IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. McKinlay,*
2020 BCSC 1381

Date: 20200917
Docket: 105547
Registry: Kamloops

Between:

Regina

v.

Cheryl McKinlay

Before: The Honourable Mr. Justice Marchand

On appeal from: the decisions of the Provincial Court of British Columbia, Kamloops Registry No. 105547-1, dated July 24, 2019 and December 2, 2019

Reasons for Judgment

Counsel for the Crown:	O.A. Potestio
Appearing on her own behalf:	C. McKinlay
Place and Date of Hearing:	Kamloops, B.C. August 25, 2020
Place and Date of Judgment:	Kamloops, B.C. September 17, 2020

Introduction

[1] Cheryl Lynn McKinlay is a long-time animal owner and animal lover. Despite her obvious affection for her animals, on July 24, 2019, she was convicted of wilfully causing unnecessary pain, suffering or injury to a large number of her farm animals and wilfully failing to provide suitable and adequate food, water, shelter and care for them contrary to ss. 445.1(1)(a) and 446(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*].

[2] On December 2, 2019, the trial judge applied the "*Kienapple* principle" to enter a judicial stay of proceedings with respect to the one count under s. 445.1(1)(a) of the *Code*. He then sentenced Ms. McKinlay with respect to the other count under s. 446(1)(b) of the *Code*.

[3] The trial judge sentenced Ms. McKinlay to four months' imprisonment to be served in the community under the terms of a conditional sentence order. Under s. 447.1(1)(a) of the *Code*, he also prohibited Ms. McKinlay from owning, having custody or control, or residing in the same premises as an animal or bird for ten years. The trial judge made an exception to the prohibition order to permit Ms. McKinlay to live with her five cats and two dogs.

[4] Ms. McKinlay has appealed against her conviction and, in the alternative, against the ten-year prohibition order. Based, in part, on fresh evidence she wishes to adduce, Ms. McKinlay submits that the trial judge erred in his fact-finding. She also submits that her convictions were due to the ineffective assistance of her trial counsel. Finally, given her lengthy association with animals, she submits that the ten-year prohibition order is an unfit sentence.

Issues

[5] The issues on appeal are:

1. Can Ms. McKinlay's fresh evidence be considered on appeal?

2. Was the guilty verdict reasonable and supported by the evidence?

3. Has Ms. McKinlay established that the assistance of her trial counsel was ineffective?

4. Was the ten-year prohibition order demonstrably unfit?

Background

[6] In summarizing the relevant background, I draw liberally from the clearly and accurately drafted written argument prepared by the Crown.

[7] On December 7, 2017, the Society for the Prevention of Cruelty to Animals ("SPCA") attended the property of Ms. McKinlay in response to a complaint. While there, Special Provincial Constables ("SPCs") Daniel Chapman and Jamie Wiltse observed numerous deficiencies in the health and safety of a variety of Ms. McKinlay's farm animals.

[8] The SPCA officers issued a notice of compliance to Ms. McKinlay under the *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372 [*Act*]. The notice contained a number of directions and cautioned Ms. McKinlay that if she failed to address the identified issues, her animals may be removed and/or charges laid under the *Code* and the *Act*.

[9] On December 11, 2017, SPC Chapman returned to Ms. McKinlay's property to check on her compliance with the notice. SPC Chapman observed that the animals appeared to be in the same condition as his prior attendance and that Ms. McKinlay had not complied with the notice.

[10] On December 12, 2017, SPC Chapman obtained and executed a search warrant on Ms. McKinlay's property. He attended the property with SPC Wiltse and a veterinarian, Dr. Heather Pedersen. The SPCA documented the poor body condition scores[1] ("BCSs") and poor living conditions of numerous animals. The SPCA seized

[1] At para. 29 of his reasons for judgment, the trial judge described "body condition score" as a "commonly used scale out of five where one is emaciated, two is thin, three is ideal, four is fat and five is obese."

74 animals from Ms. McKinlay. The seized animals generally appeared to gain weight and improve their BCSs while in foster care.

