

CITATION: R. v. Klimowicz, 2021 ONSC 2589
COURT FILE NO.: CR-19-97 (Kingston)
DATE: 2021/04/07

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
HER MAJESTY THE QUEEN) Holly Chiavetti, for the Crown
)
)
- and -)
)
MALCOLM KLIMOWICZ) Gary Grill & Alexandra Pester, for the
) Defence
)
)
) **HEARD:** November 30 – December 2, 2020
) (via videoconference)
)

REASONS FOR DECISION

PARFETT J.

[1] The accused, Malcolm Klimowicz, is charged with breaking and entering a fur bearing animal pen located in Frontenac Township with intent to commit the indictable offence of mischief, contrary to s. 348(1)(a) of the *Criminal Code*.¹

Background

[2] The accused is an animal rights activist. He is involved in attempting to bring attention to the circumstances in which domestic mink live with the hope that he can persuade the Canadian public to support his efforts to ban the mink farming industry.

[3] The complainant is a mink farmer. He owns a farm in Frontenac Township, north of Kingston and he farms mink. His family has farmed mink for three generations.

¹ R.S.C. 1985, Chap. C-46, as amended.

Evidence

[4] The evidence in this case is largely uncontradicted.

[5] The accused stated that he went to the complainant's farm on August 1, 2017 in the early hours of the morning. He entered on the property and went into the sheds where the mink are kept. He took videos of the mink in the sheds. After taking the video, he drafted a complaint to the OSPCA. He had assistance in drafting the complaint that was sent on January 26, 2018.² He also posted the video online. As far as he was aware, the OSPCA never acted on his complaint.

[6] The complainant did not discover the fact the accused had been on the property until the video was posted on YouTube and picked up by the media. He indicated that the accused did not have permission to come on his property, nor did he have permission to film the property. He agreed in cross-examination that the reason he did not know that the accused had been on his property was because there was no damage, nothing was different the next day and no animal had been harmed or released. However, the complainant noted there is always the risk of disease and for that reason he does not want people trespassing on his property.

[7] The accused agreed he did not have permission to enter on the property and that he had to climb a fence in order to get access to the sheds. He knew he was trespassing on private property. He stated that before he went into the farm, he took precautions to ensure he would not bring disease into the sheds. His sole intention was to video and photograph the animals. He did not release any of the animals or damage any property.

[8] As a result of the accused posting the film he took on YouTube, a news reports came out about the video. The complainant said he was subject to disturbing emails where he was asked to close the farm, called an animal killer and told he should be ashamed of himself. He has received similar emails and comments as a result of the publicity this trial has received. The complainant stated he was concerned enough about security that he installed video surveillance and hires guards on a seasonal basis. There is a cost associated with these security measures. In cross-examination, the complainant agreed that the communications were not threatening; just unpleasant.

[9] The accused testified that while he saw evidence at other farms of animals with wounds and other serious health conditions, he did not see anything of that nature at the complainant's farm.

Issue

[10] The accused does not deny that he entered on the complainant's property without permission and that he filmed the property, also without permission. However, he contends that

² Exhibit #14.

he did not intend to commit mischief and did not, in fact commit mischief while he was on the property.

[11] The issue therefore is whether the Crown has proven beyond a reasonable doubt that the accused either intended to commit mischief or did commit mischief when he entered on the property and videotaped the enclosures.

Analysis

[12] The relevant portions of s. 348 of the *Criminal Code* read:

(1) Every one who

(a) breaks and enters a place with intent to commit an indictable offence therein,

(b) breaks and enters a place and commits an indictable offence therein....

Is guilty.

(2) For the purpose of proceedings under this section, evidence that an accused

(a) broke and entered a place ... is, in the absence of evidence to the contrary, proof that he broke and entered the place ... with the intent to commit an indictable offence therein.

(3) For the purpose of this section 'place' means

.....

(d) a pen or an enclosure in which fur-bearing animals are kept in captivity for breeding or commercial purposes.

The relevant portion of s. 430 of the *Criminal Code* states:

(1) Every one commits mischief who wilfully

...

(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or

(d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

[13] In the present case, Defence counsel concedes that Mr. Klimowicz entered the property without permission and in a manner that would constitute breaking and entering.

[14] The real issue in this case is whether the Crown has proven beyond a reasonable doubt that Mr. Klimowicz broke into the property intending to commit mischief. The Crown particularized the indictment as follows:

That Malcolm Henryk Klimowicz did break and enter a certain place to wit: a fur bearing animal pen enclosure.....with intent to commit a indictable offence therein.

