

Citation: Regina v. Van Dongen

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Registry:

Abbotsford

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

(Criminal Division)

REGINA

v.

Quirinis C. Van Dongen

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE P.D. GULBRANSEN**

Counsel for the Crown:

Robert W. Gourlay Q.C. and K. Weddell

Appearing for the Defendant:

Casey Van Dongen

Place of Hearing:

Abbotsford, B.C.

Dates of Hearing:

December 6, 7, & 9, 2004

Date of Judgment:

December 23, 2004

[1] Mr .Van Dongen, an 82 year old farmer, is charged with an offence under s.24(1) of the Prevention of Cruelty to Animals Act, of permitting the horses and cattle on his Abbotsford farm to be in distress. The prosecution does not allege that the defendant actually caused any demonstrable harm to them but rather that he failed to provide adequate shelter for his horses and that he neglected both the horses and cattle. The Crown alleges that the neglect consisted of allowing conditions on the farm to deteriorate such that the animals were exposed to an unacceptably high risk of suffering harm.

[2] The defendant's position is that he did not neglect any of his animals. He submits that the Crown has not proven that he failed to provide shelter for the horses. He further argues that the accusation of exposing his animals to a risk of harm is based on unrealistic and impractical standards of animal husbandry. In fact, he argues, the Crown has not proven that any real or significant risk of harm to his animals existed.

SUMMARY OF EVIDENCE

[3] On several occasions between February 22, 2003 and April 5, 2003 a special constable with the B.C. Society for The Prevention of Cruelty to Animals visited Mr. Van Dongen. She expressed her concern that there appeared to be no shelter available for the horses in the pastures where they were kept and that old machinery and assorted debris on the farm was a potential source of injury to them. Mr. Van Dongen's reply was that the local climate was temperate and that he did not believe that the horses needed shelter.

[4] After her last visit on April 5th the special constable obtained a search warrant under s.13 of The Prevention of Cruelty to Animals Act authorizing her to enter the Van Dongen property on the basis that the apparent lack of shelter and the presence of dangerous debris put the horses in a state of "distress" as defined in s. 2 of the Act,

[5] The warrant was executed on April 9, 2003. The special constable was accompanied by two of her colleagues and by Dr. Mark Steinebach, a veterinarian. The SPCA officers spent several hours on the farm eventually removing the 21 horses and 51 cattle found there. (They were subsequently returned to the defendant at various times between April 14 and 17, 2003). Dr. Steinebach was there for about 2 hours and made many observations about the conditions on the farm, which he in turn incorporated into a report which was filed in evidence at the trial.

[6] This report, supplemented by his testimony, formed the backbone of the Crown's case. He noted that there were three barns on the farm, housing mainly cows, as well as three pastures and 2 broccoli fields. Most of the horses were in the pastures, while most of the cattle were in or around a large barn labelled "Barn 1" by Dr. Steinebach. Within that barn were 2 enclosed areas, one containing a sick calf; the other containing 2 cows, 1 pony, 2 foals and 3 calves.

[7] There was a concrete pad outside this barn and which separated it from "Barn 2" (as labelled by Dr. Steinebach). There were no cattle in it at the time he was there, although it was clear that they had access to it. There was a foal and mare in a separate enclosure in that barn.

[8] "Barn 3" was located about 50 feet from the other two and which contained horse stalls with a paddock at the back in which there were 2 horses. Just outside "Barn 2" there were 4 weanling horses.

[9] The veterinarian's evidence about neglect to the cattle centred on the conditions found in "Barn 1" and adjacent area. He described it as a "loafing barn", which is a barn in which cattle are able to lie down after feeding. Dr. Steinebach said that cows normally need to lie down about

50% of the time for proper digestion to occur. He described the barn floor as being "heavily soiled with manure". He noted a particularly heavy build up at the alleyway of the barn which meant that the cows had to stand in deep manure when standing at the feeding area, which ran through the centre of the barn. There were some cows lying down in the manure and it was obvious that any cow who did need to lie down would have to lie in manure.

