IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Viitre,*
2020 BCSC 1463

Date: 20200827
Docket: 30600
Registry: Vancouver

Regina

v.

Tarmo Viitre

Before: The Honourable Mr. Justice Brundrett

On appeal from: Provincial Court of British Columbia, February 27, 2020
(*R. v. Viitre*, Vancouver File No. 254750-1)

Oral Reasons for Judgment

Counsel for Crown/Respondent (appearing by teleconference):	K. Gagnon
Counsel for the Appellant:	D.J. Barker H. Rawling (Articling Student)
Place and Date of Trial/Hearing:	Vancouver, B.C. August 12, 2020
Place and Date of Judgment:	Vancouver, B.C. August 27, 2020

Introduction

[1] **THE COURT:** The appellant was charged with three offences under the *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372 [*PCAA*]. The trial took place in the Provincial Court of British Columbia in Vancouver. He was acquitted on counts 1 and 2 involving his adult dog, Kello, who was seized by the Society for the Prevention of Cruelty to Animals ("SPCA") in 2016. However, the trial judge convicted the appellant on count 3. That charge related to a six-month-old German shepherd puppy named Pauka whom the appellant acquired after losing Kello.

[2] Count 3 charged that the appellant caused or permitted an animal to be, or continue to be, in distress between October 1 and 23, 2016, in violation of ss. 9.1(2) and 24(1) of the *PCAA*. On this charge, the trial judge accepted that the appellant unnecessarily threw Pauka across a room in front of an animal protection officer thereby causing distress to the dog. The appellant appeals his conviction.

[3] The grounds of appeal raise issues related to the absence of expert evidence and improper reasoning by the trial judge. They are stated as follows in the appellant's notice of appeal:

> The grounds for appeal are:
>
> i. The evidence before the learned trial judge was not reasonably capable of establishing beyond a reasonable doubt that the accused caused an animal to continue to be in distress, contrary to section 24(1) [of the] *Prevention of Cruelty to Animals Act*. It is respectfully submitted that expert evidence was required to establish the essential elements of the offence beyond a reasonable doubt;
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> ii. The learned trial judge erred in law resulting in a miscarriage of justice by convicting the accused in the absence of expert evidence and/or by applying a legal standard and/or making a factual assumption, namely that throwing an animal a short distance is in and of itself an abusive act that caused the animal to continue to be in distress contrary to section 24(1) [of the] *Prevention of Cruelty to Animals Act*;
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> ....
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> iv. The learned trial judge erred in drawing the inference that the animal was in distress contrary to section 24(1) [of the] *Prevention of Cruelty to Animals Act* in the absence of expert evidence, or any other evidence, to support that finding where the British Columbia Society for the Prevention of Cruelty to Animals had the animal examined by an expert veterinarian. It is respectfully submitted that this error resulted in a miscarriage of justice.

[4] The third ground of appeal is not reproduced above because the appellant indicated at the hearing of the appeal that he was not pursuing it.

[5] All of the grounds of appeal are opposed by the Crown/respondent who submits that the verdict on count 3 was reasonable, no miscarriage of justice occurred and the trial judge made no palpable and overriding error.

Legal Framework

[6] Many of the authorities applying and interpreting the *PCAA* stem from the Provincial Court where these matters are frequently heard. Judge Gillespie (as she then was) appropriately set out the purpose of the *PCAA* in *R. v. Chrysler*, 2013 BCPC 0240 as follows:

> [12] … The rationale for this legislation and broad interpretation reflects the concern that animals are dependent creatures and rely on human caregivers to provide them with the necessaries of life, including food, water and adequate shelter. The [*PCAA*] is broadly worded to reflect the vulnerability of animals and the need for those entrusted with their stewardship to be accountable for their well-being.

[7] Section 9.1(2) of the *PCAA* provides as follows:

> 9.1 …
>
> (2) A person responsible for an animal must not cause or permit the animal to be, or to continue to be, in distress.

[8] Section 24(1) of the *PCAA* makes it an offence to contravene s. 9.1.

[9] Section 1(2) of the *PCAA* defines an animal in distress as follows:

> (2) For the purposes of this Act, an animal is in distress if it is
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> (a) deprived of adequate food, water, shelter, ventilation, light, space, exercise, care or veterinary treatment,
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> (a.1) kept in conditions that are unsanitary,
>
> (a.2) not protected from excessive heat or cold,
>
> (b) injured, sick, in pain or suffering, or
>
> (c) abused or neglected.
>
> [Emphasis added.]

