

2002NSSC212
S.D. No: 0999

IN THE SUPREME COURT OF NOVA SCOTIA

Cite as R. v. Bailey, 2002 NSSC 212

BETWEEN:

DANA BAILEY and GAIL BENOIT

APPELLANTS

- and -

HER MAJESTY THE QUEEN

RESPONDENT

HEARD: At Digby, Nova Scotia on June 5, 2002

BEFORE: The Honourable Justice Charles E. Haliburton

SUBJECT: Appeal from Conviction; *Animal Cruelty Prevention Act*,
S.N.S. 1996, ch. 22

DECISION: September 13, 2002

ATTENDING: Michael K. Power, for the petitioner
Lloyd Lombard, for the respondent

DECISION

[1] Bailey and Benoit, who were jointly charged in an Information, bring this appeal from both conviction and sentence. They were convicted, after trial, of two offences alleging that

“At or near Marshalltown, in the County of Digby, Province of Nova Scotia did willfully cause unnecessary suffering to a dog by neglecting to provide adequate food and water, contrary to Section 11(1) of the Animal Cruelty Prevention Act.”

and

“At or near Marshalltown, in the County of Digby, Province of Nova Scotia, did willfully cause unnecessary suffering to a dog by neglecting to provide it basic medical attention and adequate food and water, contrary to section 11(1) of the Animal Cruelty Prevention Act.”

[2] The Appellants set forth twelve grounds of appeal. I find the second, fourth and sixth grounds have some merit. The Appellants have framed those grounds as follows:

2. THAT the learned trial judge erred in fact and in law in misapplying the “beyond the reasonable doubt” standard as set out in the case of *R v W(D)* and succeeding cases of the Supreme Court of Canada;
4. THAT the learned trial judge failed to give reasons for his decision;
6. THAT the learned trial judge erred in law in misapplying the provisions of the **Animal Cruelty Prevention Act** to the facts.

[3] The Appellants have further appealed from sentence. The principal and all-encompassing ground of appeal with respect to the sentencing is contained in ground number three:

3. THAT the learned sentencing judge gave the Appellants a harsh sentence disproportionate with the facts of the case as proven at trial.

[4] I have come to the conclusion that I am compelled to allow the appeal for conviction and order a new trial. A review of the statute in the context of the evidence tendered persuades me that it would be improper and unsafe to permit the verdict to stand.

[5] The *Animal Cruelty Prevention Act*, being Chapter 22 of the Acts of 1996, contains two sections under which a person might be charged as a result of “cruelty” to animals. They are Sections 11(1) and 11(2). The Legislature has created two distinct offences under these sections and the Act provides definitions for their further clarification. The wording of the sections is as follows:

Prohibitions

11(1) No person shall **wilfully cause** an animal unnecessary pain, suffering or injury.

11(2) No **owner** of an animal or **person in charge** of an animal shall cause or permit the animal to be or to continue to be in **distress**.

Section 2 provides:

Interpretation

2 (2) An animal is in **distress**, for the purpose of this Act, where the animal is

- (a) in need of **adequate care, food, water** or shelter; or
- (b) injured, sick, in pain, or **suffering undue hardship, privation or neglect**.

(emphasis added)

[6] On my reading of the sections, 11(1) is a prohibition applicable to **any person**. It prohibits the doing of intentional acts for the purpose of inflicting pain, suffering or injury or which might objectively result in such. The import of that section is quite distinct from the import of Section 11(2) which applies to the owner or the person in charge of an animal and which imposes upon that person a duty to provide an **adequate level of care** to the animals under their control. The importance of this distinction in the present appeal is reflected in the repeated comments of Judge Prince during the course of the trial that his task was to determine the “level of care” experienced by the dogs in question. Indeed, in his decision, under the heading

Analysis, the judge observed,

“this case is obviously an assessment of the level of care afforded to the subject animals. I have to determine whether the level of care was so deficient that it caused unnecessary suffering...