[11] On May 28, 2018, Ms. McKinlay was charged with two counts of animal cruelty contrary to ss. 445.1(1)(a) and 446(1)(b) of the *Code*. Her trial proceeded on March 19 and July 17, 2019. She was represented by counsel.

[12] At trial, the court heard testimony from SPCs Chapman and Wiltse, as well as from Dr. Pedersen. Dr. Pedersen was qualified as an expert in the field of veterinary medicine, including animal health and husbandry.

[13] Ms. McKinlay and her husband testified in her defence. In her testimony, Ms. McKinlay disputed the observations of the SPCA officers and Dr. Pedersen. Ms. McKinlay argued that her actions in caring for her animals were reasonable in the circumstances given various obstacles she was facing at her homestead property.

Reasons for Conviction of the Trial Judge

[14] On July 24, 2019, the trial judge gave oral reasons for judgment.

[15] After reviewing the evidence in considerable detail, the trial judge accepted the evidence of Dr. Pedersen "regarding the requirements that Ms. McKinlay's animals had with respect to shelter, food and water." He then found that Ms. McKinlay "fell far short of the standard of care required to provide adequate care for [her] animals and to save them from distress."

[16] The trial judge found that Ms. McKinlay's testimony was "not credible" and exhibited "a tendency to blame others for her difficulties." The trial judge also found that Ms. McKinlay's answers to questions were at times "calculated for effect rather than truth".

[17] The trial judge instructed himself with respect to the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 and with the intent requirements of the two charging sections of the *Code*. With respect to intent, at para. 55, the trial judge set out the following passage from the leading case of *R. v. Gerling*, 2016 BCCA 72 at paras. 25-27:

> [25] Under both ss. 445.1(1)(a) and 446(1)(b) of the *Criminal Code*, the Crown must prove that the accused acted wilfully.
>
> [26] For the purposes of s. 445.1(1)(a), "in the absence of any evidence to the contrary", evidence that a person failed to exercise reasonable care or supervision causing pain, suffering or injury, is proof that the pain, suffering or injury was caused or permitted wilfully (s. 445.1(3)).
>
> [27] In my view, where there is no evidence to the contrary, the test under s. 445.1(1)(a) is objective. Determining whether there is an absence of reasonable care or supervision is an objective exercise. Where there is evidence to the contrary, the Crown must prove wilful conduct and s. 429(1) of the Criminal Code applies. It engages a subjective element: "knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not".

[18] The trial judge then concluded, at para. 56, as follows:

> [56] In this case, I am satisfied that the case on each count has been proven on the subjective standard and on the objective standard. It seems to me perfectly plain from the evidence that the accused was aware of the probable consequences of the efforts that she was making to provide, in particular, suitable and adequate food, water, and shelter in care for the animals and that, in doing so, she met the requirements of Count 2 under 446(1)(b) of the *Criminal Code* and that, at the same time, she caused, by the manner in which she cared for the animals, pain, suffering, or injury to the animals as evidenced in particular by the thirst and weight loss in the various animals that she was charged with the care of.

[19] The trial judge convicted Ms. McKinlay on both counts but applied the rule in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729. The trial judge registered a conviction on the s. 446(1)(b) offence only.

Reasons for Sentence of the Trial Judge

[20] The sentencing hearing was held on December 2, 2019. Ms. McKinlay represented herself. The trial judge received a presentence report dated November 21, 2019. This report included information from presentence and psychiatric assessment reports that had been prepared in relation to a 2017 conviction.

[21] Ms. McKinlay's 2019 presentence report indicated that Ms. McKinlay:

- suffered from ongoing mental health issues;

- was previously convicted of assault with a weapon (a wooden spoon) against her special needs child;
- vehemently denied that her animals came to any harm;
- blamed others for her offences; and
- remained at an elevated risk to reoffend.

[22] The Crown submitted that there were a number of aggravating features to Ms. McKinlay's offending, as follows: the vulnerability of her animals, and her lack of remorse, failure to accept responsibility, pattern of denial and projection of blame onto others. The Crown sought a three-month jail sentence.

