

CANADA / JUDGMENT

Schmirler v. Police Complaint Commissioner

2001 BCCA 573

COURT

British Columbia Court of Appeal

DECIDED

3 October 2001

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Citation:

Schmirler v.

Police Complaint Commissioner

Date: 20011003

Docket: CA027533

2001 BCCA 573

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

CONSTABLE DAVID SCHMIRLER

APPELLANT

AND:

POLICE COMPLAINT COMMISSIONER

RESPONDENT

Before:

The Honourable Madam Justice Southin

The Honourable Madam Justice Huddart

The Honourable Madam Justice Levine

M. Kevin Woodall

Counsel for the Appellant

Richard C. C. Peck, Q.C. and

P. Barclay

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

18th and 19th June, 2001

Place and Date of Judgment:

Vancouver, British Columbia

3rd October, 2001

Written Reasons by:

The Honourable Madam Justice Southin

Concurred in by:

The Honourable Madam Justice Huddart

The Honourable Madam Justice Levine Reasons for Judgment of the Honourable Madam Justice Southin:

- [1] Today this Court is also delivering judgment in an appeal, *Schmirler v. Don Morrison*, Police Complaint Commissioner and The Honourable Peter J. Millward, Q.C., Adjudicator, Vancouver Registry CA028424. In that appeal, my colleagues have quashed the findings of the adjudicator on the ground, to put it in broad terms, that the proceedings before him were vitiated by a breach of the doctrine of natural justice.
- [2] Thus, it can be said that this appeal, which was taken on the merits, pursuant to s. 62 of the Police Act, R.S.B.C. 1996, c. 367, which was first enacted S.B.C. 1988, c. 53, is moot.
- [3] But it is open to this Court, when the interests of justice require it, to address an appeal which is moot. I consider the interests of justice do so require in this case, first, because the findings of the adjudicator leave a stain on the reputation of a peace officer and, secondly, because this appeal raises an important issue of the interpretation of the Police Firearm Regulation (Police Act), B.C. Reg. 203/98, enacted under the Police Act, *supra*.
- [4] The adjudicator, the Honourable Peter Millward, Q.C., found that, contrary to s. 4(1)(g) of the Code of Professional Conduct Regulation (Police Act, B.C. Reg. No. 205/98):

... police constable #263, David SCHMIRLER, on or about the 3rd day of JANUARY, 1999, at 2368 Center Street in the City of Abbotsford, in the province of British Columbia, discharged his firearm without reasonable grounds, and when unsafe to do so. Leave to appeal was given by Low J.A.

[5] These are the relevant statutory provisions:

4 (1) In this Code, "disciplinary default" means * * *

(g) improper use and care of firearms, ...

11 For the purposes of section 4(1)(g), a police officer commits the disciplinary default of improper use and care of firearms if the police officer uses or cares for firearms in a manner that is contrary to the standards set out in the Police Firearm Regulation.

[6] By the Police Firearm Regulation (Police Act), supra:

5 (1) A member of a police force must not draw a firearm in the performance of his or her duty unless the member has reasonable grounds for believing it necessary for

(a) protecting his or her life or the life of another person, or (b) apprehending or detaining a person whom the member believes to be dangerous. (2) A member of a police force must not discharge a firearm in the performance of his or her duty unless the member has reasonable grounds for believing it necessary for one or more of the following purposes: (a) defending his or her life or the life of another person; (b) effecting the apprehension of a person whom the member has reasonable grounds to believe is dangerous; (c) destroying a potentially dangerous animal or one that is so badly injured that humanity requires its release from further suffering; (d) giving an alarm or calling for assistance for an important purpose; (e) warning a person in order to gain control of a situation that the member reasonably believes may result, if allowed to continue, in death or serious bodily harm to any person when there is no reasonably foreseeable likelihood of injury or death to an innocent person resulting from the warning shot. (3) Before discharging a firearm, a member of a police force must be satisfied that assistance and a lesser means of force are not readily available or would not gain control over a dangerous situation.

[7] The complaint against the appellant arose from the execution on 3rd January, 1999, of a search warrant by the City of Abbotsford Police Department Emergency Response Team of which the appellant was a member. The warrant does not appear in the record but it was common ground at the hearing that it authorized a search for drugs and a firearm or firearms. No suggestion was made here that the entry to the premises was unlawful or that it was a breach of regulation for the appellant to have drawn his firearm, a pistol, before making entry.

