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R. v. Johns

Between
Regina, and
Arthur Johns

Yukon Registry No. 89-09674A

[1991] Y.J. No. 82

Yukon Territorial Court
Whitehorse, Yukon Territory

Faulkner Terr. Ct. J.

Heard: March 14, 1991
Judgment: April 5, 1991

(10 pp.)

Counsel for the Crown: Bernard F. Aube.
Counsel for the Defence: Stephen L. Walsh.

FAULKNER TERR. CT. J. (orally):-- Counsel, Mr. Johns, first I want to apologize at the outset. I had intended to produce a written decision which would be available for counsel. Unfortunately, I have been ill, and to make a long story short, I was not able to do that. This matter is for decision.

The accused, Arthur Johns, operates an outfitting business providing horse-packing trips, and he thus keeps a number of horses. He is, I am satisfied, an experienced horseman who genuinely cares for his horses.

The winter of 1989/1990, he took 11 of his horses to winter in the Upper Wheaton River Valley of the Yukon. This area is accessible by road in the summer, but in winter, the area is in the winter accessible only by snow machine or on foot. Early in the winter, the accused received reports about his horses from the witness Mr. Sharp and from a trapper. In November, Mr. Sharp advised that he

had seen some of the horses and that the larger ones looked okay, however, one horse, a pinto, looked "a little ribby".

In my view, this report, while suggesting that one of the horses was not doing as well as the others, would not have set off any immediate alarm in the accused's mind about the condition of the horses, although it did indicate that the matter bore further checking. The evidence is less clear as to what the report was from the trapper, although the trapper apparently also reported that the horses were all right. It is not certain when this report was received, but it was certainly before mid-December.

The matter of the horses next came up just before Christmas of 1989. The accused runs a trap line in the winter, and his trapping area is in the Tarfu/Snafu area of the Yukon which is some considerable distance from his home at Tagish and the Wheaton Valley where the horses were. The accused had agreed to work with biologists from the Yukon Territorial Government testing new traps and making other surveys related to trapping and wildlife. It was necessary that the trap line be continuously monitored, and the accused asked Mr. Jessup, the biologist in charge, if he could take some time off over concerned about his horses up the Wheaton and wanted to get them out. Mr. Jessup agreed to give the accused time off. Mr. Jessup stayed at the trap line, and the accused went home to Tagish.

The accused then made some inquiries about getting the road ploughed out, but nothing came of this because suitable equipment was unavailable or too expensive. The accused did not go out to the Wheaton to check on the horses or take any feed to them, and he went back to the trap line without doing anything about the horses. It would have been possible to go out to the area and lead the horses back to the road via a packed snowmobile trail, however, the accused said that he did not want to do this because if the horses were walked out of the valley, they would then know the way, and he would be unable to keep them there in the subsequent winters. As I said, the accused went back to the trap line and, from all I can gather, did no more about the horses.

In late February, a man going to a mine in the Wheaton Valley saw the horses. They appeared to him to be in a poor condition, and he reported the matter to Conservation Officer Gustafson in Whitehorse. Officer Gustafson went to the area by chartered helicopter, saw the horses, and confirmed that they were in bad shape. Constable Egan of the R.C.M.P. spoke to the accused and advised him, or as he said under the Pounds Act, ordered him, to feed and water the horses immediately. The the road and then took it in the rest of the way by snow machine.

Ten of the horses survived; one died. It is clear from the photos that all were malnourished. The evidence of Drs. Fleming and Kidney satisfies me that the horse that died essentially starved. I accept that the immediate cause of death may be that the horse became cast, i.e., had fallen and been unable to rise, but this in my view is not relevant to the charge. The horse clearly was not being provided with adequate food whatever the immediate cause of death. Indeed it may well be that this horse died after the accused had started to feed the horses again in late February.

The Crown suggested that Dr. Fleming's finding of no food in the stomach told the lie to the accused's evidence on this point, but there was no evidence as to the amount of time it would take for the food to pass from the stomach, so that this evidence does not necessarily contradict the accused's evidence that he fed the horse the day before it died.

Based on what had happened, the police charged the accused with wilfully neglecting or failing to provide adequate food or water for the horses. It is clear on the evidence that the horses did not

have adequate food. The Crown also alleged that the horses did not have adequate water, but the evidence does not permit a definitive finding on this point. The evidence conflicted to the extent. If any, to which the horses proximity to a river, and there was no evidence as to whether there was any open water accessible to the horses.

We return, therefore, to the indisputable point. That is that the horses did not have adequate food. The issue then is whether the accused is criminally liable in consequence. Mr. Johns clearly did not intend to starve the horses. He hoped that they would be okay. He had successfully wintered horses in the same area in a previous year. The accused says he thought the horses were all right, and he clearly went to their assistance as soon as he found out they were in a poor condition.

There is a difficulty in this case because the evidence is not satisfactory on the acceptability in the Yukon of the practice of over-wintering horses on the range. Indeed, this case might almost be regarded in a sense as a test of this practice. I should also say that even the accused's evidence that he had wintered horses successfully in the Wheaton Valley before somewhat begs the question, what is meant by successfully? Does that mean that the horses merely survived, or that all were in as good a condition at the end of the winter as at the start.

