C A N A D A
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
No: SCM 500-36-000180-920

S U P E R I O R   C O U R T

MONTREAL, OCTOBER 14th, 1992

PRESENT: THE HONORABLE JOHN R. HANNAN J.S.C.

MICHAEL ROBBINS
APPELLANT

- vs -

CITY OF WESTMOUNT
RESPONDENT

J U D G M E N T

February 14, 1991, the Appellant was out in a snowstorm jogging on Roslyn Avenue, in the City of Westmount with his Great Dane dog. A public Security Officer of the City, patrolling the street parallel to the jogger noticed that the dog, still leashed, had defecated on a snow bank situated on private property contiguous to the street.

The officer called appellant's attention to this fact, whereupon the jogger returned to the scene of the offending deposit and flung it away from the private property. This gesture was variously

interpreted by the officer and the appellant. the effect achieved by the gesture was alleged to have been inadequate for purposes of avoiding an infraction of the Municipal by-law No 535, as amended. The gesture was also alleged to have constituted an assault on a peace officer.

By judgment of the Municipal Court of Westmount rendered March 11, 1992, the Appellant was adjudged guilty of a violation of by-law 535, as amended, concerning dogs, and condemned to pay the maximum fine of 300,00$ then prescribed for that infraction.

At the same session of the Municipal Court, the Appellant was acquitted of the offence of assaulting a peace officer contrary to Section 270 (1) Cr.C.

Both charges related to the same incident, and the proof in respect of both charges is common to them.

The present appeal relates only to the verdict of guilt for infraction of the by-law and subsidiarily the amount of the fine assessed.

The lengthy notice of appeal filed by Appellant, once winnowed to determine the issues before this Court, raises these grounds:

1) that the trial judge erred in assessing the credibility of the witnesses, failing to comment on the uncontradicted evidence introduced by Appellant, and

2) misappreciation of the evidence, amounting to misdirection as to the fact that Appellant's gesture complied perfectly with the requirements of the by-law.

By-law 535 as amended, the validity of which is not contested provides:

> *"Section 6B:*
> *If any part of private property, that portion of land owned by the city between the curb of the roadway or street and the street line or any part of a park, is soiled by the faeces of any dog, the omission by the keeper of such dog to clean forthwith by all appropriate means such faeces from such property, shall be deemed to be an infringement of this by-law by such keeper."*

The judgment appealed from holds, in part:

> *" From the testimony, it appears that the defendant was jogging, with another, accompanied by his Great Dane. This was on February 14, 1991 at about 10:30 a.m. The dog was apparently on a leash and at this time*

defecated on snow on the front lawn at 558 Roslyn Avenue.

I would suggest therefore that the Defendant at that time was very aware of what his dog had done and did nothing to comply with this section on the by-law. He continued to jog up Roslyn Avenue where he was stopped by a public security officer for the City of Westmount and advised of what the Great Dane had done. The public security officer, Sgt Mario Testa, testified that he had advised the Defendant in a polite manner and that the onus was on the Defendant to remove the faeces. There was contradictory testimony by the Defendant and his jogging companion as to the words that were used but I believe the testimony of the security officer as to the manner in which the Defendant was so advised.

The Defendant then apparently jogged or walked back to 558 Roslyn Avenue and proceeded to do something with the faeces. The security agent backed up his vehicle opposite to the house at 558 Roslyn Avenue. It is at this point that the testimony of the security officer and that of the Defendant differ a great deal. The security officer testified that the Defendant threw the faeces at the security vehicle, striking or bushing the security officer and some of it landing on the passenger side of the vehicle. He produced photographs evidencing same.

The Defendant testified that he flicked the faeces towards the street but apparently some landed on the sidewalk. He then continued to jog up Roslyn Avenue with his jogging companion and the Great Dane.

As far as this section of the by-law is concerned, it is patently obvious that the Defendant did not comply with same. The dog was on the leash when the event happened. The Defendant did nothing at that time to remedy the situation. He continued jogging up Roslyn Avenue. When accosted by the public security officer, he returned to the place of the event. Whether he threw the faeces at the vehicle and the security officer or tried to flick it unto the street does not really matter."

An appeal Court intervenes on questions of appreciation of the proof where a trial judge has committed manifest error and has thus erred in law by misdirecting himself on the facts. Jaegli

Enterprises v. Taylor, 1981 2 S.C.R. 2, 4; Roberge c. R. (1983) 1 R.C.S. 312, 315; Lensen vs Lensen (1987) 2 S.C.R. 672; R. v. Brown JE91-948 (C.A. Que) R. v. Faucher JE91-801 (C.A. Que.).

This last case holds in part that any manifest error of the Trial Court must be with respect to a deciding element of the proof (un élément déterminant). Thus a finding as to facts which do not qualify as being "deciding"is not, in the normal course, subject to revision by the Appeal Court.