- [8] The property being searched was occupied by Ronald Raber who was, as the saying is, "known to the police". Mr. Raber owned a pit bull. I do not understand it to have been in dispute either here or below that this dog showed itself at the critical time to be "potentially dangerous".
- [9] At the onset of the "raid", another member of the team, Constable Thomson, went up the front stairs of the house with the appellant behind him. When the appellant got to the top of the stairs, he saw Constable Thomson in the living room "with a large pit bull attacking his left upper arm". Immediately, the appellant shot the dog.
- [10] The appellant had been told before the raid that Mr. Raber had a pit bull which, during an earlier search on 26th November, 1998, had been "resistant" to pepper spray.
- [11] This was part of the appellant's evidence, no part of which, as I understand the learned adjudicator's reasons, did he find untruthful:

Q In your time as an ERT officer, have you taken -- or rather as a police officer, have you taken twenty-four or more different courses relating to ERT and firearms tactics? A Yes. Q During all of this training, have you been given any training in particular about the dangers that can be posed to a police officer by pit bull dogs? A Yes. In 1989, and then again in 1993, I attended an officer safety seminar. I believe the first one was two days in length, the second was three days in length, sponsored by a company called Caliber Press. During that time they had a component with respect to the dangers being encountered by -- by dogs in general and specifically the pit bull breed. Q During those seminars, were you shown any videos, training videos, to alert you to the dangers that pit bull dogs can pose to a tactical officer? A Yes, I was. Q Did you have that training in mind when you left the office on the 3rd of January to go to the Center Street residence? A Yes. and: Q Did you think that the pit bull was -- quoting from some legislation here -- did you think the pit bull was "potentially dangerous"? A It was more than potentially dangerous, it was dangerous when it was attacking Constable Thomson. In cross-examination: Q Is it fair to say then that you -- well perhaps you can say, what did you think was the risk associated with the existence of that dog in that residence on that day? A That the dog, one, is likely to be present but also that it could react in any number of ways. I didn't make any opinion whatsoever. I knew the dangers associated and the capabilities of an attacking pit bull for the reasons that have been described. I knew that this particular dog showed an aggressive tendency, but I was also aware that in some cases, even with that, a dog may choose another course of action. Q You never know what a dog is going to do; is that right? A That's a fair assessment, yes. Q You knew that the dog on November 26th, at least you had been told, that the dog had been resistant to pepper spray. And following two applications that emptied a large canister of pepper spray, the dog remained aggressive, correct? A Yes. Q That the pepper spray had not controlled the dog, correct? A Yes. Q All right. You had seen the video and read The Province newspaper? A Yes. Q And so you were aware that there was an aggressive pit bull in the residence that could not be controlled by pepper spray and you thought that -- what would have to be done to control that dog? A That would depend on what the dog did. * * * Q Sir, did it occur to you to use pepper spray? A No. Q Why not? A Because at that point the dog was physically attacking Constable Thomson. To

actually try and stop it and draw my pepper spray and apply it to the dog, to a dog that didn't react well to pepper spray before, was just inappropriate. And the dog needed to be incapacitated quickly and completely. Q It wasn't a matter of your not having time to reach your pepper spray? A I certainly had time. I wasn't prepared to use that time allowing the dog to continue to attack Constable Thomson. * * * Q You were asked whether deploying OC against the pit bull was an option. Are there any disadvantages to using OC in a room with fourteen children and a number of adults? A Residual OC contaminates an area, certainly would have contaminated a room that it would have been deployed in. It doesn't just affect the target that it's sprayed on. Q Does OC have a different effect on children than it has on adults? A It would have -- it could have a more intense effect. As well you'd have kind of the emotional factor to deal with on a child who may not have any understanding of what's going on.

[12] One can also, I think, assume that the appellant knew, as people do generally, that a pit bull is not by genetic disposition, i.e. breeding, of the same temperament as a basset hound or a miniature poodle.

