

CANADA / JUDGMENT

Robinson v. Peters et al

2004 BCSC 897

COURT

Supreme Court of British Columbia

DECIDED

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2004 BCSC 897 Robinson v. Peters et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Robinson v. Peters et al,

2004 BCSC 897

Date: 20040706

Docket: 34271

Registry: Kamloops

Between:

Kimberly Gene Robinson

Plaintiff

And

Mike Peters and Her Majesty the Queen in Right of the Province of British Columbia

Defendants

Before: The Honourable Mr. Justice Blair

Reasons for Judgment

Agent on behalf of the plaintiff

L. Wallace

Counsel for the defendants

G. Morley

Date and Place of Trial/Hearing:

June 4 and 17, 2004

Kamloops, B.C.

- [1] The defendants, Mike Peters and Her Majesty the Queen in Right of the Province of British Columbia, seek an order pursuant to Rule 18A of the Rules of Court dismissing the action brought by the plaintiff, Kimberley Gene Robinson.
- [2] Mr. Robinson commenced this action on March 4, 2003 alleging false arrest and imprisonment and malicious prosecution arising out of his arrest relating to his shooting of a bear on November 3, 1997, and subsequent prosecution on charges under the Wildlife Act, R.S.B.C. 1996, c. 488. The plaintiff initially named the Attorney General as a defendant, but I ordered pursuant to the Crown Proceeding Act, R.S.B.C. 1996, c. 89, that the style of cause be amended to designate as defendant Her Majesty the Queen in Right of the Province of British Columbia ("HMTQ").
- [3] Mr. Peters, a Merritt-based conservation officer employed by the B.C. government's Ministry of Water, Land and Air Protection, was involved in the investigation of the plaintiff. Mr. Robinson, of Merritt, a long-time hunter, trapper, breeder, and trainer of hunting dogs, brought this action on his own behalf, but was represented at the hearing of this application by an agent, retired lawyer, Ms. Leslie Wallace, acting, I understand, on a pro-bono basis. I appreciated her assistance and the focus she brought to Mr. Robinson's case.
- [4] During the hearing of the application I advised the parties that there appeared to be factual issues in dispute, particularly relating to the relationship between Mr. Robinson and Mr. Peters. The factual issues concerned me as I was being asked to decide issues without the benefit of hearing from the individuals involved. The parties concur that there are factual issues in dispute, but have urged me to proceed with this Rule 18A application, with the defence counsel, Mr. Morley, taking the position that the disputes, such as they are, ought not affect the determination of this action. In addition, Ms. Wallace notes that the cost of taking this action to trial would be expensive for Mr. Robinson, an individual with limited financial means.
- [5] Rule 18A seeks to provide parties with an efficient and inexpensive method of resolving a legal claim, with the trial judge to consider the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise because of delay, and the cost of taking the claim forward to a conventional trial. Mr. Robinson's claim arose in 1997, nearly seven years ago. The delay in bringing the claim has undoubtedly worked a prejudice as it is inevitable that the recollections of both witnesses and parties will diminish over time. It is not a complex matter and the cost of taking the claim to trial is significant in relation to the potential award were Mr. Robinson successful. I have heeded the parties' concerns and, after reviewing the material and submissions, have concluded that I am able to provide a judgment in spite of the factual issues between the parties.

