NO. 1303Y-00022
IN THE PROVINCIAL COURT OF NEWFOUNDLAND AND LABRADOR

BETWEEN:

HER MAJESTY THE QUEEN

AND:

J. S.

Heard: September 26th 2003
Judgement: October 2nd 2003

DECISION OF GORMAN, P.C. J.

INTRODUCTION:

[1] J.S. is charged with causing unnecessary pain, suffering or injury to a bird, contrary to section 446(1)(a) of the **Criminal Code of Canada**, R.S.C. 1985. He is a "young person" within the meaning of the **Young Offenders Act**, R.S.C. 1985 and the **Youth Criminal Justice Act**, S.C. 2002.

[**2**] For the reasons that will follow, I have concluded that the Crown has failed to prove beyond a reasonable doubt that J.S. committed this offence. Accordingly, an acquittal is hereby entered.

THE EVIDENCE

[**3**] The evidence in this case consisted of two witnesses. One for the Crown and

J.S. on his own behalf.

THE CROWN'S EVIDENCE:

[4] Ms. K. testified that on December 29th 2002, she and her father were watching the water to see if they could spot any seals. She was using a pair of binoculars to do so.

[**5**] Ms. K. testified that she saw J.S. and her cousin (J.B.) on the beach and she saw them shoot at a crow with a pellet gun. The crow fell to the ground. She testified that either J.S. or J.B. tied a string to the crow and dragged it back to J.S.'s yard.

[**6**] Ms. K. testified that she then observed both J.S. and J.B. throwing the crow up into the air so that J.S.'s dog would jump toward it. According to Ms. K., the dog caught the crow, the boys took it from the dog and threw it into the air again.

[**7**] Ms. K. testified that the crow was alive and that from the sounds it was making she could tell it was in pain. She described the crow as "bawling" and stated that the sound it was making was different than that which is normally made by a crow. She said it was "horrible."

[**8**] While testifying, Ms. K. identified J.S. as one of the persons she saw on December 29th 2002. At the time of her in-court identification, J.S. was sitting in

the prisoner's dock. Ms. K. also described J.B. as being "much taller" than J.S. Otherwise, no description of J.B. was provided.

[**9**] Ms. K. testified that both boys subsequently took the crow back to the beach and threw it over the break-water. She was not sure if the crow was dead or alive at this point in time. She described the two boys as laughing and having a "grand time."

J.S.:

[10] J.S. testified that his step-father (M.S.) told him that he was walking on the beach with his dog and the dog caught a crow which M.S. then brought back to the yard.

[**11**] J.S. testified that he was not on the beach and that the first time he saw the crow was in the yard. He testified that J.B. and M.S. were the ones that tied a string to its foot and it was they who were throwing the crow into the air for the dog to jump toward.

[**12**] J.S. conceded that he was laughing while this was going on and that he and J.B. brought the crow back to the beach and threw it over the break-water. According to J.S., the crow was alive at this time.

THE ONUS AND STANDARD OF PROOF

[**13**] In **R. v. Lifchus**, [1997] 3 S.C.R. 320, the Supreme Court of Canada stated, at

paragraph 13, that "the onus resting upon the Crown to prove the guilt of the accused beyond a reasonable doubt is inextricably linked to the presumption of innocence..." Proof beyond a reasonable doubt "does not involve proof to an absolute certainty, it is not proof beyond any doubt nor is it an imaginary or frivolous doubt" (paragraph 36). For a trial judge to convict "more is required than proof that the accused is probably guilty" (paragraph 36). If a trial judge is only able to conclude that the accused is probably guilty then he or she must acquit (**R. v. Avetysan**, [2000] 2 S.C.R. 745, at paragraph 14). In **R. v. Starr**, [2000] 2 S.C.R. 144 the Court held that the burden placed upon the Crown lies much closer to absolute certainty than to a balance of probabilities (at paragraph 242).