[10] There were also cows outside the barn on the concrete pad where a water trough was located. (There was no water in it, but it was quite likely that the automatic "waterer" for the trough had just recently malfunctioned. That is, its condition was not indicative of any failure by the defendant to provide water for the cows.). Dr. Steinebach also described this pad as being "heavily soiled with manure". Nearby was a large pile of manure in what he termed a "manure pit".

[11] Dr. Steinebach testified that the amount of manure on the floor of the loafing area meant that many cows would be reluctant to lie down because they are basically clean animals who prefer a clean, dry area for this activity. Since lying down is so important to their food digestion, inability to do so could eventually lead to digestive problems and the cows will not be as productive as they could be. If, on the other hand, the cows did choose to lie down despite the manure, it could lead to their ingesting contaminate material with faecal organisms in it. This could occur, for example, when the cows groomed themselves. In turn, the disease could then spread to other cows.

[12] He testified that by lying or standing in manure, the cows could also develop foot rot or foot infections and skin disease.

[13] His opinion was also that the level of manure, especially at the concrete pad but also in the barn, created a risk that the cows could slip and be injured in a fall. He also expressed a concern that a cow or calf could fall into and possibly drown in a pool of liquid at the end of the manure pit created by effluent run-off.

[14] There was undoubtedly a very large amount of used farm equipment and assorted debris in the fields. Dr. Steinebach was concerned that the horses had free access to this material because, being curious animals, it was very likely that some of them would try to investigate these piles of equipment and end up harming themselves.

[15] Dr. Steinebach also noted the apparent lack of any shelter for the horses who were in the pastures. He said that horses do need shelter from adverse weather conditions or at least to have the choice to take shelter in bad weather. In the Fraser Valley the main weather issue would be rain, with unusually cold temperatures and wind a possible problem at times. He said that if horses are constantly wet from continual exposure to rain, their skin could break down and this could make them more susceptible to disease. As well, horses need to regulate their temperature and shelter assists them to do so when there are adverse weather conditions. It was his opinion that the deciduous trees which grew along the border of the pastures provided little windbreak but could provide some shade from the summer sun.

[16] He also expressed concern that some horses appeared to have access to a pool of water which seemed to be a run-off from the manure pit. The danger was that they might drink it and become sick.

[17] Dr. Steinebach expressed less concern about the conditions in the other barns. Barn 2 had a "deep litter" system (this involves putting sawdust or "hog fuel" on the floor to create a barrier to the manure beneath). Most of the floor was relatively dry. (It appears that "Barn 1" was an example of a "deep litter" system which was not very dry.). "Barn 3" had a poorly maintained deep litter system as well, but there were few animals in it when the conditions were observed. Dr. Steinebach did express a concern that the horses in Barn 3 had their movements restricted

because of the muddy conditions. He also was concerned that the weanlings outside that barn seemed to be effectively blocked by the barn walls on one hand, and the pool of water on the other, from accessing the pastures and water troughs.

[18] The defendant called three witnesses: Jack Van Dongen, one of his six sons; Doug Anderson, a local farmer with extensive experience in the cattle industry and Sheila Rushton, who is involved with cattle auctions in the Fraser Valley and has known the defendant for over 30 years through his involvement in such auctions.

[19] All of the witnesses confirmed that the defendant has, for many years, operated a business where he buys cattle at the local auction which have been removed or "culled" from a dairy herd and put up for sale. These cattle are unwanted by their owners because they may be lame, unproductive or difficult to make pregnant. He then tries to rehabilitate them by, for example, "reversing" their lameness which according to Jack Van Dongen, his father sometimes accomplished by having the cattle walk in the pastures as an antidote to having been on concrete all the time at a dairy operation. He could often succeed in impregnating cows, when others had failed, by keeping a bull in the herd to assist in identifying, at the earliest possible time, when cows were in heat. He would try to treat a cow with mastitis by having the cow nurse a calf over a period of time. It is obvious that part of this "restorative program" also involves providing them with proper nourishment. He then puts the cattle back up for auction and sells them (he hopes) at a profit. I infer that he has been doing this successfully for well over 30 years.

