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R. v. Amorim

Between
Regina, and
Manuel Amorim

[1994] O.J. No. 2824

26 W.C.B. (2d) 1

Ontario Court of Justice - Provincial Division
Toronto, Ontario

Silverman Prov. J.

Heard: September 20 and November 19, 1993.
Written submissions: August 31, 1994.
Judgment: December 5, 1994.

(8 pp.)

Criminal law -- Wilful acts respecting property -- Cruelty to animals -- Causing unnecessary pain and suffering -- Elements of the offence -- Evidence and proof.

The accused was charged with wilfully causing unnecessary suffering to a dog. He was the owner of a pet dog, which he normally kept chained in his backyard. The dog was not fed or given water, except at irregular times. It was leashed to a short strong, heavy metal chain, and, on occasion, was seen to be muzzled. The dog was not walked regularly and there were faeces in and about the place where it was chained. It barked constantly and the barking was distressful.

HELD: Accused was guilty. Considering all of the circumstances, the accused did wilfully inflict suffering upon the dog which was not inevitable.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 446(1)(a), 446(2), 446(3).

P. Metzler, for the crown.
J. Schroeder, for the accused.

1 **SILVERMAN PROV. J.**:-- The accused is charged that he did wilfully cause unnecessary suffering to a dog (ss. 446(1)(a) Criminal Code).

Criminal Code R.S.C. 1985 c.C46

2 Section 446(2) makes this a summary conviction offence, and subsection (3) states:

> (3) For the purposes of proceedings under paragraph (1)(a) or (b), evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it pain, suffering, damage or injury is, in the absence of any evidence to the contrary, proof that the pain, suffering, damage or injury was caused or was permitted to be caused wilfully or was caused by willing neglect, as the case may be.

EVIDENCE

3 Facts: The accused was the owner of a pet pup Sheba, a Dobermann Pinscher, which he kept chained in the backyard. It had a dog house; was on a chain; and could be found on a concrete stoop; and there was a dish for food in this backyard.

4 Chain: there was some dispute as to the length of the chain, varying from two feet to twelve feet; but the weight of the evidence was that the chain was between four and five feet.

5 There was a dish for food nearby, but it appears occasionally to have been filled with spaghetti-like food.

6 There were collections of piles of faeces near and around where the dog was chained.

7 The neighbours complained about the excessive barking of the dog, day and night, which they found to be abnormal in that it was howling, whimpering, whining, crying; hysterical, painful, plaintive, agitated and distress-like, and on occasion the dog was seen to be muzzled.

8 As a result of the neighbours' complaints, they obtained a video machine from the Humane Society and took pictures which were shown in court.

9 In the end, the Humane Society with the aid of the police seized the dog and took Sheba away from the accused.

10 The defence evidence was that the dog barked as all dogs do; was walked frequently; was properly fed and had water (there was evidence by Crown witnesses of a lack of water).

Findings

11 1. The concern of the neighbours for this young dog was objective, honest, genuine, sincere and real.

12 2. The evidence of the defence witnesses, a relative and a good friend of the accused and his family, was clearly biased in favour of the accused, and was not believable; nor does it constitute evidence to the contrary as specified in ss. 446(3) of the Criminal Code.

13 3. Looking at the totality of the credible evidence, this young dog barked constantly; the barking was not normal in that it was hysterical, distressful, whining, whimpering, crying, agitated, painful, plaintive, and howling.

14 4. The dog was not fed or given water, except at irregular times.

15 5. The dog was leashed to a short strong, heavy metal chain of about four to five feet, and, on occasion, was seen to be muzzled.

16 6. The dog was not walked regularly.

17 7. There were faeces in and about the place where the dog was chained.

18 8. The Crown witnesses were intelligent, and their capacity to remember and their general integrity was impeccable and unimpeached; and, moreover, they were honestly endeavouring to tell the truth; they were sincere, frank, and unbiased. None of that description can be applied to the defence witnesses, who, as previously noted (see No. 2 above) were clearly biased in favour of the accused: their evidence was not reasonably true, nor was it true, especially where it differed from that of the Crown witnesses.

LAW

19 1. On credibility, and the need to look at the totality of the credible evidence, see: White v. The King (1947) 89 C.C.C. 148, at 151 (S.C.C., per Estey, J.); R. v. RW (or WD) [1991] 1 S.C.R. 742, (1992) 13 C.R. (4th) 257 (S.C.C., per McLachlin, J.); R. v. Morin (1988) 66 C.R. (3d) 1 (S.C.C.); R. v. Morin (1992) 76 C.C.C. (3d) 193, 16 C.R. (4th) 291, 142 N.R. 141 (S.C.C., per Sopinka, J.).