[13] These are the learned adjudicator's reasons for finding the appellant guilty:

Constable Schmirler testified that as the team approached the residence he was under the impression that there were 2 or 3 children in the driveway, perhaps with an adult. When the team was less than 10 seconds from the front door, Schmirler noticed that there was no one outside the house in the driveway, and he said to the other members of the team, "No kids!" He said that he realized there was a strong possibility they were actually in the house. He was the second officer up the stairs behind Thomson, and followed 4 or 5 feet behind him. At the top of the stairs Schmirler looked left and saw Thomson with a "large pit bull" attacking his left upper arm. He was aware of another person just beyond Thomson. Schmirler decided to shoot the dog. The muzzle of his machine pistol was about 1 foot from the dog. He fired two shots within half a second. He had been in the house 5, 6 or 7 seconds when the shots were fired. He testified that his decision to shoot the dog occurred as he entered the living room, and the only other person of whom he was aware at that precise moment was the person located beyond Constable Thomson. The evidence shows that one of the rounds fired by Schmirler passed through the dog and the other struck it a glancing blow on the side of the body and one leg. After shooting the dog, the officer's attention turned to the rest of the room. After a few seconds it became apparent that there was a birthday party in progress. There were a large number of children and adults sitting in various locations in the room. He stated that the presence of the children and the large number of people in general influenced him to put his gun on safe. During the hearing, a good deal of examination and cross-examination was directed to the angle of the rifle when the shots were fired. Commission counsel argued that the evidence pointed to the necessity for the rifle to have been fired more or less parallel to the floor, or horizontally. Counsel for the Respondents urged me to accept their position that the weapon was pointed nearly vertically, or at least at 75 degrees from the horizontal. While Commission counsel's argument seems to me to more closely accord with the evidence, I am unable to form any clear conclusion on the matter. With respect to both points of view, the precise angle of the trajectory is not determinative of the issue. I hold

that to fire two shots from the machine pistol in close quarters in the living room, without first having viewed the premises for the presence of other persons and their location in the room, particularly in the belief that at least 3 children and a number of adult persons might well be there, was unsafe. In cross-examination, Constable Schmirler was asked, "Is that the primary danger that you're concerned about, that dissuades -- that makes it preposterous that you could make such an entry when a birthday party was in progress, that a child might get shot?" to which he replied, "That would be the primary and predominant one, yes." Clearly, there were other courses of action open to Constable Schmirler. He could have elected to adopt one or more of a number of alternative steps to deal with the dog. While the dog was attacking his fellow officer it was apparently biting his arm, which was hardly a life-threatening attack. To instantly fire two shots toward the dog without considering alternatives or comprehending the surroundings was to act without reasonable grounds. I find Constable Schmirler to have committed the discipline default of which he is accused. The Police Firearm Regulation provides:

5(3) Before discharging a firearm, a member of a police force must be satisfied that assistance and a lesser means of force are not readily available or would not gain control over a dangerous situation. On the evidence, Constable Schmirler made the decision to shoot the dog immediately he saw it hanging from Thomson's arm. No consideration was given to "assistance and lesser means of force" or their availability.

[14] In his factum, the appellant alleges these errors on the part of the learned adjudicator:

I: The Adjudicator erred in law by applying a test unknown to law; that is, that a police officer is not justified in using a firearm to destroy an animal unless the animal's attack is life threatening. II: The Adjudicator erred in law, and lost jurisdiction, by making a decision that was patently unreasonable; that is, that Cst. Schmirler failed to consider or adopt alternatives to the use of his firearm. III: The Adjudicator erred in law by failing to apply the principle that a police officer cannot be found guilty of misconduct where he conducts himself in accordance with the manner in which he was trained. IV: The Adjudicator erred in law by imposing a penalty that was unreasonable, and that failed to adhere to the principles enunciated in the Police Discipline Code. [15] During the course of the hearing, counsel also argued, without objection, what might be said to be a fifth ground: that the learned adjudicator, when considering Firearm Regulation 5(2)(c), applied an objective test to the conduct of the appellant when the standard imposed by that regulation is subjective.

[16] As I read subsections (2) and (3) of s. 5 of the Firearm Regulation, the words can be combined to read this way:

A member ... must not discharge a firearm ... unless:

- (1) the member has reasonable grounds for believing it necessary for: ...
- (c) destroying a potentially dangerous animal ...; (2) the member is satisfied that assistance and a lesser means of force are not readily available or would not gain control over a dangerous situation.