In the present case the finding by the trial Court as to controverted facts relates to 1) what words were exchanged between the appellant and the public security officer when the dog's delict was pointed out, 2) whether the dung flung by Appellant was directed at the security vehicle or at the street, and where it came to rest.

The first of these facts is not germane to the consideration of this appeal having no relation to any eventual omission to comply with the by-law and whether the offence be one of either strict liability or absolute liability, (as such offenses are elaborated and distinguished in H.M. the Queen etc.

and The Corp. of the City of Sault Ste-Marie (1978) 2 S.C.R.)

Similarly the second of these facts is equally not germane whether the offence be one of strict liability or absolute liability, because whether the dung as flung ended-up on the sidewalk (which is contested) or upon the public security vehicle (which is not contested) in either case, that was prohibited by the by-law.

In the circumstances, the trial Court held that, as the appellant and his dog were jogging, (that is trotting or ambling forward,) dog and master joined by a leash, there was an inference the Appellant knew of the dog's breach of manners. Appellant contests this, but no finding in this regard is necessary to determine the infraction once the Appellant was made aware of his dog's delict. The "omission to clean forthwith" imposed by the by-law is an essential element to be proved beyond a reasonable doubt, and the review of the proof by the trial Court of the facts relating to this essential element do not justify intervention by this Court.

During the course of the hearing some discussion occurred as to whether an infraction of By-law 535, as amended, would constitute an offence of absolute or strict liability. It is unnecessary to express an opinion in this regard in order to dispose of this case and the Court does not do so.

The appeal against conviction will be dismissed.

Appellant contests the sentence imposed as being excessive, pointing out that the maximum fine permitted by the by-law was levied, whereas the offence hardly constitutes the worst violation imaginable. This Court is authorized by Sec. 285 of the Code of Penal Procedure to "exercise all the powers conferred by this Code to the judge who rendered judgment in first instance".

In this case, neither the prosecution nor the defence were heard on any matter relating to sentence.

Generally, an appeal court is slow to interfere with the decision of the trial judge on

matters of sentence, for it is he who has seen the trial unfold, and gauged the attitude of sincerity, remorse, arrogance, apathy etc. attributable to an accused who is ultimately condemned, particularly where the latter has testified, (as in this case). Where the appeal Court concludes however that the fixing of sentence is influenced by improper considerations, it can intervene. Such improper considerations would include the imposition of a maximum fine for a lesser offence where the accused was judged not guilty of a more serious offence arising from the same incident so as to, perhaps, punish for both the offence committed and the offence for which the accused "escaped" conviction. (See, generally Ewaschuk Criminal Pleading & practice in Canada ch. 25, Sec. 25:0010 ff.

In assessing sentence the trial Court held:

> *" Whatever he did, his actions were deplorable. I have no hesitation whatsoever of finding the Defendant guilty of infringing Section 6B of By-law 535. Furthermore, under the circumstances, I have no hesitation in fining the Defendant the maximum under this by-law, namely the sum of THREE HUNDRED DOLLARS ($300). I would also suggest to the Defendant that in the future, if he wishes to jog, walk or run in this municipality with a dog on a leash, he now knows what the rules and regulations are and will abide by same."*

In the context one can assume that the "deplorable" actions to which Court refers, relates to the failed attempt to cover "the omission" to clean forthwith by flinging the dung in the direction of the security vehicle and its occupant. But, at the same time one cannot escape the conviction that these "deplorable" actions were also essential elements in the charge of assault pursuant to Section 270 (1) Cr. C. of which Appellant was acquitted. Equally the maximum fine assessed implies, in part, at least, that the infraction was a particularly serious example of omission to remove dog faeces as required by the by-law.

It is not impossible to imagine more serious circumstances or occasion of such omissions involving more than one dog, even if such dogs would be somewhat less imposing in stature and product than a Great Dane.

In all the circumstances, the Court will exercise the authority conferred by Sec. 289 C.P.Q., and reduce the fine levied to the amount of 250,00$.

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FOR THESE REASONS THE COURT,

DISMISSES the present appeal against conviction, and

QUASHES the sentence pronounced by the trial Court;

CONDEMNS and **SENTENCES** the Appellant to pay the amount of 250,00$ within 60 days of service of the present judgment;

WITH COSTS and disbursements against Appellant.

JRH/jl

JOHN R. HANNAN, J.S.C.

c.c.:

ATTORNEYS FOR THE APPELLANT
Pearl & Associates
Me James Murphy
1170 Place du Frère André, 4e étage
Montréal (Québec) H3B 3C6 Tél.: 861-1170

ATTORNEYS FOR THE RESPONDENT
Me John Donovan
Westmount Municipal Court
21 Stanton
Westmount (Quebec) H3Y 3B1 Tel.: 935-8581