[23] Ms. McKinlay submitted that a suspended sentence with probation would be appropriate. Notwithstanding the findings of the trial judge, in her submissions, Ms. McKinlay outlined how well she treated her animals.

[24] The trial judge referred to five sentencing authorities relied on by the Crown and outlined various sentencing principles set out in ss. 718 to 718.2 of the *Code*. The trial judge then concluded, at para. 21, as follows:

> [21] It is apparent to me that a sentence which dealt only with community service would be a sentence which did not offer sufficient deterrence or denunciation. The question here… is whether a jail sentence is necessary or whether a conditional sentence order would be sufficient. Under s. 742.1, this offence is eligible for a conditional sentence order. It would not endanger the community to impose such a sentence and, in my view, would be consistent with the fundamental purpose of the sentencing principles. For that reason, I am satisfied that a sentence of four months, to be served as a conditional sentence order, will be appropriate.

[25] Based on the updated presentence report, the trial judge concluded that court ordered counselling had not been of much assistance to Ms. McKinlay in the past. As a result, the trial judge declined to place Ms. McKinlay on a probation order following the completion of her conditional sentence order.

[26] The trial judge then considered prohibiting Ms. McKinlay from owning or having custody of animals under s. 447.1(1)(a) of the *Code*. The trial judge concluded that Ms. McKinlay did not appreciate the risk she posed to the care of animals and, therefore, imposed a ten-year prohibition order.

Ms. McKinlay's Submissions on Appeal

[27] The overarching theme of Ms. McKinlay's submissions on appeal is that she was involved in homestead farming whereas the SPCA, the Crown, her counsel and the court focused on industrial farming standards. As a result, Ms. McKinlay submits that the Crown's evidence at trial was either misleading or misinterpreted.

[28] In particular, Ms. McKinlay submits that:

- SPC Chapman's evidence of poor BCSs was contradicted by Dr. Pedersen;
- SPC Chapman's evidence that there was no dry area in the sheep pen was incorrect as the top portion was dry;
- SPC Chapman assumed the ages of Ms. McKinlay's animals and could not tell that many were "young";
- Contrary to the evidence of the Crown's witnesses, photographs of various animal shelters presented at trial show there was in fact wood beneath their tarp roofs;
- SPC Chapman claimed that Ms. McKinlay's boar was "vicious" and needed to be separated, but this boar had previously been housed with sows and piglets with no problems;
- SPC Chapman's evidence that Ms. McKinlay's goats had no shelter or access to food and water was incorrect;
- Dr. Pedersen's evidence that Ms. McKinlay's fence was "drooping" was not supported by the photographs presented at trial; and

- Dr. Pedersen's evidence relating to BCSs was misleading.

[29] Ms. McKinlay is critical of her trial counsel for failing to adequately cross-examine the Crown's witnesses, adequately examine her husband, call an additional witness who was available to testify, and adduce evidence regarding homestead farming practices. Had he done so, Ms. McKinlay submits the outcome would have been different.

[30] In support of her appeal, Ms. McKinlay swore affidavits dated September 18, 2019 and August 18, 2020. In her affidavits, Ms. McKinlay provides some particulars relating to the alleged inadequate assistance she received from her trial counsel and attaches various documents and photographs related to homestead farming, body condition scoring for pigs and sheep, photographs of healthy animals that were not hers (for comparison purposes), and photographs of her property and her animals. Ms. McKinlay's affidavits also contain various arguments, and criticisms of SPC Chapman, Dr. Pedersen, Crown counsel and her counsel.

[31] Ms. McKinlay submits that the evidence at trial together with the evidence in her affidavits establishes that:

- when the SPCA arrived, her property had been flooded, and she was in the process of moving her animals, building new pens and getting reorganized;
- any issues she had were temporary;
- in any event, she was feeding, supplying water to and providing adequate shelter for her animals;
- the SPCA did not give her adequate time to correct any deficiencies;
- except for two underweight sows and one piglet with a broken leg, her animals were in good shape; and

- all of the animals that she has cared for over many years have lived long lives because she cared for and loved them, not because she abused and neglected them.

