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R. v. Fowlie

Between
Her Majesty the Queen, and
Neil Fowlie

[1998] N.B.J. No. 539

[1998] A.N.-B. no 539

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41 W.C.B. (2d) 257

No. N/M/18/98

New Brunswick Court of Queen's Bench
Trial Division - Judicial District of Miramichi

Riordon J.

Oral judgment: October 20, 1998.

(20 pp.)

Criminal law -- Sentencing -- Considerations in imposing sentence -- Deterrence -- Sentence, particular offences -- Killing or injuring cattle.

This was a sentencing hearing for Fowlie who pleaded guilty to willfully and without lawful excuse killing his horse. Fowlie was observed dragging his horse behind his truck. Fowlie stated that he was attempting to train the colt that was difficult to handle. He was also observed hitting the colt with a piece of wood. The matter was reported to an animal shelter and the police. The police discovered the dead colt on Fowlie's property with a rope around her neck. The veterinarian discovered that the animal had been beaten and showed signs of severe trauma around the neck. No cause of death could be established.

HELD: Fowlie was sentenced to 90 days imprisonment on an intermittent basis. The sentence would be served on weekends to allow Fowlie to take care of his farm. The killing of the horse was a cruel and despicable act. Considering the importance of general deterrence, it was necessary to impose a term of imprisonment. In addition, Fowlie was to be on probation for two years and fined \$1,000. During the probation period, Fowlie was to cooperate with the SPCA to ensure the well being of the animals in his care.

Statutes, Regulations and Rules Cited:

Criminal Code, s. 444(a).

Counsel:

John Walsh, for Her Majesty the Queen.

Michael Noel, for the accused.

SENTENCING

1 RIORDON J. (orally):-- On the 26th of June of this year Mr. Neil Fowlie entered a plea of guilty to wilfully and without lawful excuse killing his horse, contrary to Section 444(a) of the Criminal Code of Canada. The appropriate sentence must now be determined.

2 The offence occurred on July the 6th, 1997 at or near Little Branch, in Northumberland County. The horse, a Belgian colt, owned by Mr. Fowlie, approximately two years of age, died as a result of the acts and actions of Mr. Fowlie on that particular day. On that day, at around 1:00 o'clock in the afternoon, he was observed on a chipsealed public road driving a half-ton truck down the road with a wagon tied behind it and the horse tied behind the wagon. It is my understanding the horse was tied with a rope around its neck and the horse was being pulled in this fashion by Mr. Fowlie who was operating his half-ton pickup truck.

3 It was brought to my attention by Defence counsel that Mr. Fowlie had purchased this horse, a colt, in the spring of 1997 at a cost of \$1200.00, that the colt was high strung and hard to handle. July the 6th, the day of the incident, was the first day in which Mr. Fowlie attempted to train or break the animal. It is pointed out that this particular process had been used by Mr. Fowlie in the past to break in a young horse. On this occasion there was little or no cooperation from the horse and on this day Mr. Fowlie had consumed some five or six beer.

4 In any event, he was observed in his half-ton truck with the wagon behind and the horse behind the wagon being hauled by the neck by a rope, resisting and continuing to resist for a considerable distance. A distance of 200 feet was mentioned by one of the counsel. On one occasion, he was observed stopping his vehicle and backing up into the horse, hitting the horse in the process with, I presume, the wagon, and then it was noted that he persisted in trying to pull the horse in this fashion with the vehicle, and the horse continuing to resist. It is mentioned that he did stop and hit the horse with a piece of wood on the back of the horse, and it was noticed that the wood broke while the horse was being hit. This piece of wood was described as a piece of two by four. There is in evidence a piece of board, looks like a one by two to me, I did not measure it, it appears to be a very brittle piece of board and broken into pieces. These pieces of broken board were retrieved by police at the scene. Any description of the horse being hit by a two by four would appear to be perhaps possibly erroneous. The piece of wood that is in evidence is not a two by four.

5 After he was observed hitting the horse with this piece of wood, it was mentioned that he returned to his vehicle and accelerated with the horse behind. It would appear that the horse fell to the ground and was dragged possibly on the chipseal and possibly in the ditch. The chipseal highway runs for a short distance and after it ends, a dirt road continues. Mr. Fowlie continued down this dirt road with the horse in tow and in this location he was no longer visible to the person who had noticed what was going on. He was next seen coming back from the area of the dirt road, which leads along his property, I believe, with his truck and with the wagon and with no horse. This was around 2:30 in the afternoon. So the incident took place apparently between 1:00 o'clock and 2:30 in the afternoon of July the 6th.

