SUPREME COURT OF NOVA SCOTIA

Citation: ***Rogier v. Halifax (Regional Municipality)***, 2014 NSSC 267

Date: 2014/07/11
Docket: Halifax No. 405502
Registry: Halifax

Between:

Francesca Rogier

v.

Halifax Regional Municipality

Judge: The Honourable Justice N. M. Scaravelli

Heard: May 29, 2014, in Halifax, Nova Scotia

Written Decision: July 11, 2014

Counsel: Francesca Rogier, Self Represented
Katherine Salsman and Jim Janson, for the Halifax Regional Municipality

By the Court:

[1] This is a summary conviction appeal from conviction and sentence following trial where the appellant was found guilty of three offences under the Halifax Regional Municipality bylaw A-300 (animal by-law) as follows:

- That she owned a dog which ran at large contrary to Section 7 (3).
- That she owned a dog which attacked an animal contrary to Section 8 (1).
- That she failed to comply with a notice to muzzle her dog contrary to Section 8 (4).

BACKGROUND

[2] On the evening of September 14, 2010 Catherine and Tyson Simms were walking their unleashed dog on the East Chezzetcook Road. As they approached the home owned by the appellant, they saw a car heading towards the driveway and begin to turn in. As the car entered the driveway Mr. Simms observed a dog in the backseat. The dog jumped out of the back window of the car and immediately ran towards and attacked their dog. The attacking dog was later identified as Brindi, owned by the appellant. Brindi was subject to a muzzle order as a result of previous court proceedings. Brindi was not on a leash nor was she wearing a

muzzle. The attack by Brindi caused puncture wounds into the other dog's shoulder area. At the time of the incident the appellant approached and introduced herself to the owners of the other dog and asked them not to report the attack.

[3] In her sentencing decision June 26, 2012, Provincial Court Judge Flora Buchan fined the appellant $200 for each charge totalling $600. As an additional penalty pursuant to Section 195 of the Halifax Regional Municipal Charter (HRM Charter), the trial judge ordered ownership of the dog Brindi forfeited to HRM immediately and that HRM have the sole responsibility to make all decisions concerning the dog's care and custody. The trial judge further ordered an assessment as to the ability of the dog to be adopted or fostered to a responsible person or persons. In the event of ill health or failure to find an adoptive or foster home, the trial judge ordered that HRM have the right to euthanize the dog. The trial judge ordered that no action be taken by HRM pending any filing of an appeal.

[4] The notice of appeal was filed on August 1, 2012. Unfortunately, the dog has been kenneled since that time pending the hearing of this appeal, which was subjected to several delays in a great part due to the failure of the appellant to process the appeal in a timely manner.

[5] The notice of appeal as amended listed several grounds of appeal which can be condensed as follows:

1. Section 195 of the HRM Charter is unconstitutional.
2. Trial judge erred by failing to consider the defence of "mistake of fact".
3. The verdict of guilty on all charges was unreasonable and not supported by the evidence.
4. The sentence imposed was unreasonable and not authorized by statute.

STANDARD OF REVIEW

[6] The test to be applied by an Appeal Court when considering whether a verdict should be set aside as unreasonable was explained in two leading decisions of the Supreme Court of Canada ("SCC"): *R. vs. Yebes, [1987] 2 SCR, 59 CR (3d) 108* and *R. vs. Biniaris, 2000 SCC 15, [2000] 1 SCR 381*. The main principles of these decisions were outlined by Justice Cromwell (as he then was) in *R. vs. Barrett, 2004 NSCA 38, 222 NSR (2d) 182* as follows:

> [14] This Court may allow an appeal in indictable offences like these if of the opinion that "… the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.": s. 686(1)(a)(i). In applying this section, the Court is to answer the question of whether the verdict is one that a properly instructed jury (or trial judge), acting judicially, could reasonably have rendered: Corbett v. The Queen, [1975] 2 S.C.R. 275 at 282; R. v. Yebes [1987] 2 S.C.R. 168 at 185; *R. v. Biniaris*, [2000] 1 S.C.R. 381 at para. 36.

> [15] The appellate court must recognize and give effect to the advantages which the trier of fact has in assessing and weighing the evidence at trial. Recognizing this appellate disadvantage, the reviewing court must not act as if it were the "thirteenth juror" or give effect to its own feelings of unease about the conviction absent an articulable basis for a finding of unreasonableness. The question is not what the Court of Appeal would have done had it been the trial court, but what a jury or judge, properly directed and acting judicially, could reasonably do: *Biniaris* at paras. 38-40.
>
> [16] However, the reviewing Court must go beyond merely satisfying itself that there is at least some evidence in the record, however scant, to support a conviction. While not substituting its opinion for that of the trial court, the court of appeal must "… re-examine and to some extent reweigh and consider the effect of the evidence.": Yebes at 186. As Arbour, J. put it in *Biniaris* at para. 36, this requires the appellate court "… to review, analyse and, within the limits of appellate disadvantage, weigh the evidence …"