The major focus of the trial as reflected in the evidence was the condition of a female dog which had recently birthed and suckled thirteen pups. She was described by the veterinarian, Dr. Pothier, whose evidence Judge Prince clearly accepted, as “emaciated”. It was the sight of this dog in her immediate circumstances on a cold day in November that prompted Rebecca Longmire to report this animal “in a neglected state”. Indeed, among the opening words of the Crown Prosecutor in his final submissions, were “it’s clear...that the animals in this case...were not properly cared [sic] and not maintained.”

[7] In short, while it is clear that there was substantial, credible evidence to support the conclusion that one or both of these people permitted “the animal to be, or to continue to be in distress”, contrary to Section 11(2) of the Act, the evidence and the specific findings of fact made by the trial judge will not support a conviction under Section 11(1).

[8] The comments I have already made are to some extent independent of the grounds raised by the Appellants which are recited earlier but in some respects reflect the same concerns as raised in those grounds of appeal. The Appellants’ ground number (6) “**THAT** the learned trial judge erred in law in misapplying the provisions of the **Animal Cruelty Prevention Act** to the facts” is reflected in the comments I’ve already made.

[9] With respect to the “application of the Statute”, if I may call it that, my conclusion, in brief, is that the facts, when applied to the section under which the accused were charged, cannot support the conviction. It may have been possible, before entering a verdict, to amend the Information so as to reflect the evidence and support a conviction under an amended Information alleging an offence under Section

11(2). Obviously, that cannot be done at this stage of the proceedings.

[10] I will now comment on the other grounds noted above, that is, ground number (2) “THAT the learned trial judge erred in fact and in law in misapplying the “beyond the reasonable doubt” standard as set out in the case of *R v W(D)* and succeeding cases of the Supreme Court of Canada”; and number (4) “THAT the learned trial judge failed to give reasons for his decision”.

[11] Clearly in order to consider these grounds it is necessary to review the decision of the trial judge and the evidence upon which it was based.

[12] I think it appropriate to set forth the judge’s decision in full.

Facts:

The Defendants are charged as alleged in the informations.

On the date alleged a call was received by the Digby Royal Canadian Mounted Police from Rebecca Longmire who reported that animals in a neglected state were at the Defendant’s premises. As a result, Special Constable Bill Hilden an animal protection officer appointed pursuant to the *Animal Cruelty Prevention Act S.N.S. 1996, C.22* attended the location with Dr. Neil Pothier D.V.M. and two Royal Canadian Mounted Police officers. Hilden testified that they arrived on scene at approximately 1400. It was cold and windy. He testified that he knocked at the front and back doors of the residence but received no response. He testified that he noted the “dogs for sale sign” at the front of the residence but did not note that there were telephone numbers on the sign. He testified that he made no calls from the scene. He testified that after knocking he went to an area where the [sic] was an enclosure which contained two puppies. He described one as being cold, hungry and shaking with the second dog displaying fewer and lesser symptoms. No food or water was noted but he did not check inside the enclosure. Dr. Pothier examined the dogs and determined they were in need of veterinary care. There was a third dog nearby that was tangled in its chain which was secured to a tree. Dr. Pothier described this dog as emaciated and in need of immediate attention. There was a bucket of frozen water nearby. All three dogs were seized without war-

rant and returned to the veterinary hospital. Prior to departing the scene at 1430 hrs a notice was posted on the door stating what had occurred as well as contact information.

Dr. Pothier testified that he had examined and gave necessary treatment to the dogs. He described the Staffordshire terrier type dog depicted in Exhibit 1 as emaciated. He testified as follows:

“When we say an animal is emaciated it usually means that it’s lost most of its muscle mass, there’s no body fat reserves practically left; you could count all the ribs and vertebrae are very, very, you know, are prominent on the back. Ah, a very, very thin dog is what we call emaciated. I could tell this from a distance. I’ve seen, I’ve been in practice for 16 years, I mean I could see this dog from a distance was emaciated.”

