trial, Provincial Court, Saskatoon, March 19, 2021, Volume 1)

[36] I am, therefore, satisfied that the *Mitroi* case is distinguishable because there the accused took the stand, whereas in this case the appellant never took the stand. The appellant has, therefore, not met the onus of proof that an interpreter was required because all of the evidence was already in before the interpreter left the trial.

3. Did the trial judge fail to adequately consider the evidence and provide reasons for his conclusions?

[37] The appellant says that there was evidence raised in cross-examination that indicated that the complainant had changed her testimony and that the trial judge did not refer to the change in testimony in making a decision to convict the appellant. The appellant referred to page T61 of the September 8 and 9, 2020 transcript in terms of inaccuracies regarding the timing of the statements and, again, at page T69 where the complainant admitted that she gave written statements to the police in which she did not include the details that she testified to in her evidence in chief. The appellant referred to the case of *R v Villaroman*, 2016 SCC 33, [2016] 1 SCR 1000, as authority for the proposition that when proof of one or more elements of the offence depends solely on circumstantial evidence, then the trial judge would have to acquit the appellant for lack of

evidence.

[38] In the case of *R v Power*, 2022 SKCA 24 at para 74, the Court stated:

> [74] Under s. 686(1)(a)(i) of the *Criminal Code*, a guilty verdict may be set aside on appeal where the verdict is unreasonable or unsupported by the evidence. But the test here is stringent. A guilty verdict will only be set aside on this basis if it is one that no properly instructed trier of fact, acting reasonably, could have rendered (*R v Biniaris*, 2000 SCC 15 at para 36, 184 DLR (4th) 193). An allegation of unreasonable verdict does not entitle the court of appeal to retry the case but, rather, requires it to assess the evidence to determine whether, considered as a whole, it is reasonably capable of supporting the verdict rendered (*Wolfe* [2021 SKCA 39, 404 CCC (3d) 141] at para 107).

[39] In this case, I am satisfied that the trial judge was aware of the issue of circumstantial evidence and did assess the credibility of the witnesses. At page T64 to T65 of the March 19, 2021 transcript, the trial judge analyzed the evidence and found that there was no rational alternative found in the evidence other than that the accused caused all of the injuries to both cats. He also found that there was no evidence to support any kind of self-defence claim. He, therefore, found the appellant guilty of killing one cat and seriously wounding the other. I am satisfied that in making these findings, the trial judge did not commit an error of fact and that he considered all of the evidence in making his decision.

4. Was the trial conducted within a reasonable time frame pursuant to the parameters set out in *Jordan*?

[40] The final issue is whether or not the trial was conducted within a reasonable time frame according to the principles established by *Jordan*. Section 11(b) of the *Charter* provides as follows:

> **Proceedings in criminal and penal matters**

> **11** Any person charged with an offence has the right
>
> …
>
> **(b)** to be tried within a reasonable time;
>
> …

[41] The presumptive ceiling is 18 months for cases tried in Provincial Court. Delay attributable to or waived by the defence does not count towards the presumptive ceiling.

[42] In this case, the date of the offence was May 28, 2019 and the date for the completion of the trial was March 19, 2021. This was a total of 21 months and 19 days, and is presumptively over the *Jordan* limit. However, in the *Jordan* case, the Court also stated at paras. 47 and 48:

> [47] If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) *exceeds* the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.
>
> [48] If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls *below* the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have. We expect stays beneath the ceiling to be rare, and limited to clear cases.

[43] The Crown says that from the presumptive delay must be subtracted any delay caused by the defence. The Crown submits that on September 19, 2019, the trial was scheduled for January 20 and 21, 2020. However, the Crown submits that on November 29, 2019, the matter was brought forward and at that time new trial dates were confirmed for May 11, 12 and 13, 2020. The Crown submits the change in trial dates was as a result of the appellant's trial counsel being double booked. However, there is nothing

in the court endorsement that indicates the reason for the change in trial dates, and I cannot assume that the delay was caused by the actions of defence counsel.

