1999 CarswellAlta 414
Alberta Provincial Court

R. v. L. (D.)

1999 CarswellAlta 414, [1999] A.J. No. 539, 242 A.R. 357, 42 W.C.B. (2d) 346

Her Majesty The Queen and D.L.

Fradsham Prov. J.

Judgment: April 13, 1999
Docket: Calgary 80926769Y10101, 0102

Counsel: *G.E. Haight*, for Crown.
E.D. Simper, for Accused.

Subject: Criminal

Headnote

Criminal law --- Wilful and forbidden acts in respect of certain property — Injury or causing cruelty to animals — Injuring or endangering animals other than cattle — Nature and elements of offence

Criminal law --- Wilful and forbidden acts in respect of certain property — Injury or causing cruelty to animals — Injuring or endangering animals other than cattle — Miscellaneous issues

Table of Authorities

Cases considered by *Fradsham Prov. J.*:

R. v. Amorim (December 5, 1994), Silverman Prov. J. (Ont. Prov. Div.) — considered

R. v. Innes (1972), 7 C.C.C. (2d) 544 (B.C. C.A.) — referred to

R. v. Menard (1978), 4 C.R. (3d) 333, 43 C.C.C. (2d) 458 (Que. C.A.) — referred to

R. v. Schultz (1962), 38 C.R. 76, 39 W.W.R. 23, 133 C.C.C. 174 (Alta. C.A.) — referred to

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46
s. 21(1)(c) — referred to

s. 244 — referred to

s. 429(1) — referred to

s. 445(a) — considered

s. 446(1)(a) — considered

TRIAL of accused young offender D.L. on charges of wilfully maiming animal without lawful excuse and wilfully causing pain, suffering or injury to animal without lawful excuse.

***Fradsham Prov. J.*:**

Introduction of Charges and Issues

1 The young person, D.L., is a male, currently 18 years of age, but was 17 years old when he was charged that he:

COUNT 1 on or about the 11th day of April, A.D. 1998, at or near High River, in the province of Alberta did wilfully and without lawful excuse kill, main (sic), poison or injure a cat that was kept for a lawful purpose, contrary to Section 445(a) of the Criminal Code.

COUNT 2 on or about the 11th day of April, A.D. 1998, at or near High River, in the province of Alberta, did unlawfully and wilfully cause unnecessary pain, suffering or injury to an animal, to wit: a cat, contrary to section 446(1)(a) of the Criminal Code.

2 Apart from distilling the facts from the evidence, the issues that must be resolved are:

(1) was the cat which was ultimately killed (there is no dispute that it was killed) an animal being kept, at the time, for a lawful purpose?

(2) did D. L. wilfully and without lawful excuse kill, maim, or injure the cat?

(3) did D. L. wilfully cause unnecessary pain, suffering or injury to the cat (the crux of this issue being what constitutes "unnecessary" pain, suffering or injury)?

Facts

3 I have considered all the evidence, and the witnesses who gave it. My findings of fact are set out below.

4 D.S. and C.S. are sisters, 18 and 16 years old respectively, who live with their mother in High River. For several months prior to April 11, 1998, they had assumed the care of a stray cat which had made itself known around their property. As C.S. described it, "...it was kind of a stray cat, we fed it, we let it in the house on cold nights, we basically took care of it like it was our own." I find as a fact that D.S. and C.S. had adopted the cat and assumed ownership and control of it. The cat had ceased to be a stray cat, and was, at the time of the alleged offences, a pet of D.S. and C.S.

5 D.S. and C.S. testified that they had decided that they could no longer afford the expense of feeding the cat. I accept that they had come to that conclusion, but a more accurate description of the process was that they were unwilling to reorder their lists of personal priorities to allow them to properly discharge the obligation they had voluntarily assumed. In any event, they decided that the cat had to go.

6 On April 11, 1998, at approximately 3:00 to 4:00 P.M., D.L. was at the home of D.S. and C.S., together with A.S. and C.A. (C.A. is separately charged with these offences, but is currently at large with an arrest warrant outstanding for him). C.S. said to D.L. and C.A. that she and her sister needed to dispose of the cat. In the words of C.S. at the trial: "I said that we couldn't take care of the cat, we needed to get rid of it. I asked them to go, drop it off, go get rid of it, do something with it, just not there." Both D.S. (who concurred with C.S.'s request), and C.S. testified that they did not expect D.L. and C.A. to kill the cat; they expected that they would take the cat to some farm in the vicinity and abandon it. I do not accept their evidence on that point. I am completely satisfied that they knew full well that they were asking the two males to dispose of the cat, and that it might well involve killing it. It was for that reason that C.S. told D.L. and C.A. to go somewhere else to commit the deed. They may not have envisaged the method that would be adopted to kill the cat, but they knew that its death was a likely result of their request.

7 C.S. retrieved the cat (which was in the house), and gave it to C.A. who took it to the kitchen. In the kitchen, C.A. began to strangle the cat with his hands around its neck.

8 C.S. went outside and waited by the patio door. The accused young person, D.L., went outside sometime after the cat was strangled and before it was ultimately thrown outside. A.S. and D.S. stayed in the kitchen for the duration of C.A.'s abuse of the cat.