[10] The question of abuse under s. 1(2)(c) is in issue here. As noted by Judge Gulbransen in *R. v. Van Dongen*, 2004 BCPC 479 at para. 34, in the context of the *PCAA*, abuse can encompass many types of cruel conduct toward animals.

Trial Judgment

[11] The trial judge set out the background to the case as follows:

> [1] These are my reasons for judgment. By way of introduction, the accused Tarmo Viitre is 75 years old and has owned dogs since he was 15. On March 8 and 9, 2016, Constable Isenor, an animal protection officer with the Society for the Prevention of Cruelty to Animals, a society I will refer to going forward as the SPCA, attended Mr. Viitre's home and observed him interact with his three year old German shepherd, Kello, in a manner that allegedly caused Kello distress. Consequently, Mr. Viitre has been charged that he caused or permitted Kello to be, or continue to be, in distress in violation of s. 9.1(2) of the *Prevention of Cruelty to Animals Act*, thereby committing an offence contrary to s. 24(1) of that Act.
>
> [2] Kello was subsequently seized by the SPCA and eventually euthanized.
>
> [3] Mr. Viitre obtained a German shepherd puppy named Pauka after Kello was removed and not returning. On October 23, 2016, in response to a complaint from a neighbour, Constable Isenor again attended at Mr. Viitre's home to investigate the complaint. He found the home to be cluttered with debris. He observed Mr. Viitre interact with Pauka in a manner that is alleged to have caused Pauka distress. As a result of the condition of the residence in which Mr. Viitre and Pauka lived and the interaction between Mr. Viitre and Pauka, Mr. Viitre has been charged that between October 1 and October 23, 2016, he failed to care for Pauka, including protecting him from circumstances that were likely to cause Pauka to be in distress in violation of s. 9.1(1) of the *Prevention of Cruelty to Animals Act*. He has been charged, as well, with causing or permitting Pauka to be or continue to be in distress in violation of s. 9.1(2) of the *Prevention of Cruelty to Animals Act*.

[12] The trial judge stated the issue as follows:

> [5] Another point of contention is whether Mr. Viitre's actions and the environment in which Pauka lived have been proven beyond a reasonable doubt to be abusive, and thus causing both Kello and Pauka distress, as defined under the *Prevention of Cruelty to Animals Act*.

[13] As to his factual findings, the trial judge undertook a lengthy discussion of the circumstances surrounding the incidents involving Kello and Pauka:

> [17] According to Constable Isenor, in October of 2016, a complaint came in to the SPCA about Mr. Viitre. As a result, Constable Isenor got another

search warrant and attended at Mr. Viitre's residence on October 23. Mr. Viitre, as mentioned in the introduction to these reasons, had obtained another dog named Pauka. When Constable Isenor attended on October 23, 2016, it was in relation to Pauka.

[18] Constable Isenor entered the residence pursuant to the search warrant. He noted the condition of the residence, and the environment in which Pauka was living which is relevant with respect to Count 2. He described the residence as being very messy. He said there was different electrical equipment, exterior cords, computer equipment, monitors, paperwork, furniture, and furniture with debris piled on top, including boxes. Sometimes the debris would be stacked a couple of feet high on top of the furniture. He said it was dirty inside.

…

[21] In terms of his interaction with Mr. Viitre, which is what has led to Count 3, he said that he told Mr. Viitre he was there regarding the dog. Mr. Viitre was holding Pauka at the time. Mr. Viitre started backing up while Constable Isenor entered. Constable Isenor said that he would be seizing Pauka and he reached for Pauka. Mr. Viitre then lifted Pauka up off all fours and threw Pauka over a pile of debris with considerable force towards the kitchen. Apparently the debris was approximately two feet high.

[22] Constable Isenor described the trajectory of Pauka as spinning in the air, about three to four feet off the ground, and spanning a distance of 10 to 12 feet. Pauka landed against the doorframe between the west room and the kitchen, hitting the frame with an audible thunk. When Pauka landed, he yelped and retreated into a back room. Constable Isenor looked for him and found him "cowering in the corner". Constable Isenor then removed Pauka and took Pauka to the Burnaby shelter. Pauka was approximately, in Constable Isenor's estimate, six months old, 25 to 30 pounds, and about three feet tall, a German shepherd.

[23] In cross-examination, Constable Isenor conceded that the state of the residence would not have justified seizure of Pauka. It was the throw by Mr. Viitre that ultimately made him seize Pauka instead of warning him to clean the place up.