- [6] Although the situation which led to this action occurred on November 3, 1997, the history between Mr. Robinson and Mr. Peters goes back to April 1994 when Mr. Peters was posted to Merritt as a conservation officer, a position he held until 1999 when he was transferred to the Lower Mainland. On arriving in Merritt, Mr. Peters became aware that Mr. Robinson had been involved in the trading of bear gall bladders prior to that activity becoming illegal on February 1, 1993 and that Mr. Robinson had some encounters with conservation officers, including past violations such as warnings for failing to produce his hunting licence.
- [7] Mr. Peters also knew Mr. Robinson had performed contracts for the conservation service to destroy problem wildlife. Mr. Peters first met Mr. Robinson on October 12, 1995 when he attended a report of a problem cougar in the Merritt area following which Mr. Robinson filed a complaint about Mr. Peters' hunting skills. In October, 1996, Mr. Peters asked Mr. Robinson if he was interested in performing further contract work for the conservation service, an offer declined by Mr. Robinson. Mr. Peters said he had no further significant dealings with Mr. Robinson until the November 3, 1997 incident. Mr. Robinson deposed that Mr. Peters stopped him on between 15 and 25 occasions and he believed Mr. Peters intended the stops to irritate and harass him. Mr. Peters stated that he reviewed Mr. Robinson's file and determined that during the period 1994 to 1999 he stopped Mr. Robinson four times to check his hunting licence. I note the difference in the evidence as it casts some light on the apparently uneasy relationship between Mr. Robinson and Mr. Peters.
- [8] On November 3, 1997 Mr. Robinson responded to a telephone call from a local resident, Pat Lunzmann, who was concerned about a bear which had tried to enter her home. Mr. Robinson attended the Lunzmann home with his hunting hounds which, deposed Mr. Robinson, picked up the bear's scent within 100 feet of the Lunzmann home. He and his hounds followed the bear for two hours until he was able to shoot it safely. Mr. Robinson said that upon cutting open the bear's stomach he found human garbage in its contents. He removed the liver and gall bladder, fed some of the liver to his hounds as a reward, and returned the gall to the bear's stomach cavity. Mr. Robinson then left the bear's carcass as is common when killing a nuisance animal, took his hounds and left the scene.
- [9] Mr. Peters, from his home, saw Mr. Robinson's vehicle and proceeded to an observation area from which he heard hounds barking and three shots fired. He saw Mr. Robinson walk out of the bush, his hands apparently covered in blood, load his hounds into the truck, put his rifle away, and then drive away. Mr. Peters contacted his supervisor, Dave Crack, advised him of what he had seen and together the two attended the site where Mr. Peters had observed Mr. Robinson. Mr. Crack found a bear carcass and he deposed that when he examined it, he did not find the gall bladder attached to the liver which he located in the bear's stomach cavity. Mr. Crack and Mr. Peters concluded that Mr. Robinson possessed the gall bladder and that he had failed to retrieve the bear's carcass, both constituting offences under the Wildlife Act. The pair agreed that Mr. Robinson should be arrested to preserve the gall bladder as evidence.

- [10] The two conservation officers returned to their office, consulted with another officer, and then, concerned with Mr. Robinson's reaction to being arrested, arranged to meet with Constable Bob Gobeil of the RCMP's Merritt detachment. They advised the police officer of the circumstances and the offences which they believed Mr. Robinson had committed and requested his assistance in arresting Mr. Robinson. Cst. Gobeil and the two conservation officers located Mr. Robinson in his truck parked in the downtown Merritt area. Cst. Gobeil and Mr. Peters approached Mr. Robinson, and the police officer advised him that he was under arrest for possession of a bear gall bladder and failure to retrieve an animal after shooting it. He read Mr. Robinson his rights under the Charter of Rights and Freedoms and then took Mr. Robinson to the RCMP station. The gall bladder was not located on Mr. Robinson's person. Cst. Gobeil stated that he was responsible for arresting Mr. Robinson and did so based on the information provided by the conservation officers.
- [11] Mr. Robinson took strong exception to the circumstances of his arrest, deposing that it took place in a public place and in the view of many Merritt residents. He alleged the defendants' actions were designed to humiliate him in the small community in which he lived.
- [12] Upon his arrest, Mr. Robinson acknowledged that he had shot the bear and advised Cst. Gobeil that he had left the gall bladder in the bear. Mr. Robinson contacted legal aid from the RCMP office and then again repeated that he had left the gall bladder in the bear. Cst. Gobeil and Mr. Peters drove Mr. Robinson to the kill site where Mr. Robinson located the detached gall bladder inside the bear gut cavity. Mr. Robinson was released, but advised that the matter was still under investigation.
- [13] Mr. Peters, believing that Mr. Robinson's conduct involved breaches of the Wildlife Act, provided a report to Crown counsel, Steen Blechingberg, who on January 28, 1998 approved the following charges against Mr. Robinson:
- (1) hunting without reasonable consideration for the lives, safety or property of others, contrary to s. 28 of the Wildlife Act;
 - (2) discharging a firearm in a no-shooting area, to wit within 100 metres of a dwelling house, contrary to s. 32 of the Wildlife Act and s. 19(1)(b) of B.C. Regulation 76/84;
 - (3) hunting and killing big game, a male black bear, and failing to cancel his appropriate species licence in accordance with instructions on licence, contrary to s. 1.04 of B.C. Regulation 336/82, enacted pursuant to the Wildlife Act;
 - (4) hunting and killing wildlife, a male black bear, and failing to make reasonable effort to retrieve the wildlife and include it in his bag limit, contrary to s. 35(1)(a) of the Wildlife Act;
 - (5) possessing dead wildlife, the carcass of a male black bear, other than as authorized under a licence or permit or as provided by regulation, contrary to s. 33(2) of the Wildlife Act; and
 - (6) without lawful authority, changing or altering a hunting licence booklet by removing a species licence page, contrary to s. 82(3) of the Wildlife Act.