[**14**] The onus rests with the Crown throughout. If the accused's testimony or the evidence as a whole raises a reasonable doubt then the accused must be acquitted, even if the trial judge does not accept the testimony of the accused.

[**15**] In **R. v. D. (W.)**, [1991] 1 S.C.R. 742, the Court suggested that when an accused person testifies, the following analysis is appropriate:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Secondly, if you do not believe the testimony of the accused, but you are left in a reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept,

> you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[**16**] Finally, when there is a dispute in a criminal trial as to how an incident occurred, it is important to realize that proof beyond a reasonable doubt never involves simply deciding whether or not you believe the accused or the person or persons that provided the conflicting version of events.

THE LEGISLATION

[**17**] Subsection 446(1)(a) of the **Criminal Code** states:

> (1) Every one commits an offence who
>
> > (a) wilfully causes, or being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or bird;

[**18**] "Wilfully" is defined in subsection 429(1) of the **Criminal Code** as follows:

> Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do so, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

[**19**] In **R. v. Clarke**, [2001] N.J. No. 191, I had the opportunity to consider the *mens rea* and *actus reus* requirements for this offence. At paragraphs 58-62, I

concluded:

> It is not necessary therefore, for the Crown to prove subjective forseeability of the consequences for a conviction to be entered under s.446 of the **Code**. However, objective forseeability of the consequences of the *actus reus* of s.446 is constitutionally required. The definition of the word wilfully in s.429 of the **Code** is, in my view, sufficient to comply with this constitutional requirement.
>
> The Crown does not have to prove any ulterior motive nor does the Crown have to prove that the accused knew that the animal was suffering or that he or she intended for the animal to suffer. The Crown must prove that the accused acted wilfully and caused the *actus reus* knowing that suffering was a likely result or that a reasonable person would realize that this was a likely result. In other words, objective forseeability of the consequences of his or her act is sufficient. The accused's moral blameworthiness lies in causing the suffering by a wilful act. Perfect symmetry between *mens rea* and the consequences is not required under s.446 of the **Code** nor is it a constitutionally mandated requirement.
>
> This *mens rea* element can be proven by reasonable inferences from the accused's actions or through the doctrines of wilful blindness or recklessness (see **R. v. Sansegret** (1985), 18 C.C.C. (3d) 223 (S.C.C.) at pp.223-237 and **R. v. McHugh**, [1966] 1 C.C.C. 170 (N.S.C.A.).
>
> As a result, section 446(1)(a) of the **Code** does not require proof that the accused intended to act cruelly or that he or she knew that their acts would have this result. Cruelty is a consequence, as is bodily harm under s.267 of the **Code** (see **R. v. Dewey** (1999), 132 C.C.C. (3d) 348 (Alta. C.A.). The objective forseeability requirement must be tailored to the specific offence (see **R. v. Nurse** (1993), 83 C.C.C. (3d) 546 (Ont. C.A.); **R. v. Swenson** (1994), 91 C.C.C. (3d) 541 (Sask. C.A.); and **R. v. Vang** (1999), 132 C.C.C. (3d) 32 (Ont. C.A.). Under s.446(1)(a) of the **Code** the Crown must prove that "pain, suffering or injury" was a reasonably foreseeable consequence. Under s.446(1)(c) of the **Code** the reasonably foreseeable consequence relates to the provision of inadequate "food, water, shelter and

care" for the animal. The Crown does not have to prove that the accused intended this consequence.

In **R. v. Vinokurov**, 2001 ABCA 0114, the Alberta Court of Appeal concluded that the *mens rea* requirement for an offence under s.354(1) of the **Code** could not be established by resort to the doctrine of recklessness (also see **R. v. Adey**, unreported judgment, No.1300A-01158 (Nfld. Prov. Ct.). This was based, in part, on the inclusion of the word "knowingly" in that section. The word "wilfully", particularly the manner in which it is defined in s.429 of the **Code**, denotes a very different and lesser form of *mens rea*.