[32] For these reasons, Ms. McKinlay submits that her convictions or, in the alternative, the ten-year prohibition on animal ownership be set aside.

Issue 1: Can Ms. McKinlay's fresh evidence be considered on appeal?

[33] Under s. 683(1) of the *Code*, an appeal court may accept certain types of "fresh evidence" where the court considers that it would be in the interests of justice to do so.

[34] The leading case on fresh evidence is *R. v. Palmer*, [1980] 1 S.C.R. 759. The "*Palmer* criteria" were helpfully summarized by our Court of Appeal in *R. v. Aulakh*, 2012 BCCA 340 at para. 57, as follows:

> [57] The test for the admission of fresh evidence is governed by *Palmer v. The Queen*, [1980] 1 S.C.R. 759 (confirmed in *R. v. Warsing*, [1998] 3 S.C.R. 579). The proposed evidence must be admissible in accordance with the rules of evidence (e.g., not hearsay, speculation, opinion, or argument) and must meet the following criteria: (i) in spite of due diligence the evidence could not be adduced at trial; (ii) the evidence is relevant; (iii) the evidence is credible; and (iv) the evidence could be expected to have affected the result. In criminal cases the due diligence criterion is often relaxed as it "must yield where its rigid application might lead to a miscarriage of justice": *G.D.B.* at para. 19.

[35] In *R. v. Stolar*, [1988] 1 S.C.R. 480, the Supreme Court set out the procedure for considering fresh evidence when a miscarriage of justice is alleged. The fresh evidence application should be heard first, unless it is obvious the evidence does not meet the *Palmer* criteria, and judgment reserved until the main appeal has been heard. See also *Aulakh* at para. 58.

[36] I agree with the Crown that most of the evidence Ms. McKinlay seeks to adduce as fresh evidence on appeal is not "fresh" at all. In particular, the Crown and defence witnesses were extensively examined and cross-examined (including by reference to many of the photographs Ms. McKinlay attached to her affidavits)

concerning her property, efforts and animals. The evidentiary record is complete on these topics and there is no need to adduce any fresh evidence in this regard.

[37] I also agree with the Crown that some of the evidence Ms. McKinlay seeks to adduce as fresh evidence is merely her opinion on evidence adduced at trial or argument. As set out in *Palmer* and *Aulakh*, her opinions and arguments are not admissible as fresh evidence.

[38] Further, I agree with the Crown that the documents, photographs and two letters that were not before the trial judge are not admissible as fresh evidence. The court already had evidence before it concerning how to determine BCSs. Information regarding homestead farming is irrelevant (more on this later), as are photographs of animals in industrial farming and other settings. Insofar as the letters from Ms. McKinlay's supporters speak to the circumstances leading to her conviction, they are inadmissible hearsay. Insofar as the letters speak to Ms. McKinlay's good character, these letters could have been entered at her sentencing hearing with minimal effort.

[39] Finally, in my view, none of the purported evidence could have been expected to affect the outcome. The trial judge already had the key evidence from both sides and the fresh evidence of most concern to Ms. McKinlay, namely the fresh evidence regarding homestead farming, is irrelevant.

[40] During the hearing of Ms. McKinlay's appeal, I declined to admit into evidence a number of photographs of Ms. McKinlay's animals. Most of the photographs were marked as exhibits at trial, others showed images of subjects addressed by Ms. McKinlay in her testimony, and the rest were irrelevant in that they did not show her animals during the relevant time period.

[41] As noted by the Crown, in cases where fresh evidence is adduced to challenge the integrity of the trial process, a somewhat more lenient approach is taken. Fresh evidence can be admitted to assess whether a miscarriage of justice occurred such that a new trial is required. While the due diligence factor and strict

procedural requirements set out in *Stolar* can be disregarded, the evidence must still be relevant, credible and admissible: *R. v. Hamzehali*, 2017 BCCA 290 at para. 36.

