DATE: 20010130
DOCKET: C34796

COURT OF APPEAL FOR ONTARIO

RE: HER MAJESTY THE QUEEN (Appellant)
v. JOHN ROBERT (Respondent)

BEFORE: FINLAYSON, LABROSSE and LASKIN JJ.A.

COUNSEL: Laura Hodgson,
for the appellant

Kenneth S. Marley,
for the respondent

HEARD: January 24, 2001

RELEASED ORALLY: January 24, 2001

On appeal from the order of Justice Kenneth G. Ouellette, sitting as a Summary Conviction Appeal Court judge, dated July 10, 2000

E N D O R S E M E N T

-

[1] The respondent pled guilty to encouraging, aiding or assisting the fighting of animals contrary to s. 446(1)(d) of the *Criminal Code*. Counsel made a joint submission on sentence for a fine and a probation order with a condition that the respondent not possess animals for the purpose of fighting.

[2] The sentencing judge was reluctant to accept the joint submission. He ordered a pre-sentence report. He also questioned a representative of the Humane Society with respect to the proposed condition.

[3] The sentencing judge ultimately rejected the joint submission and sentenced the respondent to imprisonment for thirty days to be served intermittently, probation for two years, 100 hours of community service and an

order prohibiting the respondent from owning or having custody or control of any dog for a period of two years. The respondent appealed only the sentence.

[4] The summary conviction appeal court judge (the "SCAC judge") refused to deal with the fitness of the sentence, having found that the sentencing judge had erred in principle by calling the Humane Society witness. Although reminded that this was an appeal from sentence, the SCAC judge invited defence counsel to amend the notice of appeal to appeal the conviction, made the amendment, and ordered a new trial.

[5] It must be noted that at trial the respondent was represented by counsel who acknowledged that the elements of the offence had been made out and that the accused admitted responsibility for the offence. Counsel also acknowledged that the court was not bound by the joint submission. After the plea and a review of the facts, a finding of guilt was entered.

[6] In our view, the SCAC judge was clearly in error. Pursuant to s. 687(1) of the *Criminal Code*, when an appeal is taken from sentence alone, an appeal court must either vary the sentence or dismiss the appeal. (Section 822(1) of the *Criminal Code* incorporates the provisions of s. 687(1) on summary conviction appeals against sentence. There is no jurisdiction to order a new trial.

[7] The plea was never withdrawn and there was no proper basis for such a withdrawal. The SCAC judge exceeded his jurisdiction by inviting the respondent to amend the notice of appeal and then remit the matter for retrial. See *R. v. W. (G.)* (1999), 138 C.C.C. (3d) 23 (S.C.C.).

[8] As the fitness of the sentence was not considered by the SCAC judge, the matter must be remitted for consideration by that court. See *R. v. Devitt* (1999), 139 C.C.C. (3d) 187 (Ont. C.A.).

[9] In the result, the appeal is allowed, the order of the summary conviction appeal court is set aside, the conviction is restored and the matter is remitted to that court for review of the sentence.

(signed) "G. D. Finlayson J.A."
(signed) "J. M. Labrosse J.A."
(signed) "John Laskin J.A."