6 The matter was reported to officials including the Hope Animal Shelter and police. The matter was investigated.

The horse was found in the woods on Mr. Fowlie's property off the area from the dirt road, dead. Several pictures have been introduced in evidence showing where the incident occurred and where the horse was found by police later that day. The pictures show a rope around the neck of the horse. The subsequent investigation included an examination of the dead animal by a veterinarian. This examination of the dead animal was done shortly after, and later, the carcass was sent to have pathology work done at the Department of Agriculture by a veterinary pathologist.

7 The pictures do show patches of skin of the animal as having been removed which I understand were removed by the veterinarian to be able to examine the tissue below the skin and the hair of the horse. The pictures show blood having been puddled in the area where possible injuries were inflicted to the horse.

8 The examining veterinarian completed a detailed report as did the provincial veterinary pathologist. The veterinary, Dr. Elizabeth Hale, did a preliminary examination at the site of this female horse within a couple of hours when she thought the death of the horse occurred. She noted that the horse was lying on its right side with head and limbs extended, a rope around its neck and rigor mortis had already commenced. She says the carcass did not appear to be underconditioned from what she observed. She noticed that there was hair missing from the shoulder, over the ribs and over the hip and said that the hair loss pattern appeared to be due to friction or trauma. She described a three centimetre by two centimetre tear in the skin on the lower-left flank, and some blood and dirt on the edge of the lesions. This is where she removed the skin to examine the tissue below, and she saw subcutaneous haemorrhage below the skin. She noticed hair loss on the neck the same width as the rope tied around the animal's neck. She pointed out that hair was missing on the right side, on the right shoulder, over the ribs, over the hip and swelling was noted.

9 It was her conclusion that haemorrhage and edema can occur while the heart is pumping and thus, the lesions noticed on the left flank and on the upper left and right side of the neck occurred ante mortem or before death and that physical trauma is a reasonable explanation for such lesions. The areas of hair loss on the neck corresponded to the diameter of the rope tied around the neck. The severe haemorrhage and edema, bruising, under and cranial to these marks, make strangulation to the neck by the rope a reasonable conclusion. Given the size and strength of a horse's neck, considerable effort was required to achieve this. She goes on to state only direct physical trauma could cause the abrasions noted on the head. The lesions on the left side where exposed, bone is scraped and splintered, reveal that the tissues met a firm surface with much force. The abrasions were filled with dirt; mud was under the torn skin as well as on the surface. These findings were taken in conjunction with the hair loss pattern on the body. The lesions noted on the neck suggest that the horse was dragged over an earthen surface by the rope tied around the neck. The animal's weight could certainly provide enough force against the rope in these circumstances to cause the lesions noted on the neck.

10 The lesions noted on the left flank, tearing of the skin, and subcutaneous haemorrhage and edema, were all caused by direct physical trauma.

11 Now I do appreciate that possibly some of these injuries could have been caused after the death of the horse, when the horse would probably have been dragged into this area of its final resting place.

12 The provincial veterinary pathologist reviews the history of his findings and his final comment, his or her final comments are as follows:

"The multiple areas of hemorrhage over the head, back and thorax were definitely consistent with blunt trauma, such as would have occurred as a result of the animal being beaten. The areas of hemorrhage and edema in the throat region were unlikely to have been caused by beating but certainly could be consistent with strangulation. There was no doubt that the hemorrhages at all sites occurred prior to the death of the animal. Although the definitive cause of death could not be established from a careful post mortem examination of the horse, it must be presumed that the animal died as a result of the traumatic injuries in view of the history that had been provided and since no other cause of death could be found. There was no evidence of any fractures to the skull, ribs or other bones. There was no evidence of any significant infectious

disease process in this animal."

13 As I read the comments of the veterinary pathologist, a definitive cause of death could not be established from the post mortem examination of the horse, but it is presumed that the horse died as a result of traumatic injuries in view of the history that has been provided. In any event, no other cause of death could be found.

14 The pictures of the dead animal are indeed quite revolting and I do appreciate that some of the skin had been removed from the animal by the veterinarian to examine the areas of injury in detail. This removal of skin from the horse makes the pictures much more unpleasant.

