SUPREME COURT OF YUKON

Citation: *R.* v. *Dillabough,* 2009 YKSC 8 Date: 20090129
Docket S.C. No.: 07-AP011
Registry: Whitehorse

BETWEEN:

REGINA

Respondent

AND:

JAMES DILLABOUGH

Appellant

Before: Mr. Justice C.S. Brooker

Appearances:
Stephanie Schorr — Appearing for the Respondent
James Dillabough — Appearing on his own behalf

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] BROOKER J. (Oral): Mr. Dillabough appeals his conviction for contravening s. 30(2) of the *Highways Act*, R.S.Y. 2002, c. 108, as well as his sentence for the contravention.

[2] Mr. Dillabough has filed a one-page document entitled “Reasons for Appeal.” I take that document to outline the basis for this appeal. From that document it would appear that this appeal raises four broad grounds: one, that the Justice of the Peace misinterpreted the meaning of “allow” in s. 30(2); two, that the Justice of the Peace misapprehended the evidence; three, that the Crown failed to make full disclosure; and, four, that the penalty is too high.

[3] At the outset, I must make it clear that this is an appeal. It is not a re-trial. My

function is to determine, from the transcript, if the Justice of the Peace's verdict was unreasonable or unsupportable by the evidence. In other words, looking at all of the evidence, is the decision which the Justice of the Peace made one which a jury, properly instructed, could reasonably have made?

[4] The standard for review for an alleged error of law is correctness. The standard of review with respect to a trial judge's findings of fact is palpable and overriding error.

[5] I now turn to an examination of the appellant's grounds of appeal, bearing the foregoing legal principles in mind.

[6] First, dealing with meaning of "allow." Mr. Dillabough says that "allow" means to give permission, and that he did not give his cattle permission to go onto the roadway. That may be one meaning of "allow," depending upon the circumstances, but it is not the meaning here. According to the New Shorter Oxford Dictionary, "allow" means:

> Not prevent the occurrence of; [and] nor prevent (a person) from doing something; [to] permit.

That, in my view, is what "allow" means in the context of s. 30(2).

[7] The Supreme Court of Canada, in the *R.* v. *Sault Ste. Marie (City)*, [1978] S.C.J. No. 59, case, suggests that such wording, "permit," denotes a strict liability offence.

[8] In order to provide a defence to allowing his animals to be on the road, Mr. Dillabough had to show, on a balance of probabilities, that he took all reasonable steps to prevent the cattle from escaping onto the roadway and that such an escape was not reasonably foreseeable.

[9] I conclude that the Justice of the Peace applied the proper definition of “allow,” and that is obvious from para. 9 of his Reasons.

[10] The next ground, misapprehension of the evidence. It is trite but accurate to say that the question of whether or not an accused has taken reasonable care in the circumstances is a question of fact. The Justice of the Peace clearly held that the accused had not taken reasonable care to prevent his cattle from escaping onto the road. Since this is a question of fact, I can only interfere with it if I am satisfied that the Justice of the Peace seriously misapprehended the evidence on that point.

[11] I have reviewed the transcript of the proceedings, as well as the Reasons of the Justice of the Peace. There is evidence that Mr. Dillabough knew his cattle were attracted to the grasses growing on the side of the road. He knew that he had a piece of broken fence where the deer were going through. There was evidence that the fence was sagging low in places. He knew that his cattle had escaped before, and, indeed, many times before.

[12] I cannot conclude that the Justice of the Peace misapprehended the evidence. It was reasonably open to him to reach the conclusion he did, that Mr. Dillabough had not taken reasonable care to prevent his animals from escaping onto the roadway, and, therefore, he did allow them to be on the highway, contrary to s. 30(2) of the *Highways Act*.

[13] With respect to the third ground, that the Crown failed to make full disclosure, I can see no merit to this ground of appeal. The only information not originally disclosed was irrelevant blackouts. In any event, complete copies of the notes without the

blackouts were provided to the accused before the trial proceeded. I find, therefore, no merit to this ground of appeal.

[14] Finally, ground four, the fine is too high. The Crown suggested a fine of $500 and the trial judge imposed a fine of $500. He did not give any reasons for that.

[15] Section 42(3) of the *Highways Act* states:

> A person who is convicted of an offence under subsection 30(2) is liable
>
> (a) for a first offence, to a fine of $100;
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> (b) for a second offence within three years, to a fine of $300; and
>
> (c) for each subsequent offence within three years, to a fine of $500.

[16] There was no finding that this was a second or subsequent offence within three years. In fact, I saw no evidence about that in the transcript at all. If, as the Crown suggests, the Justice of the Peace was relying on his own knowledge of prior proceedings, that was an error. He cannot do that. Therefore, on the evidence in this case, this must be sentenced as a first offence. Therefore, the $500 fine, in my view, was not lawful.

[17] This ground of appeal succeeds. The $500 fine is set aside and in place thereof a fine of $100 is imposed.

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BROOKER J.