He also said that on scene he took the dog’s temperature. It was 37.4 Celsius; 38.5 to 39.5 Celsius is considered normal. The dog’s low weight, its temperature and the fact that it was shivering caused the Doctor to form the opinion that the dog was hypothermic. He also noticed that the dog’s nipples were enlarged but that she had no milk and was completely dry. This indicated to him that the dog had stopped lactating several weeks before. He added that with proper diet a nursing dog would maintain her body weight despite nursing a large litter. He also testified that the mucous membranes were pale which indicated poor [sic] circulation.

The dog weighed 37.2 pounds. He estimated that the breed standard weight would be about 50 pounds. He described her coat as dull and dry. There was hair missing on her neck. The dog was infested with fleas.

He testified that the day was cold and that the dog’s coat and overall condition would predispose the dog to hypothermia.

A number of tests were conducted to determine if there may be any other organic cause for the dog’s condition. There did not appear to be any other abnormalities that would account for the poor condition other than inadequate nutrition. There were no other diseases that could have caused the dog’s condition. The dog was “ravenous” and ate voraciously. It is noteworthy that the dog was restored to health quickly with nutritional intervention.

There were two puppies at the scene each was heavily infested

with parasites. Worms, biting lice and fleas were found. The worm infestation seemed to be very heavy. The witness considered that they too were in danger because of their low body temperature and the added stress caused by the parasite load.

The witness considered that all of the dogs were in present danger because of the cold weather and their poor physical condition.

The witness was cross-examined in detail and it was clear that he stood by his assessment of the peril these dogs faced.

I was impressed with Dr. Pothier's testimony. I found him to be credible and I accord his testimony significant weight.

The Defendants testified that they had acquired the adult female while she was pregnant and that she had thirteen puppies who had been weaned only two weeks before the dogs were seized. All the puppies were sold. The thrust of the Defendants' evidence was that they had fed the dog regularly and had even tried to supplement the dogs [sic] diet because of its [sic] weight. They maintained that the dog had been well cared for. They gave evidence regarding the shelter and food available. They considered the arrangements to be adequate. They testified that the puppies were recently acquired and it was not felt that their condition was as dire as described by the Crown. The animals were not kept inside because there was some concern that they might have somehow caused a risk of fire to the furnace in the basement. There had been no veterinary interventions in respect to any of these animals. It was clear that the Defendants maintained that they cared for the dogs adequately.

Dr. Siegmar Doelle was qualified to give opinion evidence with respect to veterinary medicine. He is a veterinarian who has provided services to the defendant's [sic] animals. He testified that the poor condition of the adult female could "possibly" be the result of the load the 13 puppies placed on her system. I found him to be credible and in large measure he gave opinions similar to the Crown's witness Dr. Pothier on many of the veterinary issues. I must commend his candour when he conceded that his dismissal from his position with Dr. Pothier may have affected his evidence. I found him true to the oath. I do not in any way question his credibility but I must be concerned about the issue of the weight to be accorded his evidence because of the relationship that had existed with the Crown's expert witness.

While I have reviewed in a cursory way the evidence, I have considered carefully all of the evidence including the testimony of the expert witnesses. I have also considered the exhibits. The photographs were most helpful and persuasive.

Issue:

Are the Defendants guilty of the offences?

Analysis:

This case is obviously an assessment of the level of care afforded to the subject animals. I have to determine whether the level of care was so deficient that it caused unnecessary suffering to the animals. It is trite to say that the subjects cannot communicate in any objective way their suffering if any. One has to rely on an objective assessment of the evidence.

While counsel had stipulated that the offences in question were strict liability offences, I have concluded that it is an offence which requires proof of *mens rea*. Because of this I have considered the extended definition of wilfulness in s.429 of the Criminal Code of Canada as apposite to the case at bar. While I have assessed the burden of proof to be higher than agreed to I believe the wording of the section is conclusive.

Having considered all of the evidence I am satisfied beyond a reasonable doubt that in these circumstances the Crown has proved that the dogs suffered unnecessarily because of the lack of care as alleged. I do not accept for a moment that the evidence of the care given was sufficient for these animals. The Defendants were at best wilfully blind to the plight of these creatures and in my view were reckless as to the consequences of the inadequate care. I do not accept that they cared for the dogs adequately. I do not accept the theory that the adult dog was in that condition because she was nursing. The weight of the evidence of Dr. Pothier convinces me otherwise. The care given to the puppies was inadequate.

