COURT FILE NO.: CR07-0015AP
DATE: 2008-08-13

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN	)	Stacy Haner, Assistant Crown Attorney, for the Respondent
	)	
Respondent	)	
	)	
- and -	)	
	)	
DAVID PRYOR	)	Blaine Armstrong, for the Appellant
	)	
Appellant	)	
	)	
	)	**HEARD:** August 8, 2008

J.S. O'NEILL, SCJ:

PART A - INTRODUCTION

[1] David Pryor was convicted on April 27th, 2007 of four charges contrary to s. 446(1)(c) of the Criminal Code of Canada. All of the remaining counts in the Information were stayed except for count number 11, upon which was endorsed a not guilty finding by the learned trial judge.

[2] The appellant's appeal of the convictions and his sentence (as to the making of a restitution order only) were argued before me in Gore Bay on August 8th, 2008. For the reasons which follow, I would dismiss the appeal as against the four convictions but allow the appeal with respect to the restitution order on sentence.

PART B – THE SCOPE OF APPELLATE REVIEW

[3] The appeal as to conviction and sentence were made in accordance with s. 813 of the Criminal Code. At pp.1558-1559 of Martin's Criminal Code, 2008 under the heading Nature of Jurisdiction to review findings of fact it is stated:

> "The summary convictions appeal court has no jurisdiction to retry the case. Its jurisdiction is limited to determining whether the evidence is so weak that a verdict of guilty was unreasonable: *R. v. Colbeck* (1978), 42 C.C.C. (2d) 117 (Ont. C.A.); *R. v. Arthur* (1981), 63 C.C.C. (2d) 117, [1982] 1 W.W.R. 122 (B.C.C.A.), leave to appeal to S.C.C. refused December 21, 1981. However, this jurisdiction is not limited to case where there is no evidence but like the Court of Appeal in indictable matters under s. 686(1)(a)(i), includes the power to allow an appeal where the verdict cannot be supported by the evidence or is unreasonable: *R. v. Ponsford* (1978), 41 C.C.C. (2d) 433, 6 Alta. L.R. (2d) 370 (S.C.App. Div.)."

[4] The test to be applied pursuant to s. 686(1)(a)(i) (conviction appeals in indictable offences) is whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered. The Appeal Court's function goes beyond merely finding that there is evidence to support a conviction. While an appeal court must not merely substitute its view for that of the jury, in order to apply the test the court must reexamine and to some extent reweigh and consider the effect of the evidence: *R. v. Yebes*, [1987] 2 S.C.R. 168.

[5] Where the ground of appeal is the alleged unreasonableness of the verdict, it is the conclusion that must be shown to be unreasonable. Errors by the trial judge in the assessment of the evidence may demonstrate why the verdict is unreasonable, but a verdict is not necessarily unreasonable because the judge has made errors in his or her analysis. The review must go further and consider all of the evidence: *R. v. Beaudry* (2007) 216 C.C.C. (3d) 353, (S.C.C.).

PART C – DID ANY MISAPPREHENSION OF PORTIONS OF EVIDENCE HAVE A CUMULATIVE EFFECT ON THE VERDICT?

[6] On the appeal hearing, the appellant argued that the learned trial judge misapprehended the trial evidence in four main areas with the result that the cumulative effect must lead to the setting aside of the four convictions and the ordering of a new trial. The four areas of trial evidence are summarized in paragraphs 3 through 19 inclusive of the Appellant's Factum.

[7] I am not satisfied that any misapprehension of evidence occurred to the extent argued by the appellant. Firstly, it is true that Dr. Scott indicated in his evidence that there was some water available in the barn. But in his reasons for decision, the learned trial judge also dealt extensively with the findings made by Dr. Scott with respect to the condition of the horses, and the bull, as well as the surrounding shelter and stall conditions. And, importantly, in his reasons, he did allow that inside the barn, there may have been intermittent provision of food and water for the horses.

[8] The timeframe with respect to counts 1, 6, 10 and 12 was from the earliest, March 24th, 2006, to the latest, May 15th, 2006. Inspector McAllister gave evidence at the trial. She attended on the property on March 24th, 2006 and made observations. These included observations in relation to the Hereford bull, counts 12 to 16. Photographs taken April 6th, March 24th and June 17th were entered as exhibits. At p. 29 of her evidence, Inspector McAllister confirmed, for example, that the observations made by her on March 24th were consistent with what was depicted in exhibit number 8B. Inspector McAllister went on to state that the photos taken on May 8th, 2006 again indicated that the water buckets were empty, as they had been on March 24th, 2006.

[9] Later, at p. 31 of the transcript, Inspector McAllister confirmed that the conditions in photograph number 46 taken on May 8th, 2006 were consistent with the conditions seen on March 24th, 2006.

[10] It is correct that the timeframe with respect to count 12 ended on April 5th, 2006. But at p. 15 of the transcript, the following exchange can be found:

> "Q. All right. Do you have – now I understand that your evidence in relation to the bull relates to counts, Your Honour, relates to counts 12 to 16. Did you take some photographs or do you have some photographs that illustrate your observations of the bull?
>
> A. I do have photos that may not have been taken on that particular day.
>
> Q. Okay.
>
> A. But that do depict what I saw on that day.
>
> Q. All right.
>
> A. And later dates.
>
> Q. I understand you made a number of visits to the bull.
>
> A. I did."

[11] Accordingly, I am satisfied that this witness efficiently connected and confirmed the observations which she made on March 24th, 2006, with observations then depicted on pictures taken after April 5th, 2006.