[44] The Crown also alleges that a second delay was caused by defence counsel from October 23, 2020 until January 8, 2021, when defence counsel was changed. However, once again, there is no evidence in the endorsement to confirm the cause of the adjournment and, therefore, I cannot attribute such delay to the appellant.

[45] However, as a result of a Provincial Court directive issued March 22, 2020, all out-of-custody trials scheduled before May 31, 2020 were adjourned. The appellant's matter was brought forward to March 24, 2020 and a new trial date was scheduled for September 8 and 9, 2020. This resulted in a delay of 3 months and 29 days by moving the trial from May 11, 2020 until September 8, 2020.

[46] The continuation of the trial was originally scheduled for January 8, 2021. However, that date was also adjourned due to the COVID-19 pandemic. On December 9, 2020, a Provincial Court directive was issued stating, "All criminal trials and preliminary hearings scheduled in Saskatoon between December 14, 2020 and January 16, 2021, inclusive, will not proceed on the days set." This again included the appellant's trial continuation scheduled for January 8, 2021. As a result, the trial was adjourned to March 19, 2021. This resulted in a delay of 2 months and 11 days. In total, there was a delay of 6 months and 10 days caused by exceptional delay. When subtracted, the exceptional delay due to COVID-19 results in no breach of the *Jordan* analysis.

[47] In *R v Weber*, 2022 SKQB 116, the Court took judicial notice of the COVID-19 pandemic and public notices of provincial directives. As a result, the Court concluded that the adjournment was due to exceptional circumstances and not contrary to the *Jordan* analysis.

[48] Accordingly, I am satisfied that the additional delay was due to exceptional circumstances and that the delay was not unreasonable and did not exceed the standard *Jordan* analysis.

5. Was the sentence imposed reasonable?

[49] In this appeal, although the appellant stated in his notice of appeal that he was appealing both conviction and sentence, he did not refer to any grounds for his appeal of sentence in either his written or oral argument. Neither did Crown counsel in either their written or oral argument on the hearing of the appeal.

[50] Section 445.1(1) of the *Criminal Code* provides for a range of penalties in the event of conviction, which I am satisfied that the trial judge used in rendering the decision:

> **445.1 (1)** Every one commits an offence who
>
> **(a)** wilfully causes … pain, suffering or injury to an animal …
>
> **…**
>
> **(2)** Every one who commits an offence under subsection (1) is guilty of
>
> **…**
>
> **(b)** an offence punishable on summary conviction and liable to a fine of not more than $10,000 or to imprisonment for a term of not more than two years less a day, or to both.

[51] The trial transcript of March 19, 2021, beginning at page T65, indicated that, after hearing lengthy submissions by counsel for the appellant and counsel for the Crown, the trial judge convicted the accused. The trial judge then turned to an appropriate sentence. The trial judge concluded, at page T85, that a jail sentence was appropriate and required but that since the appellant had not incurred any charges since the offence and had no record, a community-based jail sentence was appropriate. Therefore, he sentenced

the appellant to a five-month conditional sentence order with statutory conditions. The trial judge also referred to the case of *R v Gamble*, 2008 SKQB 282, 319 Sask R 236, in which such a sentence was imposed.

[52] In the case of *R v Reykdal*, 2020 NBCA 13 at para 8, the Court stated:

> [8] The permissible scope of appellate intervention on sentence appeals is decidedly limited. The oft-referenced case of *Steeves v. R.*, 2010 NBCA 57, 360 N.B.R. (2d) 88, per Drapeau C.J.N.B. (as he then was), explains it in these terms:
>
> > In sum, a court of appeal is not at liberty to substitute its view of fitness for that of the sentencing judge unless the sentence imposed is the product of either an error of law or an error in principle, or unless it is clearly unreasonable […]. [para. 25]

[53] In this case, as the appellant has provided no evidence of an error of law or an error of principle, and I do not feel the sentence is clearly unreasonable, I dismiss his appeal of sentence.

Conclusion

[54] For the reasons set out herein, Mr. Zhang's appeal against conviction and the sentence imposed is dismissed.

_____J.
N.G. GABRIELSON