In any event, I know that horses are wintered in the bush, particularly with work horses where it may simply be uneconomic in many cases to feed horses some seven or eight months a year. Unfortunately, the evidence on this point is leaving horses to fend for themselves in the Yukon winter without supplementary feeding is not providing adequate care. On the other hand, the accused had wintered horses in the Wheaton Valley in the previous year.

It seems to me that it is impossible to make a blanket statement one way or the other. So much depends on the area. Is it open? Is there feed? Is there water? What is the snowfall? Is there wind to crust the snow? Are predators a problem? Obviously circumstances may change from year to year, and the practice may turn out to be suitable for some horses but not for all horses.

It seems to me that the key to the situation is supervision. The condition of the horses must be checked at reasonable intervals. Then if there are problems, the situation can be addressed on a timely basis. The evidence is clear that the accused did not do this. The accused himself summed up the situation quite succinctly when he said to Constable Egan, "I guess I left them too long."

Is this sufficient to make the accused guilty of an offence under Section 446? Because the section speaks of neglect and failure, it is clear that the offence can be committed without an actual intention to cause harm, however, the use of the word "wilfully" in the section would presumably exclude cases of simple negligence or cases where the accused's actions were not of his free will.

429(1) which says:

> every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

The Oxford Dictionary defines "reckless" as careless, heedless; careless in respect of the consequences of one's actions; lacking in prudence or caution; careless in respect of some duty or task; negligent or inattentive.

With the section speaking of neglect and the definition of wilful including careless or negligent acts, it seems that mere negligence might suffice as the required mental element. The development of the criminal law has clearly shown, however, that not all negligence is considered criminal. What the law has not so clearly shown is what the difference is between simple, mere or civil negligence on the one hand and so-called criminal negligence on the other.

Often it has been said that criminal negligence is negligence which is sufficiently grave so that it can be properly treated as criminal, but as Justice of Appeal Laskin, as he then was, pointed out long ago in Regina vs. Binus, [1966] 4 C.C.C. 193, merely stating that a crime is a crime does not help very much.

Criminal negligence as a crime is defined in the Code and negligence in the objective sense." The Crown must establish "...some degree of awareness or advertence by the accused to the threat to the lives or safety of others or, alternatively, a wilful blindness to the threat which is culpable in light of the gravity of the risk assumed," Regina vs. Tutton (1989), 69 C.R. (3d) 289, a decision of the Supreme Court of Canada.

It does not follow, however, that this definition is to be imported into Section 446. There are other crimes of recklessness and neglect in the Code, dangerous driving, Section 249, and failing to provide necessaries of life, Section 215, being two examples that clearly require a lesser mental element.

The definition of what this element is has often floundered on a fine distinction between advertent and inadvertent negligence. At the end, the best that can be said is that to constitute a crime, the accused's actions must amount to more than a mere failure to exercise reasonable care under all the circumstances with that failure perhaps resulting in civil liability or to a penalty under a regulatory Act.

As well, despite the expansive dictionary definition of "reckless", recklessness in law has always carried with it the idea of the person having some subjective foresight of the risk but choosing to ignore it.

Is there then in this case evidence going beyond a mere failure to exercise reasonable care and exhibiting some degree of recklessness? In my view, there is. The accused was told Mr. Jessup of his concern and asked for time off to deal with the problem. Thus there was some foresight of the risk. He did make some enquiries about getting the road ploughed and rejected a proposal to walk the horses out.

The Crown has not shown that his efforts to get the road ploughed were not in good faith or that his rejection of the walk-out proposal was not a reasonable one. However, having found that he could not get the road ploughed and having rejected the idea of walking the horses out, the accused did nothing further to check on the horses but essentially left them to fare as best they could for nearly two additional months. In failing to check, the accused's actions went beyond a mere failure to exercise reasonable care or a momentary lapse in judgment.

I wish to deal as well with one additional matter that was raised by the defence. The accused was charged with having control over the horses and failing to provide adequate food for them. It was argued that the accused did not have control over the horses although he was their owner. It was said that the Crown could have charged the accused as an owner and, indeed, did so at one point but stayed the charge. Since it has now charged him as the person having control, it was said the Crown

could not rely on the fact that the accused was the owner in aid of establishing control. This argument is untenable.

The accused clearly had control over the horses. He was whose decision it was to leave them there. He had trucked them to the valley so that they could not find their way out, and it was he who had decided not to walk them out so that this means of controlling their whereabouts could be used again in future years. His ownership is clearly a factor in control, though it certainly is possible to be the owner of horses but give up immediate control over them, as for example by boarding the horses with someone else.

Finally, it would be nonsensical if a person charged with an offence, the essence of which is abandonment of or failure to care for the horses, could say that in abandoning the horses or failing to care for them he had given up control and therefore could not be prosecuted.

In the result, I find the accused guilty as charged.

FAULKNER TERR. CT. J.