[12] At the appeal hearing, considerable time was spent examining the evidence of Mr. Mansz and any arrangement which he and Mr. Pryor came to with respect to caring for the animals after March 31st, 2006. The transcript confirms that for the period after April 1st, 2006, Mr. Mansz did receive payment for feeding, watering and caring for the animals. The payment was five dollars a day. However, it is important to note that this arrangement was made after the fact, and that

payment was not received by Mr. Mansz until September 2nd, 2006. In his evidence in chief, Mr. Mansz described at pages 77 to 83 of the transcript, the conditions he observed with respect to the animals after March 31st, 2006 and the concerns he expressed to solicitor Marshall during this time. In reexamination, Mr. Mansz made it clear, in response to a question from counsel, that Mr. Pryor was responsible for feeding and watering and caring for the animals between March 24th, 2006 and the date in May when they were officially seized by the Society.

[13] In his reasons, the learned trial judge did deal with the issue of an outside water source and dealt specifically with Mr. Pryor's evidence on this point. But the trial judge had some concerns with this evidence and outlined why it was difficult for him to accept it fully. And he dealt specifically with the condition of the animals that were outside, through the observations made by the witnesses as to their condition.

[14] The appellant also raised the issue of continuity at the appeal hearing. Although a stronger link could have been made as between the appellant's animals, and those checked and trimmed by Mr. McNulty, I am satisfied that even if Mr. McNulty "understood" that the horses that he trimmed were those that had been seized from the farm (volume 1 page 110) nevertheless any misapprehension by the trial judge on this point would not be sufficient to cause the verdicts to be unreasonable.

[15] The trial judge dealt at length in his decision with the observations made by various parties, including Mr. Mansz, Inspector McAllister and Mr. McNulty. He dealt with the conditions that had been depicted in photographs taken inside the barn. At p. 18 of his reasons, he allowed that there may even have been intermittent provision of water and food to the horses. But he concluded that given the overall conditions with respect to shelter, and with respect to provision of food and water, and the conditions of the animals themselves, the guilt of the appellant with respect to the four counts was proven beyond a reasonable doubt. I am satisfied that for the reasons herein outlined, the trial judge's convictions were reasonable and supported by the evidence in its entirety. Accordingly, I would dismiss the conviction appeal.

PART D – THE APPEAL AS TO SENTENCE

[16] The appellant received a suspended sentence and three years probation, containing various terms and provisions. In addition, a restitution order payable to the Society for the Prevention of Cruelty to Animals was made in the sum of $25, 511.56. S. 738(1)(a) of the Criminal Code states:

> "Where an offender is convicted or discharged under section 730 of an offence, the court imposing sentence on or discharging the offender may, on application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person as follows:
>
> > (a) in the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence or the arrest or

> attempted arrest of the offender, by paying to the person an amount not exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned, where the amount is readily ascertainable;"

I am not persuaded that the SPCA is a victim of the offence, within the meaning of s. 738. It is true that the Society incurred expenses and financial costs after they seized the animals. But s. 15(1) and (2) of the Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, chapter 0.36 states:

> "Liability of owner for expenses
>
> 15. (1) Where an inspector or an agent of the Society has provided an animal with food, care or treatment, the Society may serve upon the owner or custodian of the animal, by personal service or by registered mail to the owner's or custodian's last known place of address, a statement of account respecting the food, care or treatment and the owner or custodian is, subject to subsection 17 (6), liable for the amount specified in the statement of account. 2006, c. 19, Sched. F, s. 2(1).
>
> Power to sell
>
> (2) Where the owner or custodian refuses to pay an account under subsection (1) within five business days after service of the statement of account or where the owner or custodian, after reasonable inquiry, cannot be found, the Society may sell or dispose of the animal and reimburse itself out of the proceeds, holding the balance in trust for the owner or other person entitled thereto. R.S.O. 1990, c. O.36, s. 15 (2); 2006, c. 19, Sched. F, s. 2(2)."

This section sets out the liability of an owner of animals for payment where expenses have been incurred by the Society, and as well, the recovery by the Society of monies upon sale.

[17] In addition, it is to be noted that on April 17th, 2008, Bill S-203 came into effect. Entitled An Act to amend the Criminal Code (cruelty to animals), s. 447.1(b) now states:

> "The court may, in addition to any other sentence that it may impose … (b) on application of the Attorney General or on its own motion, order that the accused pay to a person or organization that has taken care of an animal or a bird as result of the commission of the offence the reasonable costs that the person or organization incurred in respect to the animal or bird, if the costs are readily ascertainable."

[18] These recent amendments provide clear authority for a sentencing court to in this case, order restitution if it deems it reasonable. I do not read s. 738 of the Code as providing the

learned trial judge with the authority to order restitution, prior to the amendment made in s. 447.1(b). Accordingly, I would allow the sentence appeal and strike the restitution order.

[19] I am not persuaded that any other portion or provision of the sentence ought to be changed or varied. S. 15 of the Ontario Society for the Prevention of Cruelty to Animals Act provides for a path to recovery of expenses, and makes, in this case, the appellant liable for those provable expenses incurred by the Society. This may require more paper work and some additional legal expenses, but the striking of the restitution order should not make considerably more difficult the ability of the Society to proceed with recovery of expenses incurred.

PART E - CONCLUSION

[20] For the reasons herein outlined, the appeal as against conviction is dismissed and the sentence appeal is allowed. The restitution order is herein struck out. Order Accordingly.

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J.S. O'NEILL

Released: August 13, 2008

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B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- and –

DAVID PRYOR

Applicant

REASONS ON APPEAL

J.S. O'NEILL

Released: August 13, 2008