[24] From watching his actions and being within the interaction with Mr. Viitre, Constable Isenor was not in a position to read Mr. Viitre's mind, but it was his impression from reading the circumstances that Mr. Viitre was not trying to harm Pauka; rather, he was trying to protect him.

[25] According to Constable Isenor, philosophically he is of the view, as was his fellow officer, Constable Hall, that it is not acceptable to hit an animal, even for disciplinary reasons.

…

[29] I will now turn to Mr. Viitre's evidence, and then I will move into an assessment of the reliability and credibility of the witnesses.

[30] Mr. Viitre said that on March 9, 2016, the day that Kello was seized, he said he tried to keep Kello from attacking Constable Isenor and that he did not strike Kello at any time. He said that he learned his training methods for

dogs from books that he read and that immediate discipline of a dog when they do something incorrectly was important. To discipline a dog, he hits the dog on the dog's snout.

[31] He said in October 2016, when Constable Isenor came for Pauka, Pauka was trying to protect Mr. Viitre. He tried to prevent Pauka from going after Constable Isenor, so he hit Pauka on the snout and tried to put himself between Pauka and the officers. He said he did not throw Pauka, he pulled him away from the officers because Pauka would have bitten them otherwise.

[32] He said the only discipline method he knows is to discipline the dog right away. He said when the SPCA officers told him that hitting a dog was unacceptable, he stopped, but when people came to the door and Pauka was protective of him, he said he would hit him. This is significant evidence when the reliability assessment is made and I will explain why in a moment.

[33] Mr. Viitre described Kello as being three years old when he was put down. Kello liked to be in the backyard and that is what gave him comfort. He went to the backyard every day. He said he considered Kello to be part of the family and that Kello was a mellow dog, a good dog, and did not require much discipline. He said that for discipline, it meant that the dog did something wrong and it needed to be communicated to the dog, and that you can communicate that the dog did something wrong by touching him on the snout or saying "no" in an angry tone. This is his disciplinary philosophy.

[34] He said on March 8, 2016, he never struck Kello on the head. He said he touched Kello on the top of his head to discipline him and tell him that it was not acceptable behaviour, what he was doing, but Mr. Viitre could not remember in his evidence what it was exactly that Kello was doing. This was on cross-examination. He said, however, that he did not use any force when he touched Kello on the top of his head, and he described it as a tap on the nose that he used to discipline Kello and let him know that his behaviour was unacceptable. He said he would also yell at Kello for discipline. He said it is possible that he wrapped his hand around Kello's snout, as Constable Isenor said, but he does not recall.

[35] He then went on to say that he has a difference of opinion with the SPCA officers on how to train an animal, but he said he has never hit Pauka. This is somewhat in contradiction to what he said in examination in chief about hitting Pauka when people would come to the door and Pauka was being protective of him. He said the SPCA never explained to him what is acceptable, but he said he has never struck any animal and he said, in fact, Kello has never been disciplined by him and that Kello was a good dog. Then he went on to say that he has never hit Kello, period, not even to discipline him, and that he has never touched or tapped Kello with an open hand.

[36] These are obvious contradictions from what he said earlier in his evidence. Mr. Viitre then he conceded that, in fact, he did not remember either of the events and he said that he was - "I am relying on my counsel and the Crown to provide me with accurate facts. This is why I keep saying I believe so," when facts were presented to him. He said he has no recollection of those days.

…

> [39] He denied picking up Pauka at any time and he says he never disciplined Pauka before the event that Constable Isenor testified to.
>
> [Emphasis added.]

[14] The trial judge ultimately accepted the evidence of Constable Isenor, the attending animal protection officer with the SPCA, as to the critical events:

> [46] With respect to the evidence of the Crown witnesses, I am going to focus particularly on Constable Isenor. I found his evidence to be plausible. I found him to be internally consistent, and I will come back to the push and strike comment in a moment. I found his evidence was literally noteworthy, in that he made notes of what he observed at the time that aided him in his recall. I also found his evidence to be balanced. I appreciate the difference between a push and a strike, but I have addressed that and I do not ascribe significance to it. But even in terms of his balance, for example, his concession that the backyard had nothing of concern in it, or that he at no time thought that Mr. Viitre was intending to hurt either of his dogs, he gave somewhat virtuous interpretations to what Mr. Viitre was doing; with respect to Kello, he was trying to discipline Kello in order to aid in the interaction between him and the SPCA officers, him being Mr. Viitre, and with respect to Pauka, that he was simply being protective of Pauka.