15 It appears that Mr. Fowlie was attempting to either, I think the term that was used was "break the horse" or "train the horse" when the animal was killed. I am not sure of the methods that are normally used. I have no evidence before me as to what method is normally used to do this. The method used by Mr. Fowlie would appear to be certainly a procedure that is somewhat abnormal and certainly appears to have gotten completely out of hand. If a person would have exercised care, reasonable care, certainly this would have ceased long before the horse would have been injured. There is no excuse for beating the horse or treating it in this fashion.

16 Mr. Neil Russell Fowlie is 55 years of age. He is a resident of Black River Bridge. He has a Grade 10 education, is married, has been in a long-term marriage, and is the father of four children, three of whom still reside with him at home. He is described by his wife as a good husband, good father, and a considerate grandfather. I believe they have been married for some 29 years. He is a first offender for all intents and purposes; he did have a breathalyzer offence approximately ten years ago. Mr. Fowlie has a good employment record, he has worked for 27 years with the provincial Department of Transportation. He is described by his supervisors as being a good and loyal employee, a reliable employee. In addition to working at the Department of Transportation, he has done farming in what I would consider to be at a small scale level and has done some wood cutting. He, at the present time, does have two other horses on his farm, draft horses and at least three cattle which he cares for. These animals have been inspected by officials and are described as being in a good state of health. There does not appear to be any neglect of these animals, none that I am aware of in any event.

17 It is indicated in the pre-sentence report that Mr. Fowlie is concerned that as a result of this crime, and as a result of sentencing, he may not be able to keep his animals in the future nor care for them as a result of his conviction if incarcerated. He indicated to the Probation Officer that he did not intend to hurt the horse, but he may have expected too much from the horse in the way of performance. I have some difficulty in accepting that a person could not believe that this type of activity could not hurt this animal in the fashion in which this was being carried out, being dragged behind a half-ton truck.

18 I have listened to the representations of counsel. Mr. Walsh, the Crown Prosecutor, has reviewed the factual background and has pointed out that the public has been outraged by this action as reported in the media and justifiably so. He points out that this was a defenceless animal, killed in an act of rage which he described as an atrocious act, and he asks that in imposing sentence, the Court consider the principles of denunciation and retribution and the blameworthiness of the offender. He asks that other principles of sentence, including deterrence and protection of society, be considered keeping in mind, of course, rehabilitation. He argues that this is not an appropriate case for a conditional sentence and, even though Mr. Fowlie is a first offender and described as a good family man. He argues that this case is one in which one should expect incarceration, in addition, he asks that consideration be given for a fine and probation.

19 Defence counsel has reviewed the principles of sentencing and emphasized Mr. Fowlie's background and the fact that he is a first offender, a good employee and a good family provider. He reviewed some of the circumstances of the incident and points out that Mr. Fowlie did not intend to kill the animal but that he was reckless. He points out that as a result, he is extremely remorseful, he has been ostracized by friends and neighbours who have been outraged by this act that was committed on this animal and that he is a first offender. He also points out that officials checked all his other

animals and they were found to be in satisfactory condition. He submits that if a period of detention is imposed, that the Court consider a conditional sentence in the circumstances of this particular matter.

20 This of course is a very serious matter, there is no excuse that I can accept for the actions that were committed that day by Mr. Fowlie. He should have certainly known better. This was a defenceless animal. We all know throughout history how highly valued a horse has been in the history of mankind. To commit this type of brutal act on a defenceless horse is totally unjustified.

21 The Criminal Code does provide that for such an offence the Court can impose imprisonment of up to five years. That, I think, demonstrates how serious the Parliament of Canada considers this type of action in wilfully killing or maiming cattle, which includes a horse. There have not been many authorities on this type of offence. Counsel have referred to some cases, I did some research as I mentioned in arguments of counsel.

22 I did find a recent decision in Alberta, the case of *The Queen v. Zeller* [1998] A.J. No. 351 and in that particular case the court, the Provincial Court in Alberta, was faced with a situation in which the accused out of spite after an argument with his wife, killed her Dalmatian dog. He hit the dog with a shovel, killing the dog and that was a summary conviction offence not the indictable infraction that I have to address. The court in that case ordered a period of incarceration for 60 days and probation. The judge did review several cases which I think are extremely helpful in addressing the situation. He apparently agreed with counsel, in that at the opening sentence of his discussion on the legal authorities concerning cruelty to animals, he stated and I quote:

"There are unfortunately very few authorities to rely upon in relation to this charge. I have, however had some success in obtaining a few cases where cruelty to animals has been considered and I have reviewed the sentences pronounced in these prior judicial decisions."