[14] At trial in the Provincial Court, Mr. Robinson was acquitted on counts (1), (2) and (6), convicted on counts (3) and (4), and a stay was entered on count (5). Mr. Robinson's appeal to the Supreme Court of B.C. against the convictions on counts (3) and (4) was dismissed. Mr. Robinson obtained leave to appeal to the B.C. Court of Appeal on the issue of the proper interpretation of s. 75, referred to as the necessity defence, of the Wildlife Act which states:

75(1) A person who kills or wounds wildlife, other than prescribed wildlife, either by accident or for the protection of life or property, must promptly report to an officer

(a) the killing or wounding, and

(b) the location of the wildlife.

(2) A person who fails to report as required under subsection (1) commits an offence.

[15] The Court of Appeal in its decision cited at R. v. Robinson, 2003 BCCA 25, stated:

[2] The Crown has very fairly indicated that in view of the inappropriateness of the particular set of facts to raise the issues, and the difficulties created by the uncertainties as to the proper interpretation to be given to the provisions of the Act, that it would not oppose the appeal being granted and an order for an acquittal being made.

[16] The end result was that on January 8, 2003 Mr. Robinson was acquitted and he commenced this action on March 4, 2003 against Mr. Peters and his employer, Her Majesty the Queen in Right of the Province of British Columbia.

[17] It is with the above circumstances in mind that I turn to the defendants' application to dismiss this action, addressing first Mr. Robinson's claim of false imprisonment. There is no issue but that Mr. Robinson was detained, shifting the onus to the defendants to prove on balance that they had lawful justification for the detention. Cst. Gobeil and the defendant, Mr. Peters, possessed the authority under s. 87 of the Wildlife Act and s. 495 of the Criminal Code to arrest a person they found committing an offence.

[18] In R. v. Storrey, [1990] S.C.R. 241 Cory J., giving judgment for the Supreme Court of Canada, discussed the basis upon which a peace officer could arrest an individual. At ¶17 he wrote:

17 In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a prima facie case for conviction before making the arrest.

[19] Cst. Gobeil, who actually arrested Mr. Robinson, did so on the basis of the information provided to him by Mr. Peters and Mr. Crack from which he concluded that he had reasonable and probable grounds to arrest Mr. Robinson. This information included Mr.

Peters' observations of Mr. Robinson's activities earlier that day including the presence of dogs, the firing of three shots, and Mr. Robinson returning to his vehicle with what appeared to be blood covered hands and carrying a rifle. The subsequent inspection by both Messrs. Crack and Peters of the black bear carcass found in the area in which Mr. Robinson had been observed failed to discover the bear's gall bladder, although a liver to which the gall bladder is attached was located in the body cavity. In addition, Mr. Robinson had failed to retrieve the bear's carcass several hours after apparently shooting the creature.

- [20] Both conservation officers concluded that Mr. Robinson had retained the gall bladder in his possession and had failed to retrieve the bear's carcass. Cst. Gobeil clearly concurred with those conclusions as it was those which he conveyed to Mr. Robinson upon his arrest.
- [21] I conclude that Mr. Peters, who was instrumental in the arrest of Mr. Robinson, had subjectively reasonable and probable grounds to arrest Mr. Robinson. I further conclude that a reasonable person placed in Mr. Peters' position would conclude that there were reasonable and probable grounds for Mr. Robinson's arrest. The subsequent attendance at the kill site by Cst. Gobeil and Mr. Peters with Mr. Robinson who located the gall bladder where he had placed it in the cavity of the carcass does not detract from the information available to the arresting officers. Cst. Gobeil released Mr. Robinson upon his producing the gall bladder from the bear's carcass. Although Mr. Robinson said he took the liver from the carcass to give some of it to his dogs, he did not advise why he had separated the gall bladder from the liver and then placed it in a location different from the remaining portion of the liver. The conservation officers found the liver when they inspected the bear's stomach cavity, but not the gall bladder which would normally be attached to the liver. Given all the circumstances I conclude the officers, including the defendant, Mr. Peters, reasonably inferred that Mr. Robinson had retained the gall bladder.
- [22] I find the defendants have established that they had lawful justification for detaining Mr. Robinson on November 3, 1997 and I dismiss Mr. Robinson's claim of false arrest and imprisonment.
- [23] Mr. Robinson also claims against the defendants on the tort of malicious prosecution. In *Nelles v. Ontario*, [1989] 2 S.C.R. 170 the Supreme Court of Canada at ¶42 set out the following four elements which must be proved for a plaintiff to succeed in an action for malicious prosecution:
- a) the proceedings must have been initiated by the defendant;
 - b) the proceedings must have terminated in favour of the plaintiff;
 - c) the absence of reasonable and probable cause; and
 - d) malice, or a primary purpose other than that of carrying the law into effect.