I find them guilty on all counts.

[13] The evidence upon which the judge appears to have relied for the facts was the evidence of Rebecca Longmire and Dr. Pothier for the prosecution, with some reference to the evidence of the two accused and their expert witness, Dr. Doelle.

[14] It is perhaps not insignificant in the overall context of this proceeding that the trial took place over several months beginning several months after the complaint was originally made. Some evidence was taken in May of 2001, further evidence was taken in June and again on August 24th. Numerous procedural arguments were made and the sentencing hearing was scheduled for January 24, 2002. Ultimately no evidence was taken and the sentencing proceeded on the basis of representations. The proceeding is stained with much irrelevant evidence, procedural wrangles and references to the “reputation” of the two accused.

THE EVIDENCE AS DISCLOSED IN THE TRANSCRIPT

[15] The circumstances were that, as a result of a complaint, two R.C.M.P. officers, the SPCA representative and Dr. Pothier arrived at the Benoit/Bailey home at 13:38 hours on the 23rd of November and departed at 14:07 with the three dogs which they seized. Photographs were taken at the veterinary hospital at 15:07 to depict the conditions of the dogs. No dialogue was opened with the owners with respect to them receiving their animals which were ultimately placed in foster homes.

REBECCA LONGMIRE

[16] Ms. Longmire was asked if she attended at the relevant location on the 23rd November, 2000 and what she saw of “the puppies” (page 124):

...They were just running around and barking, looked like they wanted attention, so I went over and looked at them.
...when I started to notice the dog under the tree and that the puppies didn't look very well cared for and that sort of thing.

(objection - opinion)

When asked to clarify she said (page 125, line 18):

...They had a dog house that looked like it was falling apart...
it looked dirty.

Q. ...food and water?

A. None

(page 126) Q. ...What about the other dog?

A. She was skinny...(line 11) She had water but it was frozen.

[17] Under cross-examination (page 129), when asked if she had looked for food and water, she responded (line 9):

I didn't exactly...dig around looking for food and water, no...
But I did not see any.

(With reference to the puppies and with reference to the older female dog)

I didn't really notice if there was a dog house...(line 23) I
did not see any food...I noticed a bucket of frozen water.

[18] Another witness had attended at the scene with Ms. Longmire. She was Jan Slakov who testified at page 138:

They were dirty...there was a lot of droppings...the water
was not frozen solid...

...(The puppies) were certainly active and happy to see us...
they seems healthy, basically...

(line 23) We did see a dog who...concerned us more...She was
a lactating mother, and very thin...just looking forlorn...(page
139) the main thing I was concerned about, that she was thin,
very thin.

(line 8) There was...a little dog house...I didn't check (on
whether she could reach the house).

DR. NEIL POTHIER

[19] Dr. Pothier said at page 12 with respect to the female:

...from a distance I could see that it was emaciated...on the
verge, basically starving...when we...say an animal is ema-
ciated it usually means that it's lost most of its muscle mass,
there's no body fat reserves practically left...a very, very
thin dog is what we call emaciated. I could tell this from a
distance...

(page 13)...there was no indication of food around this dog... I looked at first to see if there was any water and there was a bucket with a block of ice in it, it was frozen solid.

(page 13, line 14) (on) close examination there was practically no muscle mass left. There was very, very pale mucous membranes...mouth colour...that's an indication of circulation... extremely pale and poor perfusion...circulation was compromised. The dog was dehydrated slightly and very thin and I took a temperature...(page 14) 37 point something I believe... subnormal. Normal temperature...is 38 and half to 39 and a half Celsius...(page 20, line 21) the temperature was (37.4 degrees Celsius)...(page 21, line 16) anything below 38.5...for an adult dog anything below that is hypothermia...

(line 22) Along with symptoms such as shivering and with a dog that had no fat reserves...I deemed the dog to be suffering from hypothermia.