And Judge Van de Veen does refer to several cases. One of the cases is *R. v. Michelin*, where the accused killed his border collie and was sentenced to 20 days imprisonment. He quoted from Judge Cioni who remarked:

"...this is an area of criminal law in which there is a "trust" dimension. Mankind accepts dominion over lower forms of life and therefore has a corresponding responsibility to them. Part of the custodianship of animals is not to kill them unlawfully."

Judge Cioni stated:

"...that there ought to be a strong message sent into the community that if persons choose to manhandle animals they will run up against the Criminal Code sections intended to protect animals from human beings."

23 He also referred to the Ontario Provincial Court decision of *R. v. Jones*, [1997] O.J. No. 1288, in which as a result of acts of cruelty, the leg of a small dog was broken by what was described as "rough housing the dog". The people in that case were involved in an activity described as determining how far a dog can fly. As they threw the dog through the air, the dog landed and hit a coffee table and was injured and the dog was dragged by the throat and thrown around. The court remarked that this activity was mean spirited cruelty without reason and imposed a sentence of 45 days of imprisonment and 12 months probation. The accused in that case had no prior record, had come from a good home and was a youthful offender. The court considered every possible alternative to jail.

24 Another case referred to was *The Queen v. Karolev*, [1992] Y.J. No. 186, of the Yukon Supreme Court, a case in which the accused pled guilty to two counts of causing unnecessary pain to animals. That is a case in which the family had been terrorized by loose dogs in the neighbourhood. They made all possible efforts to stop this and to rectify the problem they decided to place rubber bands around the testicles of the neighbour's dogs resulting in of course injury and infection to the dogs. After considering all the facts of that case, the court granted a conditional discharge because they considered it was an act of desperation following long and severe provocation, and that the children of the accused had

been bitten and harmed by the dogs of this neighbour.

25 There is also the case of *R. v. Randell*, [1989] A.J. No. 280, another Alberta case, where a person hit a dog with a hockey stick and he was sentenced to a fine of \$1,000.00.

26 In another case, that of *R. v. Paul*, [1997] B.C.J. No. 808, where a person in British Columbia had stabbed a cat a number of times, and then crushed its skull with his boot, the court imposed a sentence of one day in jail.

27 Reference is made to the decision of *R. v. Menard* (1978), 43 C.C.C. (2d) 458, where the issue of euthanasia of animals as it relates to cases of cruelty to animals. The Quebec Court of Appeal had this to say, and I quote:

"It is sometimes necessary to make an animal suffer for its own good, or again to save a human life. Certain experiments, alas, inevitably very painful for the animal, prove necessary to discover or test remedies that will save a great number of human lives. Section 420(1)(a) does not prohibit these incidents, but at the same time condemns the person who for example will leave a dog or a horse without water and without food for a few days through carelessness or negligence or for reasons of profit, or again in order to avoid the costs of a temporary board and lodging, notwithstanding that these animals would suffer much less than certain animals used as guinea pigs. Everything is therefore, according to the circumstances, the quantification of the suffering, being only one of the factors in appreciation of what is in the final analysis, necessary."

28 Judge Van de Veen refers to another case in the Alberta courts, that of *R. v. Guadin*, decided in October of 1990. The court in this case had to deal with an accused who had deliberately spread a bran-like substance with strychnine poisoning in it around his yard and a nearby park to rid his southwest neighbourhood of dogs and squirrels. Six dogs were killed by the poison, the accused was sentenced to 60 days in jail.

29 I think that in this particular case the killing of this horse in this fashion can be described quite accurately as a very cruel and despicable act. Such actions, in my view, are totally improper, such conduct cannot be condoned. This, without question, was a serious act of abuse against this animal. The accused, I think, should have known better considering his experience and background and involvement with farm animals he should have known much better.

30 I believe that all of the principles of sentencing have to be taken into consideration, and that in the circumstances of this offence, a denunciatory sentence is called for. I do not think that a conditional sentence would be proper or one that should be imposed when one considers that general deterrence is a factor that must be taken into consideration. I think that I must, of course, consider specific and general deterrence as being important in this matter before the Court. I, of course, must take into consideration rehabilitation and I do not think there is any risk of Mr. Fowlie to reoffend.