[24] Mr. Robinson has established the first two elements in that the defendants initiated the proceedings which were eventually terminated in his favour. However, the elements c) and d) are more difficult. In ¶43 of his decision in *Nelles*, Lamer J. (as he then was) wrote:

¶43 ...Reasonable and probable cause has been defined as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed" (*Hicks v. Faulkner* (1878), 8 Q.B.D. 167, at p. 171, Hawkins J.)

¶44 This test contains both a subjective and objective element. There must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances. The existence of reasonable and probable cause is a matter for the judge to decide as opposed to the jury.

[25] Mr. Peters conducted the investigation as to Mr. Robinson's involvement in the November 3, 1997 killing of the black bear, and prepared a Report to Crown Counsel outlining his concerns about Mr. Robinson's conduct with specific reference to what appeared to be breaches of the Wildlife Act and the Regulations. Mr. Blechingberg reviewed the material and concluded that there was a substantial likelihood of Mr. Robinson's conviction and that the prosecution was in the public interest. In considering the charges he reviewed s. 75 of the Wildlife Act and concluded that the defence did not apply because he did not see an imminent threat from the bear which was shot the day following its presence at the Lunzmann residence and, when shot, was some two kilometres from the Lunzmann's residence. He also did not consider that the law allowed Mr. Robinson to act as an agent and shoot the bear on Ms. Lunzmann's behalf.

[26] Mr. Blechingberg drafted the information setting out the six charges against Mr. Robinson which was then sworn by Mr. Peters as the informant on January 28, 1998. Mr. Blechingberg prosecuted the matter in Provincial Court and also appeared at Mr. Robinson's appeal in B.C. Supreme Court.

[27] I conclude that both Mr. Peters and Mr. Blechingberg had an actual honest belief in the guilt of the accused based on the circumstances, which they believed to be true, that Mr. Robinson was probably guilty as charged. Support for the position taken by Mr. Peters and Mr. Blechingberg is found in the findings of guilt reached at the Provincial Court and upheld in the Supreme Court. That the B.C. Court of Appeal took a different position from the lower courts on the applicability of argument based on s.75 of the Wildlife Act as advanced by Mr. Robinson throughout this litigation does not, I find, adversely affect my conclusion that the defendants had reasonable and probable cause to charge Mr. Robinson.

[28] In *Nelles*, Lamer J. addressed the element of malice, stating at ¶45:

The required element of malice is for all intents, the equivalent of "improper purpose". It has according to Fleming, a "wider meaning than spite, ill-will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage". (See J.G. Fleming, *The Law of Torts* (5th ed. 1977) at p. 609)

[29] Although Mr. Robinson imputes malice on the part of Mr. Peters because of their apparently bad relationship over the years, there is no evidence of malice or a primary purpose other than carrying the law into effect on the part of the defendants: see *Griffith v. British Columbia* (Crown Counsel), 2000 BCSC 1395 at ¶28. Although Mr. Peters initiated the investigation after making certain observations of Mr. Robinson on November 3, 1997 I find he acted in good faith throughout and was careful to involve others in the decision making process, including his supervisor Mr. Crack, RCMP Cst. Gobeil and Mr. Blechingberg. Mr. Peters, as the lead investigator, gathered the information which led to the charges and, although the charges were subsequently dismissed, that does not necessarily imply in this case that the charges against Mr. Robinson were brought for an improper purpose.

[30] I conclude that Mr. Robinson has been unable to prove against the defendants either malice or a primary purpose other than that of carrying the law into effect.

[31] In conclusion, Mr. Robinson has failed to establish two of the four elements required to establish malicious prosecution and that his claim under this tort must be dismissed.

[32] The defendants will have judgment dismissing the plaintiff's claim.

[33] In the ordinary course, the defendants having succeeded in their claim would have their costs at scale 3. I did not hear submissions on costs and I direct the parties to arrange with the trial coordinator to arrange a convenient time to make submissions on the issue of costs.

"R.M.L. Blair, J."

The Honourable Mr. Justice R.M.L. Blair

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