[15] While the trial judge rejected the appellant's version of events, he accepted that the appellant did not intend to hurt his dogs:

> [48] In conclusion, I accept Mr. Viitre's evidence that he would never maliciously or intentionally hurt his dogs, and that they were, and Pauka is, part of his family. I do not accept his denials of his conduct and explanation of his motives and state of mind as reliable, given his lack of recall. I do accept as reliable and accurate Constable Isenor's evidence of what he observed of the interactions between Mr. Viitre and the dogs and the environment in which he lived.

[16] The trial judge reasoned as follows with respect to the legal test for a strict liability offence that he was bound to apply:

> [6] In terms of the legal framework, the offences are strict liability offences, so Mr. Viitre will be convicted upon proof of the *actus reus*, unless he were to establish, on a balance of probabilities, a due diligence defence – that due diligence or reasonable care was exercised, or that a reasonable mistake of fact occurred. Here Mr. Viitre does not rely on a defence of due diligence or a reasonable mistake of fact. Rather, the principal issue is whether the *actus reus* has indeed been made out. More particularly, did his actions put Kello and Pauka in distress?
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> [Emphasis added.]

[17] The trial judge was alive to the absence of expert evidence. On that point, he stated as follows:

> [8] Secondly, there is the question of whether there is sufficient evidence in the absence of expert evidence to conclude, beyond a reasonable doubt, that Mr. Viitre caused either dog to be in distress as defined in s. 1(2) of the *Prevention of Cruelty to Animals Act*. The relevant part of s. 1(2) reads as follows, ". . . an animal is in distress if it is . . ." and I am now referring to paragraphs (b) and (c):
>
> > (b) injured, sick, in pain or suffering, or
> >
> > (c) abused or neglected.

[18] After acquitting the appellant on counts 1 and 2, the trial judge concluded as follows on count 3:

> [61] Turning to the last count, Count 3. This is the allegation of throwing Pauka. I accept the evidence of Constable Isenor as described by him. Throwing Pauka was unnecessary, unwarranted, and unjustified. One can see where confusion may lay regarding the permissible amount of corrective physical force, if any, used to discipline a dog. Reasonable people may reasonably disagree.
>
> [62] Further, there may be generational or cultural factors at play, and there is no code defining with precision what is or is not permissible, for example, like the Criminal Code governing conduct among people. However, it is hard to fathom how picking up and throwing a dog, other than to protect it from objectively obvious imminent harm, can be justified. Pauka apparently, on being suspended in the air and spinning, landed against the doorframe with an audible thunk, and yelped and retreated.
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> [63] Referring back to the analysis under Count 1 regarding Kello, this is an example where the act itself, despite Mr. Viitre's intention, is sufficiently egregious that a reasonable inference can be drawn that it was abusive and that Pauka's response was a distress response. I appreciate that I said that Kello's yelping and whimpering was most likely a stress response, but that additional evidence would be required to prove it beyond a reasonable doubt. That is because the actions of Mr. Viitre were more benign than the actions of Mr. Viitre with respect to Pauka, and so it is easier to conclude that Pauka's response was a distress response.
>
> [64] Under those circumstances, I am satisfied beyond a reasonable doubt that Mr. Viitre caused Pauka to be in distress from that act and I find him guilty of Count 3.

Analysis

[19] The appellant submits that the evidence was not reasonably capable of establishing beyond a reasonable doubt that the accused caused or permitted an

animal to be, or to continue to be, in distress contrary to ss. 9.1(2) and 24(1) of the *PCAA*. His grounds of appeal overlap somewhat, but the main arguments were as follows: a) expert evidence was required to make the critical finding of abuse on count 3; b) the trial judge's analysis was internally inconsistent; and c) the trial judge erred in his approach to intention. The appellant also characterized some of these grounds as errors with respect to the burden of proof or errors amounting to a miscarriage of justice.

a) The Need for Expert Evidence

[20] On the first point related to the requirement for expert evidence, it is common ground that the trial judge relied on the lay evidence of Constable Isenor in his analysis of count 3. No expert was called, despite the fact that a veterinarian examined Pauka later on the same day of the incident. The appellant submits that it could not be inferred, without expert evidence, that the act of throwing Pauka caused distress within the meaning of s. 1(2) of the *PCAA*.