[20] Jack Van Dongen has had extensive experience in farming and particularly with cattle. His present occupation –marketing artificial insemination services for cattle- takes him to hundreds of farms in B.C. and Alberta. He has a very detailed knowledge of his father's farming practices and about this particular farm property. (He lived there years ago and he stays at his father's house four days every month during his sales trips to B.C.) Even taking into account his possible bias in favour of his father, I found Jack Van Dongen to be a careful, forthright and candid witness. I accept that he has a strong practical or "hands on" knowledge of cattle operations.

[21] Jack Van Dongen said several times that his father was not a "tidy farmer". He further said that he was not at all proud to say that "this is my father's farm" when he drove by the property- mainly because the vast accumulation of old and rusting farm equipment on the property was an eyesore. (As an aside, he testified that he and his brothers convinced their father to finally get rid of this material. An auction was held and whatever was not sold was sent for scrap). He also said that he would classify his father's farm as being at the lower end on the "cleanliness scale" of farms that he had seen. (He said it was similar to the variation in standards of cleanliness that one might find in a person's car.) All that being said, however, he roundly rejected any suggestion that the conditions on the farm represented a significant risk of harm to the animals on it.

[22] He testified that the manure in and around the barns was cleared twice a week. His opinion was that this was an acceptable practice because these were not milk producing cows and there was no need to maintain the same cleanliness standards that one would find at a dairy farm. He also did not believe that the level of manure as depicted in the photos was at that much variance from what one might see in many similar operations.

[23] He also pointed out that he had personally poured the concrete for the pad between "barn 1" and "barn 2". He said that he had scored or roughened the concrete at that time to create a surface that would help to prevent cows from slipping. It is fair to say that he believed the suggestion that the cows might slip on the pad, even with manure on it, was untenable. He had a similar reaction to the suggestion that a cow might fall into the pond of waste near the manure pit. His view was that cows were not stupid and it was thus quite unlikely. (I note that Dr. Steinebach also said that cows are more intelligent than they are usually given credit for.)

[24] Jack Van Dongen also provided a rough drawing of the farm and its buildings. By his calculation, the total area of shelter available in the barns amounted to 9232 square feet or about 189 square feet per animal. The pastures all had gates on them which, when open, gave the horses (and the cows for that matter) free access to most of the other areas on the farm. Although he did go to the farm on the day of the search, he could not say whether any of the gates were open then, but said that in his experience, the gates were open more often than not.

[25] Doug Anderson has been involved with the cattle business since 1946. He knows the defendant as a business rival. He and Mr. Van Dongen often bid against each other for the "culled" cattle at the auction. Like the defendant, Mr. Anderson tries to rehabilitate and "recycle" these cows (as he put it). The techniques that are used include "dehorning" them, checking out their udders, breeding and rebreeding them, all to get the cows back into a productive state. He is not a friend of the defendant nor have they ever been in business together.

[26] He confirmed Jack Van Dongen's observation that there are varying levels of cleanliness in cattle farms. When shown the photographs taken of the property on April 7th he said that all the cows that he saw in the photos looked healthy and that while the conditions in the barns were not perfect, they were suitable. When shown a photo in an unspecified location, of an SPCA worker standing in manure which was deep enough to cover the "boot" part of his/her gumboots, he said that one could find such a pile somewhere on any farm (that is, one that had a number of cows on it).

[27] Mr. Anderson was a very candid and forthright witness who has considerable practical knowledge of the workings of the cattle business and in particular of the type of business that the defendant operates. The accumulation of manure is inevitable in such operations, but there is no need, in his opinion, to scrape or clear it as often as must be done where the cows are producing milk on a dairy farm.

[28] Sheila Rushton's evidence confirmed that she had known the defendant for over 30 years through his involvement in the cattle auctions in buying and reselling "culled " cattle and that he was an honourable man who always paid his accounts promptly.