[**20**] As regards the elements of an offence under subsection 446(1)(a) of the **Code**, at paragraphs 67 and 68 of **Clarke**, I held:

Under s.446(1)(a) of the **Code**, the Crown must prove:

i that the accused "wilfully"
ii caused unnecessary pain, suffering or injury to the animal.

The *actus reus* of this definition of the offence requires proof that the accused caused unnecessary pain, suffering or injury to the animal. The *mens rea* requirement requires the Crown to prove that the accused did so "wilfully". In the context of s.446(1)(a) of the **Code** this requires proof that the accused intended such a consequence or that a reasonable person would realize that his or her acts would subject an animal to the risk of unnecessary pain, suffering, or injury.

CAUSING UNNECESSARY PAIN, SUFFERING OR INJURY

[**21**] The purpose of section 446 of the **Code** is to prevent "unnecessary pain, suffering or injury" being caused to animals (see **R. v. Linder** (1950), 97 C.C.C. 174 (B.C.C.A.). The Court of Appeal in **Linder**, considered the word

"unnecessary" and stated:

> ...In *Ford v. Wiley* (1889), 16 Cox C.C. 683 at p. 689, Lord Coleridge C.J. defined the term "abuse" as used in that statute to mean "substantial pain inflicted upon it"; and "unnecessary" as "inflicted without necessity". In the same case Hawkins J. at p. 695 said two things must be proved: first, that pain and suffering has been inflicted in fact, and secondly, without necessity, or, in other words, without good reason. Grove J. (Lindley J. concurring) in *Swan v. Saunders* (1881), 14 Cox C.C. 566 at p. 570, defined these terms as "unnecessary ill-usage by which the animal substantially suffers".[1]

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[1]The word "unnecessary" was considered in **R. v. Pacific Meat Co. Ltd.** (1957), 118 C.C.C. 237 (B.C. Co. Ct.), in the context of a hog slaughtering plant, with the following result:

> In my view, if someone who was not employed in a slaughterhouse was to shackle a hog as described in this case, and if such a person hoisted the animal as herein described, just to hear it squeal or for any other sadistic reason, and if evidence was adduced that the hog in fact suffered pain in the process, then I would hold that such pain and suffering was "unnecessary" and that such a person would be guilty. But I am dealing with a case involving two human individuals whose regular employment involves the necessity of slaughtering hogs to provide food for mankind. The crux of the case before me is whether the admitted pain or cruelty was "unnecessary". Crown witnesses described the method of slaughtering hogs in parts of Europe, and as is now being tried out in the four slaughterhouses in the U.S.A., to which I referred earlier. It is clear that no matter which method is used, the hog is still alive at the time the "sticker" severs the jugular vein. I am not prepared to hold on the evidence before me that the hogs do not experience pain and suffering when killed by those other processes described by Crown witnesses. Much less am I prepared to hold that the Crown has prima facie established that the pain or suffering endured by the hogs in the process of slaughter as described at the premises of the respondent, Pacific Meat Co., constituted "unnecessary" pain or suffering.

[**22**] In **R. v. Amorim**, [1994] O.J. No. 2824 (O.C.J.), the Court, in the context of subsection 446(1)(a) of the **Code,** provided the following definition of the words “unnecessary suffering”:

> 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).

[**23**] In **R. v. D.L.**, [1999] A.J. No.539 (Prov. Ct.), it was held that what constitutes unnecessary "pain, suffering or injury is determined by the circumstances of each case, and what in those circumstances could reasonably have been avoided. If the pain, suffering or injury inflicted could have been reasonably avoided, while effecting the lawful purpose in the circumstances of the case, then the pain, suffering or injury was unnecessary' " (at paragraph 30).

