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R. v. Quilloy

Between:

**Her Majesty The Queen and
Porfirio Alvair Quilloy**

[1993] A.J. No. 689

144 A.R. 140

Nos. 30288716P10101 - 0102 and 30343115P10101

**Alberta Provincial Court -- Criminal Division
Calgary, Alberta**

Pepler Prov. Ct. J.

September 23, 1993.

(11 pp.)

STATUTES, REGULATIONS AND RULES CITED:

Animal Protection Act, S.A. 1988, c. A-42.1. Criminal Code, R.S.C. 1985, c. C-46, ss. 446(1)(d), 447(1).

Criminal Law -- Animal mistreatment offences -- Unlawful possession of a cockpit -- Unlawful encouragement, aiding or assisting in the fighting or baiting of fighting birds -- Elements of the offences -- Burden of proof.

Accused was charged with two counts of unlawful possession of a cockpit on premises under his control and unlawfully encouraging, aiding or assisting in the fighting or baiting of fighting birds. The accused had on his premises a barn in which he maintained game birds. Opinion evidence offered by the Crown to prove that part of the barn was a cockpit was clearly equivocal. Also, the injuries found on some of the accused's birds were consistent with injuries that could have been sustained other than in cockfighting. The accused denied the allegations of the Crown and was supported by the credible evidence of his son.

HELD: Accused not guilty. Although the circumstances appeared extremely suspicious, the court has a reasonable doubt as to the guilt of the accused.

D.M. Oko, for the Crown.
R.D. Shellnutt, for the Defence.

REASONS FOR JUDGMENT

1 PEPLER PROV. CT. J.:-- The accused is charged with two offences, namely:

Count No. 1: on or about the 2nd day of March 1993, at or near Calgary, Alberta, did unlawfully have in his possession a cockpit, on a premise that he had control of, contrary to Section 447(1) of the Criminal Code.

Count No. 2: On or about the 2nd day of March 1993, at or near Calgary, Alberta, did unlawfully encourage, aid or assist at the fighting or baiting of fighting birds, contrary to Section 446(1)(d) of the Criminal Code.

2 The general circumstances surrounding these counts were described in the evidence of Linda Badgley and John Stevenson, Special Constables with the Calgary Humane Society, Police Constable Mark Cottrell and by admissions of counsel. As well Donald Stewart and William Gess gave evidence as to the showing and judging of game birds at the Calgary Exhibition and Stampede and elsewhere in the province of Alberta.

3 The primary Crown witnesses were Eric Lane Sakach who was qualified by the court as an expert in the area of illegal animal fighting operations, and Dirk Dekens, a Doctor of Veterinary Medicine with a speciality in the injury and treatment of small animals and poultry.

4 Mr. Sakach has acquired a rich experience in animal fighting as an investigator since 1976 for the Humane Society of the United States - West Coast Regional Office. It is his opinion that part of the barn where the accused maintained his birds constituted a cockpit. He viewed the premises for about 1 hour prior to giving his evidence. When asked by Crown counsel whether he had any doubt at all that this was a cockpit, he answered as follows:

(Trial Excerpt of Evidence, 20th & 21st May A.D. 1993 at pp. 139-140)

"It's consistent with numerous other cockpits that I have seen. Cockpits can come in any size or configuration. I've seen bales of hay arranged in large circles and semi-circles. I have seen stakes driven in the ground 3 feet tall with canvas run -- run around them to comprise a pit. I have seen very elaborate set-ups where concrete was poured and block walls established with a large circular pit, 20 -- 20

feet in diameter. I've seen cockfighting arenas built out of plywood with walls about 24 inches high in both square and rectangular shapes, and I've attended cockfights in Monterey County where the people that were fighting the birds did nothing more than have one fellow walk around a large area diameter with his foot dragging it in the dirt, making a large circle indication, and a number of people crowding around the area where the fights were occurring comprised the pit."

5 When asked on what he based his opinion he stated at p. 140:

"It's consistent with numerous other cockpits that I've seen. There were feathers on the floor of the -- of the pit, which -- you always find feathers on the floor of the pit where a cockpit is. There were stains of what appeared to be blood on the walls of the pit. It was enclosed on four sides."

6 Later at p. 142, he was asked these questions and gave these answers:

"Q Would cockfights go on there for spectators?

A No, not more than two or three, but it would be very crowded to get more than a few people in -- in that area to -- to do that sort of thing.

Q Does that make it any less a cockpit?

A No, it is a cockpit in every sense of the word. A cockpit is a place where cocks are fought.

Q In your opinion, have birds been fought in this cockpit that you saw yesterday?