- [17] Thus analyzed, these provisions bear a close resemblance to s. 32 of the Criminal Code (the use of force to suppress a riot) which I addressed in *Berntt v. City of Vancouver* (1999), 63 B.C.L.R. (3d) 233.
- [18] One must first ask whether the phrase "reasonable grounds for believing" means the same as the Criminal Code formula, "believes on reasonable grounds". Is it open to the construction that the condition is met if there are objectively reasonable grounds even if the member does not believe his act is necessary for one of the purposes described in s. 5(2)? In my opinion, such a construction is at odds with the thrust of the Regulation. Therefore, I construe the words "reasonable grounds for believing" to mean the same as "believes on reasonable grounds."
- [19] The next question is what does "must be satisfied" mean? As this is not a form of words hallowed by usage, one cannot obtain assistance from cases on the Criminal Code sections on the use of force, on arrest, or warrants to search. The Shorter Oxford English Dictionary defines the word "satisfy", "With ref. to feelings or needs", in part thus:
4. To furnish with sufficient proof or information; to set free from doubt or uncertainty; to convince 1520. 5. To answer sufficiently (an objection, question); to fulfil or comply with (a request); to solve (a doubt, difficulty) 1581. [20] In attempting to put flesh on these words, one must not overlook that sometimes a peace officer is confronted with an unexpected danger to which he must respond and in which he has little if any time to think of alternatives. This unfortunate obligation of peace officers must have been known to the draftsman of this Regulation.
- [21] That being so, I infer that the draftsman did not by these words expect a peace officer confronted with a dangerous dog to sit down and write out for himself an analysis of the alternatives and the pros and cons of the alternatives.
- [22] Without attempting to give a definitive meaning to the word "satisfy" in this context, I construe it as "hold the belief, a belief which is reasonable taking all the circumstances into account."
- [23] Putting the matter thus, I approach the issues as I did the issue in *Berntt*, supra, at p. 238. In *Berntt*, the plaintiff did not dispute that he was injured during a "riot". Here, as I have said, the Police Complaint Commissioner does not dispute that this dog, at the time it was shot, was a "potentially dangerous animal". Thus, in my opinion, the questions which ought to have been asked here were these:
- (1) Did the appellant believe that discharging his firearm was necessary for destroying a potentially dangerous animal? (2) Did he believe that assistance and a lesser means of force were not readily available or would not gain control over a dangerous situation? (3) If the answer to the first question is yes, did the appellant have reasonable grounds for that belief? (4) If the answer to the second question is yes, was his belief reasonable taking all the circumstances into account? [24] There is nothing in the learned adjudicator's description of

the events or in the evidence that would justify a finding that the answer to either of the first two questions is "no".

[25] As to the third and fourth questions, a passage from the judgment of Lord Atkin in *Liversidge v. Anderson*, [1941] 3 All E.R. 338 (H.L.) at 357-358, is apposite:

A judge's decision is not substituted for the constable's on the question of unlawful arrest, nor does he sit on appeal from the constable. The judge has to bear in mind that the constable's authority is limited, and that he can arrest only on reasonable suspicion, and the judge has the duty to say whether the conditions of the power are fulfilled. If there are reasonable grounds, the judge has no further duty of deciding whether he would have formed the same belief, any more than, if there is reasonable evidence to go to a jury, the judge is concerned with whether he would have come to the same verdict. [26] Thus, the question under (3) and (4) is not whether the appellant was wrong but whether he lacked reason for his belief both that the discharge of the firearm was necessary and that "assistance and a lesser means of force" would not avail in the situation with which he was confronted, that is to say, his fellow officer being attacked by a powerful dog. To put it another way, the question is not whether in the learned adjudicator's opinion the appellant was wrong to shoot the dog but whether his doing so was unreasonable.

[27] In my opinion, the learned adjudicator asked himself the wrong questions. To ask the wrong questions is to commit an error in law.

[28] Thus, I would allow the appeal.

[29] If the findings of the adjudicator were not already quashed, the final issue would be whether this Court should dismiss the complaint or remit it to the adjudicator to decide it according to law.

[30] It is sufficient to say that I would not remit the matter because to find this peace officer guilty of the alleged disciplinary default was unreasonable.

"THE HONOURABLE MADAM JUSTICE SOUTHIN"

I AGREE:

"THE HONOURABLE MADAM JUSTICE HUDDART"

I AGREE:

"THE HONOURABLE MADAM JUSTICE LEVINE"

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