(line 5) ...she was not lactating...

(line 16) Q. What effect, if any, would that have on the weight of a dog...

A. If properly fed, a lactating dog, there is no difference... with a proper diet and proper care they will maintain their normal weight...(page 23, line 4) the weight was 37.2 pounds.

(line 8) For a dog with that body size, I would estimate the normal weight would be approximately 50 pounds.

(objection - no basis in expertise)

(page 25) The hair coat of the dog was dull and dry...over the top of the neck...was partial baldness...the dull dry hair coat is usually a symptom of poor nutritional status.

Dr. Pothier testified that he did a number of tests on urine and blood and for parasites and found everything “completely normal” (page 27, line 18):

(line 22) ...after a couple of hours in the office it started to bounce around, it was lively...the mucous membrane colour started to become more pink indicating the improved circulation...we decided...to give it a flea treatment. It was extremely ravenous...so we spread the food out on numerous

occasions like four to six feedings a day so he [sic] could take it in and, it was taking the food in really well.

When asked about the effect of the weather, Dr. Pothier responded on page 28, line 19:

...with that temperature and the breeze and a dog that has a very short hair coat and, you know, no, no fat reserves and, and very, very thin like that, it would be more predisposed to hypothermia than a normal healthy dog under the same circumstances.

[20] With respect to the two pups at this location, he described them as 2 to 2 ½ months old. The black and white one had:

...a terribly dry hair coat, flaky...a lot of fleas...and lice as well... (page 30, line 8) quite heavy infestation with lice and it also had a low body temperature...38.8...puppies at this age tend to have temperatures closer to 39.0...(line 17) 39 to 39 and a half...I noted that the dog had a, a pot belly appearance...a symptom that we often associate with heavy intestinal parasites...it was shivering...

On inspection at his animal hospital, he determined the puppy was infested with lice, fleas, a

heavy infestation with a roundworm...common roundworm of pups, ear mites...which is another common parasite.

and his diagnosis, page 31, line 17:

With the intestinal parasite load and the external parasites the, I figured...(that) if we corrected that the pup would likely respond well.

Dr. Pothier went on to describe the second pup. It was:

(page 32) ...not as severely affected as the other two...it was in better body condition, it did have lice and worms...(it was) reasonably active...we decided to, you know, take him along because it was suffering the same diseases and given another day it would probably start to deteriorate as well...

[21] The doctor opined on page 33 that if left exposed that day, they might have died in another six hours. The female dog, if left in those conditions:

...if she had stayed out there she might have been dead by morning.

Under cross-examination, it was disclosed the dogs had been placed in foster homes (page 58).

And over the period of...one week she gained weight... close to 55 pounds now in the foster home. She did very well and looked like a normal dog. The other dogs...fleas and lice were treated, the ear mites were treated and the intestinal parasites were treated...they responded well...

Dr. Doelle, testifying on behalf of the Defence said, for an adult female (page 300):

...a normal body temperature (is) between 38 and 39 degrees Celsius.

He characterized 37.4 as:

...slightly below normal...they can recover...Puppies can have a little higher temperatures. In my experience, the temperatures have ranged from 38 ½ to 39 ½.. (A temperature of 38.8) is well within that range.

(page 303) If the temperature drops below 37 degrees celsius [sic] they're headed towards shock and if they go below 36 I would get concerned, if they're below 32 degrees celsius, [sic] it's considered unrecoverable.

When shown photographs of the adult female he described her condition with these words (page 314):

...it's quite poor. The ribs are sticking out and the back bone is visible...So she's lost a fair amount of weight...but her hind leg still has a fair amount of muscle in that picture...there's fairly good muscle there.

[22] The essential disagreement between the two veterinarians in their evidence was with respect to whether a dog nursing 13 pups could maintain its weight if properly fed or whether it would have lost weight. Dr. Pothier's contention was that properly fed the dog's weight would be maintained. Dr. Doelle testified (page 327, line 19):

Basically, it's very unusual for any female that's lactating to maintain her weight during lactation. It's the exception rather than the rule. Any female lactating will lose weight. The question is, how much weight is she going to lose during her lactation.