[7] The well accepted standard of review with respect to sentencing is set out in *R. vs. Young, [2014] NSCA 16*:

> [10] As a general proposition, trial judges are entitled to deference with respect to sentence. In *R. v. E.M.W.*, 2011 NSCA 87, Justice Fichaud recapitulated the standard of review in a sentence appeal:
>
> [6] In *R. v. Shropshire*, [1995] 4 S.C.R. 227, paras 46-50, Justice Iacobucci for the Court stated or adopted the views that:
>
> (a) An appellate court should vary a sentence only when "the court of appeal is convinced it is not fit" or "clearly unreasonable", or the sentencing judge "applied wrong principles or [if] the sentence is clearly or manifestly excessive".
>
> (b) "if a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts".
>
> (c) "[S]entencing is not an exact science", but rather "is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender".

> (d) "The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range".
>
> (e) "Unreasonableness in the sentencing process involves the sentencing order falling outside the `acceptable range` of orders".

[8] Grounds of appeal based on errors in law attract a standard of be of correctness.

[9] The appeal is dismissed for the following reasons:

CHARTER BREACH

[10] The first ground of appeal raises a constitutional issue that was not raised at trial. Appellants are prohibited from raising issues on appeal that were not raised at trial without leave of the Appeal Court. Moreover, there is a high threshold where a charter issue is raised for the first time *R. vs. Hobbs [2010] N.S.C.A. 53*.

[11] The stringent test exist because charter arguments generally require a factual foundation based on evidence adduced at trial. As stated in *MacKay v. Manitoba [1989] 2 S.C.R. 357*:

> "9 Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require

> or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel."

[12] The appellant raised other charter arguments at trial that were unsuccessful. On appeal the appellant makes several allegations challenging the validity of Section 195 of the HRM Charter including that the provision lacks a valid purpose and is vague; that is ultra vires the provincial legislature.

[13] The appellant was self-represented throughout. I am satisfied there is no tactical reason for not raising the current charter issue at trial. Although the respondent submits leave to raise the ground of appeal should be refused, it has addressed the issue in it's factum and in submissions. In response to the Notice of Constitutional issue the provincial and federal crowns declined to participate.

[14] Under the circumstances I grant leave to raise the charter issue and briefly deal with the issue.

[15] Section 195 of the HRM Charter reads:

> "Additional penalty
>
> 195 At the trial of a charge laid against the owner of a dog this is fierce or dangerous, that persistently disturbs the quiet of a neighbourhood by barking, howling or otherwise or that runs at large, contrary to a by-law, in addition to the penalty, the judge may order that the

> (a) dog be destroyed or otherwise dealt with; and
>
> (b) owner pay any costs incurred by the Municipality related to the dog, including costs related to the seizure, impounding, or destruction of the dog.
>
> and it is not necessary to prove that
>
> (c) the dog previously attacked or injured a domestic animal, person or property;
>
> (d) the dog had a propensity to injure or to damage a domestic animal, person or property; or
>
> (e) the defendant knew that the dog had such propensity or was, or is, accustomed to doing acts causing injury or damage. 2008, c. 39, s. 195."

[16] This provision is an addition to the penalties prescribed in the animal bylaws.

LACKS A VALID PURPOSE AND IS VAGUE

[17] Section 2 of the HRM charter provides for the purpose of the legislation, namely "developing and maintaining safe and viable communities". The removing from custody or destroying a dog that has caused a public nuisance or threat to public safety is consistent with the stated purpose of the legislation. The validity of this purpose cannot be challenged. Any contention that the statue was enacted for an improper purpose is not based on evidence.

[18] With regards to vagueness the case of *R. vs. Nova Scotia Pharmaceutical Society [1992] 2 SCR 606* states:

> "The foregoing may be summarized by way of the following propositions:
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> 1. Vagueness can be raised under s. 7 of the Charter, **since it is a principal of fundamental justice that laws may not be too vague**. It can also be raised under s. 1 of the Charter in limine, on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on the Charter rights be "prescribed by law". Furthermore, vagueness is also relevant to the "minimal impairment" stage of the Oakes test (Morgentaler, Irwin Toy and the Prostitution Reference).
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> 2. The "doctrine of vagueness" is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion (Prostitution Reference and Committee for the Commonwealth of Canada).
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> 3. Factors to be considered in determining whether a law is too vauge include (a) the need for flexibility and the interpretative role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist (Morgentaler, Irwin Toy, Prostitution Reference, Taylor and Osborne).
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> 4. Vagueness, when raised under s. 7 or under s. 1 in the limine, involves similar considerations (Prostitution Reference, Committee for the Commonwealth of Canada). On the other hand, vagueness as it relates to the "minimal impairment" branch of s. 1 merges with the related concept of overbreadth (Committee for the Commonwealth of Canada and Osborne).
>
> 5. The Court will be reluctant to find a disposition so vague as not to qualify as "law" under s. 1 in limine, and will rather consider the scope of the disposition under the "minimal impairment" test (Taylor and Osborne).