[21] The trial judge found, at paragraph 51, that "in cases where the act itself is egregious enough, and there is evidence of the animal's reaction that can be interpreted as a distress reaction to that act, then it is not speculative to conclude, without expert evidence, that the animal's reaction is one of distress." In support of the proposition, the trial judge cited *R. v. Keefer*, 2017 BCPC 142 [*Keefer*], a sentencing decision involving three accused who plead guilty to violently assaulting and abusing a cow in several ways.

[22] The appellant submits that the trial judge erred in finding that the act of throwing a dog across the room was so obviously abusive that it obviated the need for expert evidence of distress.

[23] The trial judge accepted Constable Isenor's evidence that, upon being advised that Pauka would be seized, the appellant lifted Pauka up and threw him over a pile of debris with considerable force towards the kitchen. Having been thrown in this manner, Pauka spun in the air approximately three to four feet off the ground. He travelled a distance of 10–12 feet and landed against a doorframe with

an audible thunk. The trial judge also accepted Constable Isenor's evidence that Pauka yelped and retreated and was found cowering in the corner.

[24] Pauka was six months old, 25 to 30 pounds, and about three feet tall at the time.

[25] The trial judge found that the act was sufficiently egregious such that it was reasonable to infer that the act was abusive and Pauka was in distress.

[26] While the trial judge cited *Keefer*, Judge Dyer in *R. v. Battaglio*, 2020 BCPC 45 at para. 348 provided another illustration of inference-drawing without the need for expert evidence. There, Dyer J. indicated that the distress or continued distress of two animals could be inferred in that case from their inadequate care and filthy living conditions without the benefit of an autopsy or necropsy report.

[27] On the facts of the present case, I do not agree with the appellant that the trial judge required expert evidence to make the requisite finding of distress. As noted in *R. v. Mohan*, [1994] 2 S.C.R. 9 at 23, "… if on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary…." Here, Pauka's emotional state was readily observable. No testing was necessary. The appellant's throwing of the dog was an act that a layperson could conclude could cause harm. Constable Isenor witnessed it and described it in detail.

[28] In my view, it was open to the trial judge to draw a common sense inference from the appellant's treatment of his dog as to whether Pauka suffered abuse, which is a form of distress under s. 1(2)(c) of the *PCAA*. In these circumstances, the issue of whether Pauka appeared to be in distress as a result of being forcibly thrown across a room and into a doorframe was not outside the purview of common knowledge so as to require expert evidence.

b) Inconsistent Reasoning

[29] The appellant argued secondly that the trial judge erred because he found on count 1, in relation to similar allegations, that the lay evidence offered was not

sufficient to ground a finding that Kello was in distress. The appellant maintained that the trial judge's reasoning on count 1 was impermissibly inconsistent with his reasoning on count 3.

[30] In dismissing count 1 concerning Kello, the trial judge found that the acts of striking Kello and grabbing her snout were not so egregious that he could find that Kello was in distress:

> [53] The accused's actions towards Kello, though, are far more brief and benign than the example I just gave from *R. v. Keefer*. They are not so egregious that a straight line can easily be drawn between those acts and causing distress. Kello is said by Constable Isenor to have yelped, whimpered, and retreated immediately after being struck. These are most likely pain responses and communications of suffering and distress by Kello. But Kello is a sentient being of a different species than humans. I cannot claim to have experienced what Kello has experienced or know if that is necessarily what that communication is in that context, nor do I know anyone who has.
>
> [54] There is no expert evidence tendered to assist with what exactly Kello was communicating in Kello's response or feeling. Can I take judicial notice that a dog, in this case Kello's yelping, whimpering, and retreating is in response to Mr. Viitre's actions as a show of distress? Judicial notice may be taken of matters of fact that are so generally known and accepted that they cannot be reasonably questioned. Furthermore, that they may be readily verified by readily available sources whose accuracy cannot be questioned.
>
> [55] Here, as mentioned, Kello's response is most likely a distress response, but I cannot claim that that reaction – yelping, whimpering, retreating – in response to the acts of Mr. Viitre are so generally known and accepted that they cannot be questioned.

[31] In contrast to count 1, the trial judge indicated that he was satisfied beyond a reasonable doubt that the appellant caused Pauka to be in distress on count 3. The appellant argued that if the trial judge had a doubt on count 1, he ought to have had acquitted on count 3 by applying the same reasoning.