Q. And is that normal, what you see there?

A. It's possible. I wouldn't call it normal, but it's certainly possible.

(page 330) She could easily lose 10 pounds, about 20 percent of the weight.

(page 332, line 9)...but considering the number of pups she was nursing and the possible lengths of lactation, it doesn't surprise me that she got to that weight.

[23] Dr. Pothier was recalled on rebuttal. At page 354, line 7, he testified:

Now, in a lactating female, these demands are much increased to the fact that a normal dog lactating, in the peak lactation which occurs in the first few weeks, they require three to four times the calories or the energy to sustain normal function. So that you have to be inclined to realize that as they're lactating, you have to increase the amount of calories they're consuming three to four times what they take in as a normal adult dog in maintenance.

DANA BAILEY

[24] Dana Bailey testified that he and Ms. Benoit had gone to Halifax on the day in question leaving home after their children went to school sometime before 8:30 in the morning and returning at approximately 2:30 in the afternoon to be there when the children returned from school. With respect to the dogs, he testified on page 164, line 20:

...before we left that morning, when I put the dogs out...I gave them food and water before we left...when we came home that day, there was dog food scattered, out of the bowl...the puppies might have hit it or maybe one of them stepped on it or whatever, but there was some around the ground...

Asked if he had filled the water dish and food dishes, he said at line 26:

I sure did, yeah.

At page 166, line 23, with respect to the female dog:

I put her out and I gave her food and water and I put hay in her house and away I went.

With respect to the “skinniness” of the dog, page 175:

Well, the dog had 13 pups and they wasn't off her for about two weeks, two to three weeks they were off her. And I was feeding her twice a day...

With respect to the parasites on the puppies, when asked if they had been treated for fleas, page 177:

Those dogs, no. 'Cause one...we had just got one pup and it wasn't -, we never had that a day, I mean we didn't have time to even go over it...

(line 16) ...we had one probably two days and we got the other one like a day after...maybe three days...

Gail Benoit testified to the same effect as Mr. Bailey. They had arrived home before 2:30 in the afternoon and the puppies were newly acquired.

(page 191, line 3) One dog I had gotten the day before they took 'em and the other dog, it was about three days before they took that one.

She testified the dogs were normally kept in the basement of their house (page 193):

There's a little box stall that Dana had made, it takes up half of the basement floor and that's where he kept - the little pups and then Nanook (adult female) just had the run of the house.

[25] She testified that before leaving that morning they put the dogs out (page 194):

...their food and water dish is always by their house...he got the dog food from in the basement, put the dog food in the bowls and I carried the water jugs over to him so he could fill them up.

Responding to the condition of the adult female, page 203, line 14:

...that dog had 13 puppies...that's quite a litter...we did everything that we could do. What more could you do, you could feed the dog, you watered it. I even gave it cans of canned milk, like two cans of canned milk a day, sugar and water and canned milk for that dog, so...

ISSUES

APPELLANTS' ISSUE NUMBER 4: **Did the learned trial judge give reasons?**

[26] It is not always necessary for a trial judge to give reasons, although it is helpful if they do. It is helpful to understand the reason of the trial judge if and when a matter should go on appeal. However, perhaps more important is that an accused person, when convicted, should understand the reasons for their conviction. In reflecting upon whether the decision here provided reasons, I have considered the following cases, *R. v. Hache*, 175 N.S.R. (2d) 297, N.S.C.A.; *R. v. Kloepfer*, 1999 CarswellNS 166, N.S.C.A. docket C.A.C. 144936 and *R. v. Sheppard*, 1962 C.C.C. (3rd) 298. The words of Justice Binnie in *R. v. Sheppard* are apt when he observed that the accused:

...still does not understand the basis of his conviction, and neither do we.

[27] I refer again to the lengthy proceedings and rather convoluted arguments that marked this prosecution. It must be disquieting to the Appellants that in the end the judge imposed a sentence for three counts when only two were alleged. This error

was rectified when drawn to his attention by counsel. However, it suggests that because there were three dogs in total, the judge was prepared to enter a conviction with respect to each of the dogs. This begs the question, which of the dogs were the subject of which count in the Information?