[15] At the outset of the trial, the Crown was asked to provide further particulars in relation to the indictable offence it was alleging the accused intended to commit. The Crown indicated that it was the offence of mischief. Consequently, the Crown cannot rely on the presumption in s. 348(2) and instead it must prove mischief beyond a reasonable doubt.³

[16] In its submissions, the Crown outlined various ways it suggested Mr. Klimowicz committed mischief. The Crown suggested that mischief was committed because;

- Mr. Freeman felt an invasion of privacy and security;
- Personal details concerning Mr. Freeman were posted without his permission;
- Mr. Klimowicz surreptitiously and without permission, videotaped the mink barns; and
- Mr. Klimowicz published personal information of Mr. Freeman on the internet.

[17] The Crown also argues that there was potential mischief in relation to the breach of bio-security and disturbance of the animals. The evidence at this trial was that no harm befell the mink as a result of Mr. Klimowicz entering the barns. He took measures to ensure there would be no breach of bio-security and there was none. In my view, a harm that might have occurred, but did not, cannot constitute mischief.

[18] I also agree with Defence counsel that Mr. Freeman's feelings when he found out, well after the fact, that his property had been entered do not constitute an interference with the lawful use of his property. As noted in *R. v. Bevo*,

Wholly abstract notions or feelings of privacy and security and interference with theoretical rights to control access to property, even a dwelling house, cannot be transformed into criminal conduct.⁴

[19] Finally, in relation to the information that Mr. Klimowicz published on the internet, that information was already publicly available and that also does not constitute mischief.

[20] A lot of evidence was led at trial concerning whether Mr. Freeman complied with the Code of Practice in relation to mink farming and/or the requirements of the *Ontario Society for the*

³ *R. v. Khan* (1982), 66 C.C.C.(2d) 32 (Ont. C.A.)

⁴ [2000] O. J. No. 888 at para. 33.

Protection of Cruelty to Animals Act.⁵ There was insufficient evidence at this trial to conclude that Mr. Freeman had knowingly breached any of the requirements of the Code of Practice. Even if he had, there was no evidence that such a breach would render his use of his property unlawful.

[21] In any event, as was noted by the Crown, where other sanctions for unlawful use are available, such as a complaint to the *OSPCA*, breaking and entering is not a reasonable alternative.⁶ Moreover, I agree with Crown counsel, that Mr. Klimowicz could not have known when he entered on the property that its use was unlawful (assuming it was). He may have suspected that was the situation, but that expectation is not enough to justify the unlawful entry.

[22] It is not Mr. Freeman who is on trial and the treatment of mink on his farm is not relevant to this trial.

[23] Defence counsel has argued that Mr. Klimowicz's intent in entering onto Mr. Freeman's farm was to publicize the conditions in which mink are farmed. In other words, he did not intend to do anything that could constitute mischief.

[24] In my view, Defence counsel is mixing up motive with intent. Mr. Klimowicz' motive in entering on the property was clearly to publicize the conditions he found there. However, that was not his intent. His intent as he clearly stated in his testimony was to film the conditions in which the mink were kept.

[25] The key issue in this case is whether the videotaping of the mink constitutes mischief. The Crown pointed to the case of *R. v. Manoux* as support for the position that surreptitious videotaping can constitute mischief.⁷ It is important to note that in *Manoux*, the landlord was surreptitiously videotaping his tenants.

[26] In *Manoux*, the fact the property was a private residence was critical to the trial judge's analysis. She noted the high level of privacy expected in one's home. The reasonable expectation of privacy is informed by the place and biographical details available from entering the place.⁸ In present case, the sheds are commercial properties and therefore, there is a lesser expectation of privacy.

[27] In my view, in the circumstances of this case, the videotaping of the mink barns does not constitute mischief. There was no interference with the conduct of any activity in the barn. There is no evidence that the mink were disturbed by what occurred. There is no evidence that the mink suffered any harm. Indeed, the evidence indicates that Mr. Freeman was completely unaware that anyone had entered on his property until he saw the video through the media.

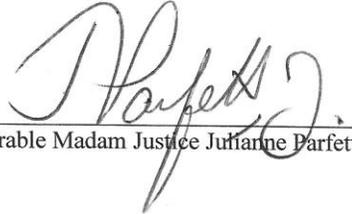
⁵ R.S.O. 1990, c. O.36

⁶ *R. v. Janusus*, 2015 BCPC 203 at para. 22.

⁷ [2017] O.J. No. 303 at paras. 55-64.

⁸ *Thompson Newspaper* [1990] SCJ No. 23 at para. 122.

[28] Consequently, I find the Crown has failed to prove that Mr. Klimowicz entered Mr. Freeman's property with the intent to commit mischief and Mr. Klimowicz will be acquitted of that charge.

A handwritten signature in black ink, appearing to read "J. Parfett J.", written over a horizontal line.

The Honourable Madam Justice Julianne Parfett

Released: April 7, 2021

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Released: April 7, 2021