[**24**] In **R. v. Menard** (1978), 43 C.C.C. (2d) 458, the Quebec Court of Appeal, at page 463, concluded that the section does not "intend, as in the cases of assault

among human beings, to forbid through criminalization the causing to an animal of the least physical discomfort, and it is to this extent and no more, that one may speak of quantification..." The Court of Appeal proceed upon the presumption that humans are infinitely superior to other animals and thus it concluded:

> Within the hierarchy of our planet the animal occupies a place which, if it does not give rights to the animal, at least prompts us, being animals who claim to be rational beings, to impose on ourselves behaviour which will reflect in our relations with them those virtues we seek to promote in our relations among humans. On the other hand, the animal is inferior to man, and takes its place within a hierarchy which is the hierarchy of the animals, and above all is a part of nature with all its "racial and natural" selections. The animal is subordinate to nature and to man. It will often be in the interests of man to kill and mutilate wild or domestic animals, to subjugate them and, to this end, to tame them with all the painful consequences this may entail for them and, if they are too old, or too numerous, or abandoned, to kill them. This is why, in setting standards for the behaviour of men towards animals, we have taken into account our privileged position in nature and have been obliged to take into account at the outset the purpose sought. We have, moreover, wished to subject all behaviour, which would already be legalized by its purpose, to the test of the "means employed". Thus, para. (a) of s-s. (1) of s. 402 is not only of general application, but normalizes human behaviour from these two points of view: the purpose and the means. While ss. 400 and 401 of the *Criminal Code* have been enacted to condemn interference with the rights of the owners of certain animals, s. 402 was enacted for the protection of the animals themselves, including those, who through the interests of their owners, are protected in part by ss. 400 and 401.

[**25**] **Menard** was considered in **R. v. McRae**, [2002] O.J. No. 4987 (O.C.J.). In **McRae**, the following principles were said to flow from the analysis contained in

Menard:

> a. The accused must be identified beyond a reasonable doubt as the person who caused the pain, suffering or injury to the animal or permitted it to be caused.
>
> b. There are circumstances in which it is not a criminal offence to cause pain, suffering or injury to an animal.
>
> c. The pain, suffering or injury must be caused wilfully, that is, voluntarily and intentionally or as provided by s. 429(1) of the *Criminal Code of Canada*.
>
> d. With respect to the degree of pain or suffering caused to an animal by an accused, the Crown need prove beyond a reasonable doubt only that it caused the animal something more than "the least physical discomfort."
>
> e. Once that threshold has been met, then one must consider the means by which and the purpose for which the pain, suffering or injury was caused to decide whether it was caused "unnecessarily."
>
> f. In determining whether or not pain, suffering or injury was caused to an animal "unnecessarily", it is appropriate to consider both the means employed and the purpose for which the pain, suffering or injury was caused, and also the relation between the purpose and the means.
>
> g. In some cases, the purpose may be legitimate, but the means employed may not be.
>
> h. This determination should involve a consideration of all the surrounding circumstances.

[**26**] In **Clarke**, I concluded that Parliament's decision to use the word "unnecessary" in subsection 446(1)(a), signalled a specific legislative intent (at paragraph 52):

> The reference to "unnecessary" pain or suffering signals a legislative intent

> that the wilful causing of any pain or suffering will not constitute an offence. Reference must be made to the extent or degree of pain and the purpose for inflicting it (see **R. v. Menard** at p.464-465) including any societal benefits gained.

[**27**] The torturing of a crow for one's entertainment contains no discernable societal benefit.

INJURY

[**28**] In **R. v. Presnail** (2000), 80 A.R. 258 (P.C.), the word "injury" was defined in the context of section 446 of the **Code** as follows (at paragraph 44):

> In my opinion, the word "injure", as it is found in section 445(a), should be given its ordinary meaning. *The Shorter Oxford English Dictionary on Historical Principles*, 3rd edition, (Clarendon Press, Oxford) defines "injure" as "to do hurt, or harm to; to damage; to impair". *Collins Dictionary of the English Language*, (Collins, London, 1985) defines "injure" as "to cause physical or mental harm or suffering to; hurt or wound".