Continuing at para 63, Gonthier J. stated:

> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. **Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp**

> **to the judiciary. This is an exacting standard, going beyond semantics.** The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law. **[emphasis added]**"

[19] The power of the court to order the dog be "destroyed or otherwise dealt with" under section 195 provides notice to the public of the maximum penalty to be suffered which, in addition to the penalties imposed in the by-laws, establishes a range of penalties from fines to the risk of the dog being destroyed and provides the court with the discretion to impose other conditions in relation thereto. There in an intelligible standard in the wording of the section and, as such does not offend *Section 7 of the Charter of Rights and Freedoms*.

ULTRA VIRES

[20] This doctrine is invoked where the legislature enacts legislation that is outside their competency. The HRM Charter is a proper exercise of provincial jurisdiction as being a matter of a local or private nature under *Section 92 (13) of the Constitution Act 1867*.

[21] Other allegations by the appellant regarding charter breaches lack evidentiary foundation, are vague without supporting authority or mere policy arguments.

MISTAKE OF FACT

[22] The charges under the animal by-laws are strict liability offences. The person charged has the burden of proving the mistake of fact was a reasonable held one. Alternatively, the person may establish she reasonably attempted to prevent the incident. *R vs. Sault Ste. Marie (City), [1978] 2 SCR 1299.*

[23] There was no evidence before the trial judge that the appellant was mistaken about some fact that would have rendered the act innocent. The appellant testified she made an error in operating her car window which enabled the un-muzzled dog to escape. This raises the issue of due diligence which the trial judge properly considered and dismissed. The appellant failed to muzzle the dog and keep the dog in an escape proof enclosure that prevents the dog from getting out as ordered in prior Provincial Court proceedings. The appellant was aware the window was "reverse operating" at the time.

REASONABLENESS OF VERDICT

[24] The appellant submits that the evidence did not establish that the dog

was running at large. Section 2 (1) x of the HRM by-laws A-300 provides:

> "(x) "runs at large" when used in respect of an animal, means an animal that is off the property of it's owner without a leash; and an animal shall be deemed to be running at large where it is on any private property or premises without the permission of the owner or occupant thereof;"

[25] The trial judge found as a fact that the dog jumped out of the open car window and attacked another dog by biting the dog on a roadway. The trial judge accepted the evidence of the owners of the other dog as she was entitled to do. Her determination based on credibility is amply supported by the evidence adduced at trial. Findings of credibility by trial judges are entitled to a high degree of deference. *R. vs. Kagan [2009] NSCA 43*.

SENTENCE

[26] Section 195 of the HRM Charter gives the judge the power to impose as an additional penalty, an order that the "dog be destroyed or otherwise dealt with". The appellant's submission that this section does not authorize the removal of ownership of a dog is untenable. The destruction of the animal itself, removes ownership. The further discretion to "otherwise" deal with the dog permits the judge to craft a sentence short of destroying the dog which is consistent with the intent of the legislation namely, protection of the public.

[27] At the time of sentencing the dog Brindi already had a record. This was not the first incident of aggression by the dog. In 2008 the appellant was charged with the same three offences which are the subject of this appeal. At the time of sentencing other incidents of Brindi attacking dogs were put before the court. In handing out the sentence, the trial judge returned the dog to the appellant under strict conditions including requiring the appellant to complete obedience and aggression control training. Further, the dog was to be muzzled at all times when outdoors and inside an escape proof enclosure that would not enable the dog to get out.

[28] These factors were considered by the trial judge at sentencing for the current offences. The crown sought a fine in the minimum amount of $600 and an order that the dog be euthanized. The trial judge considered the evidence of an expert in dog training indicating that the dog had territorial aggression, dog to dog but that it was trainable. The trial judge determined that the appellant was less then remorseful and had demonstrated her inability to control the dog. She determined that the dog could not be safely returned to the appellant. Instead of an outright order for the destruction of the dog, the trial judge ordered ownership of the dog forfeited to HRM and directed HRM to have the dog assessed with a view to

adoption or foster placement. Should adoption or foster placement be unavailable or as a result of ill health, the court allowed HRM to euthanize the dog.

[29] The appellant has not demonstrated the trial judge has committed an error in principle or failed to consider relevant factors. The trial judge addressed the goal of public safety by removing the dog from the appellant and properly exercised her discretion by inserting conditions allowing the dog to be otherwise dealt with short of destruction.

Scaravelli, J.