20 2. As ss. 446(1)(a) speaks of "unnecessary suffering", a distillation of the meanings of these words from various dictionaries is: unnecessary" - that which is not needed or necessary, superfluous, not essential, etc.; "suffering" - to undergo, suffer, endure pain or distress etc.: see Chambers Maxi Paperback Dictionary 707, 1090, 1194 ffl. & R. Chambers Ltd., Edinburgh 1992); The Penguin Concise English Dictionary 494, 794, 724 (Bloomsbury Books, London (1991); Cassell Concise English Dictionary 891, 1328-9, 1441 (Cassell, London, (1993); Collins Concise Dictionary Plus 858, 1299, 1424 (Collins, London and Glasgow 1989); The Random House Dictionary (softcover) 586, 870, 950 (Random House, New York 1991); The Pocket Oxford Dictionary of Current English 594, 912, 1005 (Clarendon Press, Oxford 1992).

21 3. Although the legislation was somewhat different (ss. 402(1) (a) Criminal Code - "wilfully cause unnecessary pain and suffering"), the reasoning in Regina v. Menard (1978) 43 C.C.C. (2d) 458 (Que. C.A., per Lamer, J.A.) is applicable. Lamer, J.A. referred to Rex v. Linder (1950) 97 C.C.C. 174, 10 C.R. 44, [1950] 1 W.W.R. 1035 for the meanings of the words abused (as used in the Criminal Code in that case) and "unnecessary".

22 4. In a closely reasoned judgment Lamer, J.A. in Menard (at page 464 C.C.C.) said

> "the quantification of the suffering... [is] only one of the factors in the appreciation of what is, in the final analysis, necessary."

He concluded (id. at pages 465-6):

> Thus men, by the rule of ss. 402(1)(a) [the then applicable Criminal Code section], do not renounce the right given to them by their position as supreme creatures to put animals at their service to satisfy their needs, but impose on themselves a rule of civilization by which they renounce, condemn and repress all infliction of pain, suffering or injury on animals which, while taking place in the pursuit of a legitimate purpose, is not justified by the choice of means employed without necessity does not mean that man, when a thing is susceptible of causing pain to an animal, must abstain unless it be necessary, but means that man in the pursuit of his purposes as a superior being, in the pursuit of his well-being, is obliged not to inflict on animals pain, suffering or injury which is not inevitable taking into account the purpose sought and the circumstances of the particular case. In effect, even if it not be necessary for man to eat meat and if he could abstain from doing so, as many in fact do, it is the privilege of man to eat it.
>
> Considered in terms of the purpose sought the expression "without necessity" must be interpreted

> taking into account the privileged position which man occupies in nature.
>
> Considered in terms of the means by which one seeks the purpose which is justified, the expression "without necessity" takes into consideration all the circumstances of the particular case including first the purpose itself, the social priorities, the means available and their accessibility, etc. One does not kill a steer in the same way that one lulls a pig. One cannot devote to the euthanasia of animals large sum of money without taking into account social priorities. Suffering which one may reasonably avoid for an animal is not necessary. In my opinion, in 1953-54 the legislator defined "cruelty" for us as being from that time forward the act of causing (in the case in issue), to an animal an injury, pain or suffering that could have been reasonably avoided for it taking into account the purpose and the means employed.

23 5. As for the phrase "in the absence of any evidence to the contrary" in section 446(3) of the Code, see, for example, in a different context (and see 2588(1)(d) of the Code which now does not contain the word "any"), R. v. Proudlock (1978) 43 C.C.C. (2d) 321, 5 C.R. (3d) 21, 91 D.L.R. (3d) 449 (S.C.C.). In the 1995 edition of Martin's Annual Criminal Code (Canada Law Book, Aurora, Ontario) at page CC/533, the following appears:

> R. v. Proudlock (1978), 43 C.C.C. (2d) 321, 5 C.R. (3d) 21, 91 D.L.R. (3d) 449 (S.C.C.). [Note: Since this decision the Criminal Code has been amended to delete the word "any" from the phrase "in the absence of any evidence to the contrary". However, the majority judgment in R. v. Proudlock indicates that there is no basis for a distinction depending on the presence of the word "any"; the phrases "evidence to the contrary" and "any evidence to the contrary" both being the converse of "no evidence to the contrary".]

24 Thus evidence "which is rejected or disbelieved is not 'evidence to the contrary": R. v. Nolet (Charette) (1980) 4 M.V.R. 265 at 269 (Ont. C.A., per Martin, J.A.). In the instant case, therefore, there is an absence of any evidence to the contrary.

CONCLUSION

25 Applying the aforesaid law to the facts; ad applying section 446(3) of the Code; and considering the totality of the credible evidence; and considering that the dog was a young pup who in the circumstances was at best a pet, and hardly capable at the time of being guard dog; and considering all of the circumstances, the accused did wilfully inflict suffering upon the animal which was not inevitable; and considering, as Lamer, J.A. put it in Menard (at page 466 C.C.C.) -- "Suffering which one may reasonably avoid for an animal is not necessary". Accordingly, in all of these circumstances, the Crown has proven, beyond a reasonable doubt, that the accused did wilfully cause unnecessary suffering to this dog (there being an absence of any evidence to the contrary), and he is guilty as charged.

SILVERMAN PROV. J.

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