

Q.B.
No. 159

A.D. 1998
J.C.Y

IN THE QUEEN'S BENCH
JUDICIAL CENTRE OF YORKTON

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

- and -

GEORGE SUNDUK

RESPONDENT

Daryl Bode

for Appellant

Orest Rosowsky, Q.C.

for Respondent

JUDGMENT
March 30, 1999

Pritchard, J.

[1] The Crown appeals the acquittal of George Sunduk ("the Respondent") on the charge that contrary to section 445(a) of the Criminal Code he did, on or about the 13th day of August, 1997 at Danbury, in the Province of Saskatchewan, wilfully and without lawful cause kill a dog that was kept for a lawful purpose and was the property of Kirby Mirva.

[2] Section 445(a) of the Criminal Code provides:

445. Every one who wilfully and without lawful excuse
 (a) kills, maims, wounds, poisons or injures dogs, birds or
 animals that are not cattle and are kept for a lawful
 purpose, or
 (b) ...
 is guilty of an offence punishable on summary conviction.

[3] The learned trial judge gave the following reasons for the
 acquittal:

On the whole of the evidence, I am satisfied beyond a reasonable doubt that the accused discharged his rifle and shot and killed a dog belonging to Kirby Mirva. I do not accept and do not believe the accused's denial. He was observed shooting the dog by his neighbours, Shirley Fedorchuk and Roxanne Fedorchuk and I accept their evidence as trustworthy and credible.

The dog in question named Brew normally stayed on Kirby's father's farm, one half mile west of Danbury. On the day in question, Brew was with the Fedorchuk's two dogs on or near the Fedorchuk property. Even though Roxanne Fedorchuk, aged eight, did play with Brew at other times, I conclude that in the circumstances of this case, Brew was a stray animal on the date in question. There was no one at the time exercising control over the dog. It was too far away from home on its own. The Honourable Judge Nosanchuk in *R. v Deschamps*, (1979) 43 C.C.C. (2d) 45 at 48 stated:

Section 401(a) [now Section 445(a)] is designed to protect domesticated or domestic animals and does not purport to deal with situations where

the victim animals are stray animals or animals that are wild or generally at large. The words "kept for a lawful purpose" set out in s. 401 (a) [now 445 (a)], in my view, obviously contemplate a "keeper" and a measure of control to be exercised by the keeper.

[4] In concluding that Brew was a stray animal on the date in question, the learned trial judge appears to have relied on the statements in *Deschamps* as quoted in his decision. In *Deschamps*, the accused fatally shot a cat but was acquitted of a charge under s. 445(a) [then s. 401(a)] because the court found that the cat in question was a stray. Immediately following the above quoted portion of *Deschamps*, Judge Nosanchuk went on to say:

There is, in my opinion, no legal evidence that Mrs. Foster intended to exercise control over the cat or the victim cat in this case, to the extent that she could be found to be keeping the cat. I observed that the cat did not reside at her residence. It was not treated as the family cat by her or her children. She did no more than perform an act of kindness of leaving food for the cat in the morning.

[5] Based on the entirety of *Deschamp*, it becomes clear that the court found that the cat in question was a stray because "it was not a cat that could be said to be a domestic pet of the Foster family". (p.46) However, in finding that Brew was a stray, the learned trial judge focused his attention solely on the circumstances that Brew found himself in immediately prior to being fatally shot. At that particular time, there was no one exercising control over Brew and on that basis alone, the court concluded

that he was a stray. Although the factual basis for the court's conclusion is correct, this court finds no basis in law for such a determination. There is nothing in s. 445(a) of the Criminal Code that limits its protection only to animals that never stray from their keepers nor is there anything in the *Deschamps* decision to suggest that once a domestic animal strays from its home it loses its identity as a family pet, becomes a stray and, is no longer an animal that is kept for a lawful purpose.

[6] The undisputed evidence in this case is that Brew was a domestic pet of the Mirva family. The dog had a name and he was owned by Kirby Mirva. Although owned by Kirby Mirva, he was really the pet dog of Kirby Mirva's seven year old step-son, Brian Storshuk. Brian lived with his mother and step-father in Hyas, Saskatchewan but he also lived at his grandfather Mirva's farm, which was the residence from which he went to school. Based on the evidence, young Brian appears to have been living in two homes; his parents' home in Hyas and his grandparents' home just outside Danbury. However, his pet dog Brew stayed only at the Danbury home where it was fed and cared for by his grandfather, Mr. Joe Mirva. Grandpa Mirva helped Brian care for Brew and it was Grandpa Mirva who made an extra hole in the dog collar that Brew was wearing on the day he was shot. Grandpa Mirva's farm is about one-half mile from the home of the Respondent. It is approximately 10 to 11 miles from Brian's other home.

[7] Unlike the cat in *Deschamps*, the evidence here establishes that Brew was a domestic animal that was part of a family. The family in this case did not all live in the same home at the same time but that does not make Brew any less of a family pet.

Nor is Brew's status as a family pet affected by the fact that his owner and his regular caretaker were not the same person. A situation such as Brew's, where he was owned by Kirby Mirva and was the pet dog of seven year old Brian yet lived with Joe Mirva is certainly more complicated than that for most pet animals; but, it still results in Brew having a keeper or even a number of keepers. At a minimum, the evidence establishes that Brew was kept by Joe Mirva who kept him as a pet for his grandson Brian, which keeping was clearly for a lawful purpose.

[8] Based on the foregoing, this court finds that the learned trial judge erred in law in finding that Brew was a stray and not allowed the protection afforded by s. 445(a) of the Criminal Code. Section 445(a) does not require that the animal always be within the immediate direct care and control of its keeper. The only requirement is that the animal be kept for a lawful purpose. An animal that strays is not necessarily a stray animal. If it has strayed from its home, it may be more difficult to establish that it was not a stray and was kept for a lawful purpose, but on the evidence in this case, the court is satisfied beyond a reasonable doubt that this burden of proof has been met.

[9] The acquittal is therefore set aside and a guilty verdict is entered. The matter is remitted to the trial court for sentencing.

PRITCHARD, J.