[29] None of these witnesses knew of the existence of publications from Agriculture Canada which were "Recommended Codes of Practice" for the care and handling of farm animals-one for horses and one for cattle. These are clearly voluntary guidelines and do not purport to impose any legal obligation on farmers in Canada to comply with the recommended practices. Dr. Steinebach considered the publications to be authoritative guidelines which set standards of animal husbandry with which any competent farmer would seek to comply.

ANALYSIS

[30] It is important to emphasize that the issue in this case is whether the Crown has proven, beyond a reasonable doubt, that Mr. Van Dongen permitted his animals to be "in distress" as defined in the Prevention of Cruelty to Animals Act, not whether his farming practices complied with voluntary guidelines created by Agriculture Canada.

[31] In his admirably clear and cogent argument on behalf of the Crown, Mr. Weddell stated that the prosecution did not maintain that the defendant had failed to provide adequate food or water for his animals. The case was rather that he had not provided adequate shelter for the horses and that he had neglected both the horses and cattle, essentially by allowing conditions to exist on the farm that exposed the animals to an unacceptable risk of serious harm.

[32] One unusual aspect of this case is that there was no allegation that any of the animals actually suffered any harm.

[33] The offence under section 24 of The Protection of Cruelty to Animals Act (I will refer to it hereafter as "the Act") is committed by allowing animals to be in distress. The noun "distress" is defined in Merriam- Webster's Collegiate Dictionary (Tenth Edition) as "a pain or suffering affecting the body" or " a painful situation' or " a state of danger or desperate need"

[34] The definition in s.2 of the Act of animals "in distress" must also be considered.

These are animals who are:

- a) "deprived of adequate food, water or shelter" or,
- b) "injured, sick, in pain or suffering" or,
- c) "abused or neglected".

Subsections a) and b) refer to the most common consequences of cruel conduct. "Abuse" likely refers to deliberate malicious acts towards animals and encompasses many sorts of cruel conduct. "Neglect" must therefore refer to conduct which could cause animals to end up in the states of "distress" referred to in the previous subsections. The purpose of the Act is to prevent cruelty to animals. It does not purport to subject farmers to investigation of their daily practices to be measured against a particular standard of farming practice and divorced from the likely consequences of their actions.

[35] This is, in fact, the approach taken by the Crown in this case. Mr.Gourlay and Mr. Weddell have set the prosecution's task as proving that the alleged neglect by the defendant exposed the animals on his farm to a high and therefore unacceptable risk of suffering the type of harm contemplated in the definition of "animal in distress" in s.2 of the Act.

[36] The assertion that the defendant deprived the horses of adequate shelter can be dealt with briefly. There was no evidence that there were any adverse weather conditions either on April 7th or on the previous visits by the SPCA officer. That is, Mr. Van Dongen was not shown to have refused or neglected to provide shelter to the horses when they needed it. As well, there were barns on the property which could easily accommodate all of the horses and cows. There were gates in the pasture fences, which according to Jack Van Dongen were open frequently. There was, therefore, shelter available to the horses during the time frame set out in the information .Finally the horses were well nourished and in good health. There was no evidence offered to show that any of them was suffering from any physical malady related to being improperly exposed to the elements..

[37] The statement made by the defendant to the effect that horses did not need shelter is an expression of opinion in the context of an argument with the SPCA officer. It is not an admission that he has deprived them of needed shelter in the past or that he would never provide them shelter in adverse weather conditions in the future.

[38] Neither does the evidence establish that it was likely that the horses were effectively restricted from access to water by the existence of a pool of water over which they would not like to travel. As the video of the news footage filed by the defence shows, these were healthy, lively horses capable of jumping 5 foot fences with ease. The pool of water was not a significant impediment. Neither can it be inferred that they might have consumed water from the nearby "effluent" pool. I accept Dr. Steinebach's evidence that horses are intelligent animals. They were obviously healthy and well fed. There was potable water in 2 troughs in the pastures and that is obviously where they drank it from and would drink from in the future.