[42] In this case, the result is that I will consider Ms. McKinlay's affidavit evidence concerning the alleged shortcomings in the performance of her trial counsel. In fairness, I will also consider the affidavit her trial counsel swore in response, after she formally waived solicitor-client privilege. His affidavit is highly relevant and meets the *Palmer* criteria.

Issue 2: Was the guilty verdict reasonable and supported by the evidence?

[43] Under s. 686(1)(a)(i) of the *Code*, a verdict may be set aside on the ground that it is unreasonable or cannot be supported by the evidence.

[44] As noted by the Crown, the test is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. This involves an assessment of whether the finding was reasonably open to the trial judge on the evidence: *R. v. A.G.*, 2000 SCC 17 at para. 6. An appellate court cannot interfere with the verdict "unless there has been a clearly unreasonable assessment of the evidence": *R. v. E.R.*, 2002 BCCA 361 at para. 3.

[45] The law is clear that an appellate court may not interfere with findings of fact absent palpable and overriding error: *R. v. Clark*, 2005 SCC 2 at para. 9. "It is not enough that there is a difference of opinion with the trial judge": *R. v. Gagnon*, 2006 SCC 17 at para. 10.

[46] With the greatest respect, Ms. McKinlay's appeal against conviction misses the mark in two important respects. First, this is not a case about the differences between homestead farming and industrial farming and, second, I am not in a position to re-weigh the evidence.

[47] Dealing with the first point, Ms. McKinlay was charged under s. 445.1(1)(a) and s. 446(1)(b) of the *Code*. Under s. 445.1(1)(a), the question is whether an animal owner like Ms. McKinlay has wilfully caused or wilfully permitted to be caused

unnecessary pain, suffering or injury to an animal or bird. Under s. 446(1)(b), the question is whether an animal owner like Ms. McKinlay wilfully neglected or failed to provide suitable and adequate food, water, shelter and care for an animal or a bird.

[48] These *Criminal Code* provisions apply equally to homestead farming and industrial farming. Whether an animal owner is engaged in one or the other is, therefore, irrelevant.

[49] In this case, the trial judge set his mind to the issues arising under the *Code*. The identity of Ms. McKinlay as the owner and primary caregiver of the animals was clearly established. The trial judge carefully reviewed and weighed the evidence, including the expert evidence, concerning the poor body and living conditions of Ms. McKinlay's animals. He correctly instructed himself with respect to the necessary intent.

[50] After having taken all of these steps, the trial judge concluded that Ms. McKinlay had wilfully failed to provide suitable and adequate food, water, shelter and care for her animals, which caused them unnecessary pain, suffering and injury. The trial judge based his findings primarily on the thirst and weight loss of Ms. McKinlay's animals. His findings turned only on Ms. McKinlay's actions and inactions, not on the type of farming operation she was running.

[51] Dealing with the second point, the trial judge heard Ms. McKinlay's evidence regarding her property, efforts and animals. He did not find her evidence credible and rejected it. He was entitled to do so. While Ms. McKinlay strongly disagrees with the trial judge's findings, I can discern no palpable and overriding error. In particular:

- SPC Chapman's evidence of poor body conditions may not have aligned perfectly with Dr. Pedersen's evidence, but Dr. Pedersen was qualified to give expert opinion evidence on the topic and the trial judge accepted her evidence. In any event, the evidence of both SPC Chapman and Dr. Pedersen was consistent that many of Ms. McKinlay's animals were severely underweight and some even emaciated;

- The trial judge referred to SPC Chapman's evidence that there was no dry area in the large sheep pen but did not make any specific findings as to whether that was so. Rather, the trial judge relied on Dr. Pedersen's evidence that the shelter provided by Ms. McKinlay for her animals was inadequate in a number of ways;