[28] Section 11(1) creates a full *mens rea* offence. A person would not be guilty of this offence without some conscious act which they knew or ought to have known would result in pain, suffering or injury. The reasons failed to define specifically what action or inaction on the part of the two accused or either of them led to “suffering”. A simple “lack of care” imports relative values and is an unsatisfactory basis upon which to impose quasi-criminal penalties .

[29] The evidence of the two accused, which is neither contradicted in testimony nor rejected by the judge, was that the dogs were regularly fed twice a day, that they had water available to them and that they were normally kept in the house. With respect to the two puppies, they had been part of the household for only one and three days respectively and with respect to the adult female, she had been recently stressed by feeding 13 pups. The adult had suffered a lowered temperature, she was unable to access her dog house because her chain was tangled but the signs of “hypothermia” disappeared within a couple of hours when she was placed in a warm environment. Neither of the pups apparently suffered any ill effects and remained playful throughout.

[30] Perhaps the judge found the evidence of the two co-accused to be totally unreliable and dismissed it. He did not say so. When precisely did the dogs or any of them begin to “suffer”? Did they suffer before they were placed outdoors that morning or only after the accused had departed? Did the adult female suffer because she was tangled, because she was malnourished, or simply because she was outside?

APPELLANTS’ ISSUE NUMBER 2: ***R. v. WD* AND REASONABLE DOUBT**

[31] This issue is, in the circumstances, simply an extension of the need to provide reasons. The recent case of *R. v. Mah*, 2000, N.S.C.A. 199 is apropos of this discussion. Having failed to declare his assessment of the evidence offered by the

defence or making findings of fact as such, it is not clear exactly what it was that was proven beyond a reasonable doubt. I suggest that *R.v. Mah* is apropos because there, Cromwell J.A. expressed concern about whether the judge had applied assumptions based on some stereotypical thinking to the evidence which he had heard or whether he weighed the evidence in the appropriate fashion. In the present case the transcript is so full of references or allusions to the reputation of the two accused, their relationships to veterinarians and their operation of a “puppy mill” that the basis of conviction is not clear. This raises a concern about whether the judge concluded that these people were “unfit” to care for dogs and were therefore guilty.

[32] The allegation that the accused had neglected to provide “food and water” was specifically refuted by both Benoit and Bailey. We do not know that the trial judge rejected that testimony and made a finding of fact that they had not done so. The evidence of Dr. Pothier suggests that if the adult female had been fed in the morning, she would have consumed all she was given. His testimony that she was “ravenous” would explain why there was no evidence of food available to her when she was seized.

[33] It would seem that the judge was concerned with the “adequacy” of care, food and water. But technically, this was not the allegation, and would be relevant only in a prosecution under s. 11(2).

[34] At the risk of being overly repetitive, the issue to be determined in a charge under Section 11(1) of the Act is not whether an animal has been accorded an appropriate or acceptable standard of care, rather the issue is whether the accused has performed some act or failed to perform some act which they were obliged to perform in the knowledge that that action or failure would likely result in unnecessary pain, suffering or injury.

[35] As I indicated at the outset, it is my view that neglect of any animal, which is also an offence under the Act, must be dealt with under the appropriate section. The case against these two accused persons for “neglect” would be much stronger than the allegation that was put before the court. It might properly be concluded, without

specific reasons from the trial judge, that the adult female was neglected and therefore in distress as that term is defined in s. 2(2) of the Act.

[36] The specific findings of fact with relation to suffering, and the specific cause of that suffering attributed to the two accused are unfortunately not to be found in the reasons of the trial judge; nor self-evident to me from the transcript as I consider the wording of the prohibition contained in s. 11(1).

[37] In the circumstances I would decline to deal with the sentence appeal. In the event that a further trial is possible under the appropriate section, it will be necessary that the sentence be imposed based on the facts brought forward at that time.

Dated at Digby the 13th day of September, 2002.

J.