RISK OF HARM

[39] The level of manure in the barns and surrounding area was probably at a greater level than it should have been. That does not, in itself, prove neglect or that the cows were at risk of suffering any harm.

[40] The first issue is that the evidence presented at the trial was obtained over a 2 hour period on a single day. There was evidence that the defendant did have the manure scraped or removed on a regular basis, perhaps twice a week. That is, it was very likely that the manure was going to be scraped or cleared fairly soon. The evidence did not establish that those conditions had existed for any significant time period before the search. Dr. Steinebach did not examine any of the cows and he did not say how long they would have to be in comparable conditions before it was probable that they might suffer illness or digestive difficulties. Jack Van Dongen and Mr. Anderson, both highly experienced farmers, indicated that the conditions were not unacceptable, although they could have been better.

[41] This relatively brief glimpse at the farm also showed that Mr. Van Dongen was in other respects paying attention to things he was supposed to do. He had isolated a mare and foal from the other horses. Sick calves were isolated in a properly spacious but enclosed area. There was no suggestion that he had caused any of the problems noted about the animals. It would be normal for any herd of cattle to have some sick animals and the evidence did not suggest that the defendant was not paying attention to their needs.

[42] The Crown must prove its case to the standard of beyond a reasonable doubt. The allegation that the defendant deprived the horses of adequate shelter has not been proven to that standard.

[43] The crown's case regarding the cows centres on the assertion that they would have been in danger of contacting and spreading disease from ingesting faecal organisms: of developing digestive problems from the same source; of developing foot problems and foot rot from having to stand and walk in manure: of slipping on the manure on the cement pad and suffering injury.

[44] I must emphasize again that there was no evidence that any of the cows had in fact suffered any illness or digestive problems or that any of them had slipped and fallen or that they had any foot problems resulting from exposure to manure. The essential question is: "How significant was the risk of harm?"

[45] There was no evidence introduced of any medical examination of the cows nor of the scientific analysis of, for example, tissue samples from them which could have indicated whether there was something abnormal about their physical condition.

[46] This tends to support the defence contention that the conditions in which the cows were found were not indicative of any neglect on the defendant's part.

[47] The concept of possible harm from exposure to risk includes the issue of how long any exposure must take place before the likelihood of harm becomes significant. There was no evidence of how long the cows had been exposed to the particular levels of manure accumulation noted on April 7th. As well, the defence evidence established that the manure was usually scraped or removed twice a week, which means that the conditions as observed on April 7 would not remain as they were for long.

[48] As well, it would not be in the defendant's economic interest to neglect his cows' health. That is, he could not have successfully bought and resold "culled" cattle for over 30 (and probably closer to 50) years if that were his usual pattern. This does not establish that he did not neglect the cows on this occasion, but it makes it somewhat less probable that he did.

[49] There was evidence that by April 7, 2003 the horses had been exposed to the risk represented by the equipment for a considerable time. That is, it must have taken a long time for that quantity of material to accumulate. The horses (and sometimes the cows as well) were nearby and had access to it. Yet there was no evidence offered that any horses had, in the past, suffered injury nor that anyone conducting the search on April 7 saw the horses doing anything at or near this material, which might have resulted in harm to them. There is considerable force to Casey Van Dongen's argument that the horses had become adjusted to the equipment and, being intelligent, were not likely to injure themselves. As well, no evidence was given of what exactly made up these large piles of equipment and debris. Were there accumulations of large quantities of sharp metal objects or other material which could cut the horses or cause them to fall and suffer injuries? There was no detailed evidence on that point.

VERDICT

[50] Considering all of the evidence I have a reasonable doubt that the defendant neglected the horses and cows on his farm. For the reasons stated earlier I also have a reasonable doubt that he deprived the horses of adequate shelter.

[51] I find the defendant not guilty.

THE HONOURABLE P. D. GULBRANSEN, P.C.J.