- If SPC Chapman was wrong about the ages of Ms. McKinlay's animals, that did not affect the outcome. The trial judge relied on Dr. Pedersen's evidence that Ms. McKinlay's animals were suffering as a result of inadequate food, water and shelter;

- While there may have been wood beneath some of the tarp roofs, there was plenty of other evidence regarding the inadequacy of the shelter provided by Ms. McKinlay for her animals;

- SPC Chapman's evidence that Ms. McKinlay's boar was "vicious" was based on his observations at a particular moment in time. Ms. McKinlay's evidence that her boar was generally good-natured did not undermine SPC Chapman's testimony. In any event, the perceived viciousness of Ms. McKinlay's boar was not central to the outcome;

- The trial judge was entitled to accept the evidence of SPC Chapman and Dr. Pedersen that Ms. McKinlay's goats had inadequate food, water and shelter;

- Whether the photographs presented at trial supported Dr. Pedersen's evidence that Ms. McKinlay's fence was "drooping" is immaterial. The trial judge's critical conclusions hinged on much bigger problems; and

- Notwithstanding Ms. McKinlay's opinion otherwise, the trial judge was entitled to accept Dr. Pedersen's expert evidence relating to BCSs.

[52] In short, there was ample evidence upon which a properly instructed jury, acting judicially, could reasonably convict. The guilty verdicts were supported by the evidence and reasonable. I must, therefore, dismiss this ground of appeal.

Issue 3: Has Ms. McKinlay established that the assistance of her trial counsel was ineffective?

[53] An appellant who seeks to set aside a conviction on the ground of ineffective assistance of counsel must establish three criteria on a balance of probabilities:

1. the underlying facts on which the claim is based;

2. the representation by trial counsel fell below the standard of reasonableness expected from professionals; and

3. the professional incompetence of trial counsel resulted in a miscarriage of justice.

(See *Aulakh* at para. 44.)

[54] As noted by the Crown, a miscarriage of justice will occur where there is a reasonable probability or possibility that, if not for counsel's unprofessional errors, the result would have been different. It will also occur where counsel's performance was so incompetent that it undermined the "fairness of the adjudicative process": *Aulakh* at paras. 42-43.

[55] An allegation of ineffective assistance of counsel has two components: a performance component and a prejudice component. Both must be established by the appellant on a balance of probabilities. The performance component relates to acts or omissions of trial counsel that are alleged to have been incompetent, and might include allegations that the Crown's case was not properly challenged: *Aulakh* at paras. 45-46.

[56] Throughout the analysis, there is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The wisdom of hindsight has no place in this assessment: *R. v. G.D.B.*, 2000 SCC 22 at para. 27. Further, appellate courts have adopted a cautious approach to assessing the performance component of the test. Deference must be given to strategic and tactical decisions made by trial counsel: *Aulakh* at para. 48.

[57] Ms. McKinlay raised numerous complaints concerning the performance of her trial counsel. I summarize these as follows:

- Trial counsel did not question her husband about his control over the couple's money, his decision to only run electrical service to their shop (and not to the animals' quarters) and why the property did not have running water;
- Trial counsel did not adequately cross-examine the Crown's witnesses regarding homestead farming and/or outside living standards for farm animals;
- Trial counsel did not cross-examine the Crown's witnesses regarding BCS charts; and
- Trial counsel did not call Ms. McKinlay's neighbour, Nicolette Schriber, who was available to testify for the defence.

[58] I am unable to accede to any of Ms. McKinlay's submissions. In particular, trial counsel's affidavit establishes that:

- Trial counsel presented Ms. McKinlay's case as instructed except when he was instructed to adduce evidence that would not be admissible or that, in his professional opinion, would not advance her defence;
- Trial counsel followed Ms. McKinlay's instructions to call her husband as a witness despite his knowledge that, if asked, he would say Ms. McKinlay refused to part with her animals even though they were in distress. While Ms. McKinlay may have wanted to blame her husband for some deficiencies, trial counsel was understandably careful in his questioning of Mr. McKinlay;
- Trial counsel understood Ms. McKinlay's desire to challenge the Crown's witnesses regarding various industry standards. Trial counsel asked Ms. McKinlay to provide him with alternative standards but, instead, she provided printouts of Kijiji ads, Wikipedia pages and pictures of pigs in fields found by

way of internet searches. Trial counsel advised Ms. McKinlay, correctly in my view, that this information was neither reliable nor admissible;