31 In all of these circumstances, it is my decision that the appropriate sentence would be one of a term of imprisonment of 90 days of detention. In view of the fact that Mr. Fowlie is employed, I believe that consideration should be given to allowing this period of detention to be served on an intermittent basis so as not to impact too severely on his employment.

32 In addition, I will impose a fine of \$1,000.00 and place the accused on probation for a period of two years.

33 During the period of probation, the terms that I direct to be imposed are as follows: he will remain under the supervision of a probation officer and will report to the probation officer at such time and place and in such manner as the probation officer directs; he will immediately advise his probation officer of any change of address, occupation or place of employment; he will not leave the Province of New Brunswick without the prior written approval of the probation officer; he will attend for assessment and complete to the satisfaction of the probation officer treatment or counselling as recommended for psychological counselling and/or anger management.

34 During the period of probation, he will at all times cooperate fully with officials of the S.P.C.A. or their

representative, including any animal shelter representatives authorized by S.P.C.A., to allow them to inspect and monitor the condition of animals in his care or possession. He will attend one educational seminar such as might be available and reasonable on the subject of cruelty to animals at his expense. This is to be coordinated between the probation officer and the officials of S.P.C.A. or alternatively review materials on the subject of cruelty to animals that might be available and provided by the S.P.C.A., all to be coordinated by the probation officer.

35 I direct that the probation officer monitor efforts to have the accused attend counselling and review materials on the subject of cruelty to animals in order to facilitate and complete the probation in an efficient fashion.

36 In the event of any breach of probation, the probation officer will forthwith have the accused brought back before the Court to be dealt with.

37 In view of the fact that Mr. Fowlie does have other animals on his farm, I am not making any prohibition in regard to care and custody of animals. I trust that the provision that I have made with respect to monitoring and inspection by officials of the S.P.C.A. will ensure the safety of the other animals that are in his care and under his control.

38 That concludes the matter.

39 THE COURT: It was brought to my attention that perhaps counsel may want - require clarification on service of the -

40 MR. WALSH: I raised -

41 MR. NOEL: Yes.

42 THE COURT: Intermittent sentence.

43 MR. WALSH: I raised it just only so that everyone is clear as to - as to the terms of the intermittent sentence, that's all, My Lord.

44 MR. NOEL: May I address the Court on that matter?

45 THE COURT: Yes, yes, certainly.

46 MR. NOEL: In other instances of, of intermittent time most of my experience, again in Provincial Court, the Court normally allows - around 7:00 p.m. to allow the person to return home from work and return to, to - go to incarceration. So I'm asking this Court to consider having Mr. Fowlie report to the jail at 7:00 p.m. every Friday. As far as release, Provincial Court, from my experience, normally order release between - sometime on Sunday mornings.

47 Now I'm asking the Court, in light of the fact that we - Mr. Fowlie has been acknowledged as still having animals and caring for animals, that the Court consider not changing that, let's say perhaps modifying it to Sunday evening and Mr. Fowlie will, will - obviously when he gets home Sunday have to - have to tend to, to them. So I'm asking the Court not to deviate from what is my experience is normally imposed, that is, Friday evening to Sunday morning period of incarceration. Thank you.

48 THE COURT: Mr. Walsh.

49 MR. WALSH: I'm not familiar with Friday but I don't concern myself so much with those kinds of dispositions, that I'm not familiar with when it is they release them from the provincial jail.

50 THE COURT: But wouldn't that be up to the -

51 MR. WALSH: I would've thought that would be the jailer.

52 THE COURT: Report by 7:00 p.m. and -

53 MR. WALSH: And -

54 THE COURT: And be released by the official in charge of the detention centre.

55 MR. NOEL: On Sunday.

56 THE COURT: On Sunday.

57 MR. NOEL: Yes, that - that's fine.

58 THE COURT: Do you have a problem with that, Mr. Walsh?

59 MR. WALSH: No, My Lord.

60 THE COURT: Therefore he would be required to report to the detention centre, I presume it's in Moncton, by 7:00 o'clock on Friday and whatever the practice is that is normally carried out that this be done in this instance. That is, that Mr. Fowlie be treated the same as anyone else.

61 MR. NOEL: Thank you.

62 CONSTABLE: Please stand.

RIORDON J.

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