A Yes, based on what I saw, the feathers on the floor, the substance that appears to be blood, and based on my experience and training, that is a cockpit where birds have fought."

7 In cross-examination he stated at p. 172:

"My opinion's based on the presence of game foul (sic), the presence of game foul (sic) in the immediate proximity of a cockpit, and the -- a presence of sparring muffs in the immediate proximity of the cockpit."

and was asked and gave these answers at p. 181:

"Q ... And just summarize it for me again.

You say this is a pit because of why?

There is one game foul (sic)?

A There are game foul (sic).

Q Two, there was muffs or sparring mitts?

A Correct.

Q And three, you found some tie cords?

A Tie cords are minor taken by themself [sic]. It's a common method that -- as you already stated, cock fighters do use them. And they also have legitimate purposes for them. The sparring muffs, the cockpit and the birds, and the proximity of all these things to one another in relation to their position in the barn, leads me to believe and it is my opinion that it is a cockpit. And this is for cock fighting.

Q And that's what you're basing this on?

A Its very consistent with numerous other cockpits I have seen in very similar operations."

8 Several additional comments must be made with regard to the opinion evidence as to the existence of the cockpit. There was in fact blood on the cardboard walls -- lab analysis could not confirm it was chicken blood. Mr. Sakach has never seen cardboard used on the walls of a pit in all of his experience. Mr. Gess in his evidence noted that poultry judges would not use sparring muffs to protect themselves when handling game birds. The accused tied his birds up in this area when attending to them and to their cages.

9 Condition of the birds is a key factor in determining whether or not they have been fought. When asked by Crown counsel whether the birds were of show quality Mr. Sakach said the following at pp. 135 - 136:

"A The birds that I've seen at poultry shows - and I do go to quite a few poultry shows, I attend shows in Sacramento at our state fair, as I mentioned the first cockfights that I ever attended were as a result of going to poultry shows - have always been in very good feather. These birds appeared not to be -- many of them had broken feathers. Some of them had

scars on their -- their faces and their heads. They didn't appear to be particularly beautiful. I mean if some of the feathers -- the coloration of birds is -- is quite pretty and what not, but as far as the -- the feathers being wide fanned, long, unbroken sickles, that sort of thing, and having a luxuriant sort of quality, I mean, they didn't appear to be noteworthy.

Q All right.

A They're indistinguishable from other game fowl that I've seen at cockfights."

10 He was also asked these questions and gave these answers at pp. 137 - 138:

"Q Okay. Were there any -- was there any evidence yesterday, when you viewed these birds, of injury? You've mentioned scars on their faces and heads. Were there other -- any other evidence of injury that you observed?

A The one bird that we looked at had toes that were deformed either from an old injury or from a -- from a congenital defect. I don't know whether it was caused from a breeding problem, a diet problem, or if it was caused from an injury, but the toes were quite off. I'll have to leave that up to the doctor. I don't --

Q Did you make any observations of the cages themselves with respect to injury?

A The cages were very, very typical of what I see in California. In fact, I have quite a few photographs that I've brought with me of cages that are almost indistinguishable that are consistent with other cages that I have seen at cockfighting operations in California and other states. There was some blood present on a number of the cages. So, they didn't look particularly different

from anything I have seen.

Mr. Shellnutt: Is it blood? Before we get any farther, was there a substance or was there blood? Do you know it's blood?

A It's a substance that appeared to be blood.

11 In cross-examination Mr. Sakach was asked these questions and gave these answers at pp. 178 and 179:

"Q Okay. And, again, just to finish up, then, except for the birds you looked at, you didn't specifically pull any other birds out.

A I removed one bird from the cage.

Q Okay. And you say some others had scratches, but that was just in walking past?

A That was looking in the cages at the birds.

Q How many?

A How many what?

Q Had scratches?

A I didn't keep a count on how many had scratches.

Q It might be one? It might be two? If you don't know, you don't know.

A I wasn't taking notes on it. There were several birds that had scratches to their heads and what not.

Q Okay. But not all of them, just several?

A That's correct. And only some of the birds had their combs clipped or dubbed, and others were in full comb and wattle."

12 And earlier these questions at pp. 166 and 167:

"Q ... You talked about these birds that you saw, some of them had scarring. What kind of scarring?

A Scars, scratches, old wounds to the head.

Q Well, are you talking about removals of this? Of the dubbing process?

A No. Scratches and things to the face of the birds. The veterinarian also examined the bodies of the birds and, I believe, he found some scratches also to the legs. Things of that nature.

Q Well, they are in cages; aren't they?