- BCSs were obviously central to the case against Ms. McKinlay and trial counsel cross-examined the Crown's witnesses at some length on the topic; and

- Trial counsel declined to call Ms. Schriber as a witness because she had no first-hand knowledge regarding the condition of Ms. McKinlay's property at the relevant time, namely December 2017. (Though I did not admit Ms. Schriber's letter as fresh evidence on appeal, it indicated that Ms. Schriber had observed Ms. McKinlay caring for her animals on a daily basis, including by watering and feeding them, between May and October 2017.)

[59] Trial counsel was clearly of the view that Ms. McKinlay was unlikely to be acquitted. He was frank in giving her advice. Even though Ms. McKinlay did not accept all of his advice, he resolutely advanced her defence within the boundaries of the rules of evidence, his professional ethical obligations and his professional judgment.

[60] Ms. McKinlay has failed to persuade me on a balance of probabilities of any underlying facts on which to base her claim of ineffective assistance of counsel, that trial counsel's work for her fell below the standard of reasonableness expected from professionals, and that anything done by trial counsel resulted in a miscarriage of justice.

Issue 4: Was the ten-year prohibition order demonstrably unfit?

[61] A sentence should be varied only if the appeal court is convinced it is not fit in the sense of being clearly unreasonable. An unreasonable sentence is one that falls outside the acceptable range of orders: *R. v. Shropshire*, [1995] 4 S.C.R. 227 at paras. 46 and 50.

[62] Put another way, an appeal court should only intervene to vary a sentence if the sentence is demonstrably unfit, meaning that the sentence represents a substantial and marked departure from sentences customarily imposed for similar offenders committing similar offences: *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at paras. 90 and 92.

[63] Sentencing is a highly individualized process. The type of available sentence may be constrained by statutory provisions and the range of appropriate sentence is generally established through a consideration of sentences imposed on similarly situated offenders who have committed similar offences in similar circumstances.

[64] In this case, the Crown proceeded summarily. Under s. 446(2) of the *Code*, Ms. McKinlay was, therefore, liable to a fine not exceeding $5,000 or to imprisonment for a term of not more than six months or both. Under s. 447.1(1)(a) of the *Code*, Ms. McKinlay was liable to an order prohibiting her from owning, having the custody or control of, or residing in the same premises as an animal or bird during any period that the court considered appropriate. All other sentencing options, including a discharge, suspended sentence and conditional sentence order, were also available to the trial judge.

[65] Ms. McKinlay is critical of the author of the presentence report for “cutting and pasting” information from her previous presentence report and psychiatric assessment. There was nothing unusual about this. In fact, providing longitudinal information to the court can be very helpful to a sentencing judge in formulating an appropriate sentence. For example, in this case, Ms. McKinlay did not appear to be responding well to community supervision and court ordered counselling so the trial judge declined to place Ms. McKinlay on probation following the completion of her conditional sentence order.

[66] Ms. McKinlay objects to the ten-year prohibition order on the basis of her long history of providing good care to animals and on the impact the order will have on her ability to support herself. Given the trial judge’s findings, the ten-year prohibition order was justified and supported by the authorities. For example:

- In *R. v. Powell* (24 January 2011), Nelson Reg. File No. 21727-1 (B.C.P.C.), the offender's 11-year-old stallion died of starvation and the offender was convicted of wilfully neglecting to care for an animal contrary to s. 446(1)(b) of the *Code*. The offender showed no remorse. To denounce the offender's conduct and to specifically deter him from reoffending, the offender was sentenced to a 90-day intermittent jail sentence and a two-year ban on possession of any animals.