[32] Kello was three years old. Pauka was a six-month-old puppy. Different acts were involved. Kello was hit and grabbed. Pauka was thrown. The trial judge found that the cause of Kello's responses was ambiguous and that the appellant's actions towards Kello could have been disciplinary. The act of throwing Pauka did not leave open the same interpretation in the judge's eyes. Given the different contexts, I

cannot agree with the appellant that the trial judge's reasoning was erroneous or inconsistent as between counts 1 and 3.

[33] Even so, the fundamental question here is not whether the trial judge engaged in inconsistent reasoning but whether the trial judge made a palpable and overriding error with respect to his assessment of the facts on count 3. Applying the requisite deference to the findings of facts, I cannot find that the trial judge made a palpable and overriding error respecting a factual finding or factual inference: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 10, 19, 22. Rather, I find that a properly instructed jury could reasonably have returned the verdict on count 3.

[34] The appellant also described this ground of appeal at times as a failure to apply the proof beyond a reasonable doubt standard to count 3. I cannot agree. The trial judge's reasons make clear that he applied the requisite criminal standard of proof.

c) Error with Respect to Intent

[35] Finally, on the appellant's last point, he raised the relevance of the appellant's intent. As noted above, the trial judge found that the appellant would never have maliciously or intentionally hurt his dogs. It appears the trial judge was prepared to accept that the appellant may somehow have been trying to protect Pauka from Constable Isenor. In other words, the trial judge found no malice or subjective intention to harm.

[36] As I understand the argument on this point, the appellant was not submitting that he had shown on a balance of probabilities that due diligence or reasonable care had been taken: *R. v. McAnerin*, 2016 BCPC 319 at para. 75 [*McAnerin*]. Rather, he submits that more emphasis ought to have been placed on the finding that he was not trying to harm Pauka.

[37] As the trial judge noted, the offence is one of strict liability. It does not require any intent to do the wrong. The Crown was only required to prove beyond a reasonable doubt that the appellant caused the animal to be in distress: *R. v. Sault*

Ste. Marie, [1978] 2 S.C.R. 1299 at 1326 [*Sault Ste. Marie*]; *R. v. M.V. "Glenshiel"*, 2001 BCCA 417 at para. 19; *McAnerin* at paras. 3, 75. As stated in *Sault Ste. Marie* at 1326, "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."

[38] At paragraph six of his reasons, the trial judge correctly summarized these propositions of law. Nevertheless, the trial judge stated, at paragraph 50, that although "intention is not an element that needs to be proven, in cases where distress to the animal is not self-evident from the act, intention is part of the total body of material evidence that the court can consider or ought to consider."

[39] In my view, being an offence that is completed upon satisfaction of the prohibited act, the trial judge should not have had regard to the presence or absence of malice on the accused's part in determining whether the Crown had met its burden of proof. This is a regulatory offence, not one where a certain guilty mind is required.

[40] It may be that the trial judge was referring to the proposition in *Sault Ste. Marie* at 1326 that the defence of reasonable care "will be available if the accused mistakenly believed in a set of facts which, if true, would render the act or omission innocent." Here, as noted, the trial judge referred to the fact that the appellant might have been trying to protect Pauka when he threw him.

[41] Nevertheless, the trial judge was clearly of the view that a due diligence defence was not made out in the circumstances because he stated, at paragraph 61, that "[t]hrowing Pauka was unnecessary, unwarranted, and unjustified." In other words, the trial judge found that even accepting the accused's evidence that he was merely trying to protect Pauka from imminent harm, he failed to exercise due care on an objective standard.

[42] Hence, the evidence was insufficient to make out a defence of due care on a balance of probabilities. As noted above, the offence in issue is a public welfare offence where the Crown was relieved of the necessity of proving a wrongful intent.

Accordingly, I cannot agree with the appellant that the trial judge erred with respect to the accused's intent by failing to give weight to the lack of intent to harm the dog.

[43] The appellant submits that some of the errors raised resulted in a miscarriage of justice. As I do not agree that the trial judge erred in making the requisite finding of distress, I would similarly not accede to such ground of appeal cast under s. 686(1)(a)(iii) of the *Criminal Code*, such as a misapprehension of evidence or failure to appreciate relevant evidence: *R. v. Lohrer*, 2004 SCC 80 at paras. 1–3.

Conclusion

[44] In the result, I cannot find any error with respect to the trial judge's inference drawing process or in his application of the law to the facts of the case.

[45] The appeal against conviction is dismissed.

"Brundrett J."