A That's correct.

Q People walk by. They flutter around. They jump out of the cage. They do different things.

A They could.

Q They do or they could? Did they do it when you walked by?

A Yes. Many of the birds were very aggressive.

Q So there could be any reason for scratches or for cuts?

A I suppose so.

13 Dr. Dekens also gave an opinion as to whether a cockpit was on site. He was asked these questions, by Crown counsel and gave these answers at pp. 28 and 29, (Trial Excerpt from Evidence, 17th August A.D. 1993):

"Q Now, on the second occasion when you went back to the barn, this occasion that you're now talking about, did you know anything at that time about cockfighting or cockfighting pit?

A Well, I was starting to get a little more knowledgeable about it, because, I mean, I knew that time there was a suspicion that it could be -- had been some cockfighting or training for these birds going on. So, we started -- I started to inform myself about the practice of cockfighting and the things to look for, so I was starting to

get a little bit more knowledgeable at that time.

Q What did this area look like to you when you went back to that --

A It looked to me that likely a training area for cockfighting."

14 I found the doctor's evidence to be somewhat evasive when not being questioned directly on the medical aspects of the case and because of his lack of familiarity with game cocks and cockpits generally, placed little weight on his opinions in that regard.

15 Dr. Dekens found it necessary to destroy one of the birds on March 4th, 1993 and examined three further birds at random on May 3rd, 1993.

16 The bird which was destroyed had a leg injury of some 2 and 1/2 weeks to 3 weeks' duration causing it to become mummified and of no use. As well, an external examination revealed that the bird had had its beak trimmed, spurs clipped, comb, wattles and ear lobes removed. The left nostril had a blood clot and there were pick wounds near the left eye. Internal examination revealed the bird to be in great distress - loss of fat deposits, reduction in muscle mass and an "S" shaped breast bone which is often an indication of poor nutrition. Bruising to the right side of the bird could have been caused by falling over because of the bad left leg. The leg injury was consistent with trauma and possibly the bird had been fought. As well, fighting was consistent with the loss of ventral feathers. The bird was housed with two hens.

17 In cross-examination the doctor conceded that all of the injuries, save the leg, could have been caused right in the cage where the bird was found and that the leg injury could have been caused by catching it in something.

18 Dr. Dekens re-attended the premises on May 3rd, 1993 with Constable Stevenson. He stated that the birds were less aggressive than they had been upon the earlier visit in March, an opinion of the birds' aggressiveness not shared by Constable Stevenson, and he gave this explanation at p. 30:

"A I would imagine -- I mean, nothing changed inside the barn. The only explanation I can give is that these birds hadn't been trained or practised as fighting birds anymore and because of that, after two months, some of that aggressive behaviour would have been reduced.

Q And that would be a natural response that you would expect to find in birds?

A That would be a natural behavioral response I would expect, yes."

19 Three different birds were examined on this date - birds that could have some problem. Bird One had a missing spur either from birth or because of trauma. This bird showed signs of scarring consistent with trauma possibly fights, there were no other injuries on the bird.

20 Bird Two was selected with no apparent problems but on closer examination evidence of abrasion and old wounds and crusty healing wounds on the bottoms of the wings were noted. Likely these wounds caused bleeding when they occurred. The doctor stated that for another bird to get access to that area of the wing the birds would have to have direct contact with one another.

21 Bird Three had deformed toes which could have been birth defects or the result of trauma, no other injuries were noted.

22 These injuries, first to the bird with the mummified leg and second to the bird with the under wing injury, give me particular concern as to their origin.

23 The accused, his son and his landlord gave evidence for the defence.

24 The accused's evidence was far from persuasive on many points. He struck me as one who was anxious to please the questioner and was too eager to explain away every ambiguity. Added to this is what he calls his natural attraction to cockfighting - its addictive qualities - and the fact that he sees nothing wrong with pitting one animal against another in what is often a fight to the death - sentiments not shared by the great majority of people in our community. Notwithstanding these shortcomings in his evidence, the accused states that he never used a vacant corner in the barn as a pit and never trained his birds to fight. He gave an explanation as to how he acquired the sparring muffs and how he used them. A fact confirmed in part by the evidence of his son - whose evidence I accept.

25 I am mindful of Ms. Oko's very able closing argument and the submission that I must review all of the evidence in reaching a decision on the case. I have done so and while I find the circumstances extremely suspicious I have a reasonable doubt and both charges are dismissed. In the result, the Crown's application for an amendment to the information regarding the dates is dismissed. A further count under the Animal Protection Act remains to be considered.

PEPLER PROV. CT. J.

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