[**29**] For a conviction to be entered pursuant to subsection 446(1)(a) of the **Code**, the Crown need only prove the existence of pain, suffering or injury. Thus, the Court must be careful not to interpret these separate words in a manner which fails to differentiate between them. To define injury as meaning to suffer would for instance, unnecessarily restrict the scope of this provision. Certainly, an animal can suffer pain without suffering an injury. Therefore, the word injury, in the context of subsection 446(1)(a) of the **Code**, must be interpreted so that pain or suffering are not necessarily included. Beyond this, the specific circumstances of

this case do not

require me to provide a larger definition as I am satisfied that the Crown has established that pain was caused to the crow.[2]

[**30**] In this case, the Crown has not presented any evidence that the crow was injured. Therefore, the question becomes: has it proven that pain or suffering was inflicted upon the crow?

PAIN

[31] The Oxford English Dictionary, at Volume VII, page 377, includes the following as part of its definition of the word "pain":

> A primary condition of sensation or consciousness, the opposite of pleasure; the sensation which one feels when hurt (in body or mind); suffering, distress.

[**32**] I am not convinced that Ms. K. is able to distinguish between the sound a crow normally makes as compared to the sound that one in pain makes. She provided no explanation as to how she was able to distinguish between the two.

[**33**] The Crown seeks to have the Court draw an inference of pain or suffering

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[2] **The Oxford English Dictionary** (Clarendon Press, 1961), in its defining of the word "injury" refers to it as meaning (at Volume V, page 302):

> Hurt or loss caused to or sustained by a person or thing...To hurt, harm, damage.

from the manner in which the crow was treated. Though the crow was treated in an unacceptable and shabby manner, this is not the same as the causing of pain and

suffering. It must be remembered that the Crown has the onus of proving this element of the offence beyond a reasonable doubt and that J.S. is charged with a criminal offence (see **McRae**, at paragraph 22).

[**34**] I am satisfied that dragging a crow along the ground and allowing a dog to catch it in its mouth would cause pain to the crow. Therefore, this element of the offence has been established and I need not attempt to define the effect of the word "suffering."[3]

[**35**] If J.S. was involved in this activity in the manner that Ms. K. described, then the *mens rea* requirement has also been established. The real issue in this case is: has the Crown proven that J.S. was involved in the commission of this offence?

WHO MISTREATED THE CROW?

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[3] **The Oxford English Dictionary** includes the following in its definition of the words "suffer" and "suffering":

> To have (something painful, distressing, or injurious) inflicted or imposed upon one; to submit to with pain, disorder or grief (Volume X, page 102).
>
> The bearing or undergoing of pain, distress or tribulation (Volume X, page 105).

[**36**] As you will recall from my earlier summary of the evidence, there is a dispute as to who mistreated the crow. Ms. K. said J.S. was involved and J.S. said that he did not touch the crow.

[**37**] Ms. K. is an honest witness. She was clearly outraged at what she saw. However, she was asked to identify the person she saw mistreating the crow, for the first time, while she was testifying in court and while that person was sitting in the prisoner's dock. It is well established that such identification evidence is of little value (see **R. v. Gould**, [2003] N.J. No. 78 (P.C.).

[**38**] The evidence of the extent of Ms. K.'s contact with J.S. was scarce, though he was not a complete stranger to her. In addition, though she indicated that J.B. is taller, there was no other evidence presented as to whether or not J.S. looks similar or different from J.B. The same is true in relation to M.S.

[**39**] Finally, as I mentioned earlier, J.S. testified that he did not touch the crow. There is no basis upon which the Court can summarily reject this evidence. It was not illogical, incoherent or contaminated by obvious falsehoods or exaggerations. In short, it is sufficient to cause me to have a reasonable doubt. Thus, an acquittal must be entered.

[**40**] Judgement accordingly.

Appearances:

Mr. A. Sparkes for Her Majesty the Queen.
Ms. R. Adams for J.S.