- In *R. v. Harfman* (3 February 2011), Penticton Reg. File No. 35084-1 (B.C.P.C.), a large number of farm animals were seized from the offender. They were obviously emaciated and in distress. Several had to be euthanized. The offender was convicted of wilfully permitting or causing unnecessary pain, suffering or injury to the animals under s. 445.1(1)(a) of the *Code*. The sentencing judge emphasized the need for deterrence and denunciation. He sentenced the offender to a six-month conditional sentence order followed by 30 months of probation. Despite the offender's complaint that he would "lose [his] home and [his] farm and everything", he was also prohibited from owning, having the custody or control of, or residing in the same premises as an animal or bird for the duration of his sentence.

- In *R. v. Draney* (5 May 2011), Kamloops Reg. File No. 88552-1 (B.C.P.C.), the offender was convicted of wilfully failing to provide a number of his horses with adequate and suitable food, water and shelter under s. 446(1)(b) of the *Code*. His horses had apparently escaped into the high country and become malnourished, emaciated and close to starvation. Emphasizing deterrence and denunciation, while also recognizing that the offender would be "approaching these things differently in the future", the sentencing judge imposed a 60-day conditional sentence order and a three-year prohibition order under s. 447.1(1)(a).

- In *R. v. Roberts* (19 December 2016), Vernon Reg. File No. 49804-1 (B.C.P.C.), the offender was convicted of wilfully causing unnecessary pain,

> suffering or injury to a large number of his horses under s. 445.1(1)(a) of the *Code*. The offender had "starved" his horses to the point that 18 of them were considered to be in extreme distress. The offender lacked empathy for his animals and was sentenced to a nine-month conditional sentence order and a 20-year prohibition order under s. 447.1(1)(a).

[67] Given the number of animals involved, Ms. McKinlay's case is clearly more serious than *Powell*. While I agree with Ms. McKinlay that there are some similarities between her case, and the *Harfman* and *Draney* cases, the distinguishing feature identified by the trial judge is that Ms. McKinlay has taken no personal responsibility for the condition of her animals, lacks remorse, blames others and lacks insight into the risk she poses to animals. These features of Ms. McKinlay's case may not be as egregious as the offender's lack of empathy for his animals in *Roberts* but it increases the seriousness of her offending, the risk she poses to animals and her moral blameworthiness.

[68] In the circumstances, I consider the ten-year prohibition order to be at the higher end of the range but I cannot say that it is outside of the range or clearly unreasonable.

[69] I understand how painful the ten-year prohibition will be for Ms. McKinlay but it was imposed to protect vulnerable animals. In all of the circumstances, I must dismiss her appeal against her sentence.

Conclusion

[70] Ms. McKinlay's case concerned standards established in the *Criminal Code* for the care and welfare of animals. Contrary to her belief, it had nothing whatever to do with distinctions between homestead farming and industrial farming. She was well represented by trial counsel who responsibly advanced her defence within the boundaries of the rules of evidence, and his professional responsibilities and judgment. The outcome was driven by objective evidence provided by the SPCA officers and Dr. Pedersen concerning the state of Ms. McKinlay's property and the condition of her animals.

[71] The outcome would not have changed even if the materials Ms. McKinlay sought to adduce as fresh evidence on appeal had been before the trial judge, or if trial counsel had adduced more evidence from Mr. McKinlay or called Ms. Schriber. As noted, the fresh evidence was largely irrelevant or otherwise inadmissible, Mr. McKinlay had more harmful than helpful evidence to provide and Ms. Schriber had no first-hand knowledge of relevance.

[72] There was ample evidence on which to convict. Ms. McKinlay has not established that trial counsel's assistance was ineffective. There has been no miscarriage of justice.

[73] Ms. McKinlay's love of animals has never been in issue. Her ability to care for them is. The sentence imposed by the trial judge, including the ten-year prohibition order, was justified to denounce her conduct and specifically deter her from failing to adequately care for animals in the future.

[74] Ms. McKinlay's appeal must be dismissed.

"L.S. Marchand J."

MARCHAND J.