9 C.A., after strangling the cat, hit the cat's head against the closed glass patio doors approximately three times. He then put the cat on the floor and kneeled on its back. The sound of the cat's bones breaking could be heard by those in the kitchen. He then opened the patio door. D.L. was by this time outside the patio door holding a broken hockey stick he had found by the house. C.A. called to D.L., "batter up", grasped the cat by the neck, and threw it out the open door.

10 The cat was thrown in such a way that it flipped over in the air two or three times. While the cat was still in the air, D.L. struck the cat with the hockey stick as one would a baseball with a baseball bat. The cat fell to the ground. D.L. went to the cat, and struck it in the head four to six times. Only after D.L. was through beating the cat's head was the cat dead. I accept C S.'s evidence that the cat was still breathing after it had been thrown out, and only stopped during D.L.'s striking of its head with the hockey stick.

11 I do not believe D.L. when he denies hitting the cat in mid-air. I am satisfied beyond a reasonable doubt that he knew what C.A. was doing to the cat, that C.A. said "batter up", and that D.L. was waiting by the patio door with the hockey stick for the sole purpose of hitting the cat in the fashion I have described.

12 D.S. testified that she saw D.L. strike the cat both when it was in mid-air and on the ground. Though there are some discrepancies in her evidence, I am completely satisfied that it is reliable on these points, and I accept her evidence on them. I find corroboration in the fact that C.S. saw D.L. waiting by the patio doors with the hockey stick before the cat was thrown out. Further, neither C.S. nor A.S. deny that D.L. struck the cat in mid-air; they both say that they turned or walked away, and did not see the cat between it being thrown out the window and it landing on the ground. At point they did look, and saw D.L. strike the cat's head several times with the hockey stick.

13 In short, I do not believe D.L.'s denials. I also do not believe him when he says that he hit the cat just to put it out of its misery after it hit the ground. I find that his intent was to kill the cat, and his sole motivation was simply to kill. He had no intention of lessening suffering. If some of his actions did result in lessening the cat's suffering, it was a result he neither contemplated nor sought.

14 Once the cat was dead, C.A. and D.L. put the cat in a bag and took it away for disposal. They took it to a nearby bird sanctuary, and in D.L.'s succinct words: "I chucked it over the fence." They then returned to the residence where both exhibited signs of excitement about what they had done in the killing of the cat. Only after D.L. had a conversation with A.S. (his former girl friend) about a puppy they had once owned, did he express any remorse for his actions. I am satisfied that his remorse was borne of his involvement in the torture and killing of the cat. D.L. told C.S., "I'm not proud of what I just did." He testified that his remorse, and his comment to C.S. arose from having killed the cat, but he also testified that he only killed it to end its suffering. His explanation of his emotions and his comment does not make sense if he had only been trying to help end the cat's suffering. I reject that evidence, and do not believe him. I find that his remorse, and his comment about not being proud of what he had done, arose solely from having participated in the torture of the cat, and beating it to death.

Law and Analysts

(1) Was The Cat An Animal Being Kept. At The time. For A Lawful Purpose?

15 When the cat came to C.S. and D.S. it was a stray. However, they adopted the cat by regularly providing it food and shelter. They assumed control of it, and it had become their pet. As a result, when it was killed by C.A. and D.L. it was an animal being kept for a lawful purpose.

(2) Did D.L. Wilfully And Without lawful Excuse Kill, Maim, Or Injure The Cat?

16 There is no doubt that D.L. killed the cat, and that he did so wilfully (as that term is defined in section 429(1) of the Criminal Code). It is also without doubt that he injured the cat just prior to killing it. Again, his acts were clearly wilful.

17 There is insufficient evidence to conclude in criminal law that he directly "maimed" the cat. I take "maim" in section 445(a) to mean the same that it does in section 244 [i.e.: to render the victim less able to defend him or herself: *R. v. Schultz* (1962), 133 C.C.C. 174 (Alta. C.A.); *R. v. Innes* (1972) 7 C.C.C. (2d) 544 (B.C.C.A.)]. I cannot say that the evidence before me allows me to safely conclude that the injuries inflicted on the cat directly by D.L. rendered it less able to defend itself by the time they were inflicted. By that time, the animal had most likely already been rendered defenceless.

18 However, I am completely satisfied that C.A. maimed the cat, and D.L. was, in law, a party to that maiming: section 21(1)(c) of the Criminal Code. I find that D.L. foresaw that C.A. was going to torture the cat, and inflict upon it serious injuries which would lead to it being maimed. He encouraged C.A. in his acts by participating in them. He participated in them by positioning himself outside the patio door with a hockey stick so as to be able to hit the cat when C.A. tossed it towards him. D.L., through his encouragement, abetted C.A. in his maiming of the cat.

19 Accordingly, I find that D.L. wilfully maimed and killed the cat (any acts causing injury are subsumed in the maiming and killing). The question becomes: did D.L. act without lawful excuse?

20 C.S. and D.S. owned and had control of the cat. They authorized C.A. and D.L. to kill it. As morally reprehensible as many may find their attitude, they had the right in law to issue the cat's death sentence. D.L. had a lawful excuse to kill the cat.

(3) Did D.L. Wilfully Cause Unnecessary Pain, Suffering, Or Injury To The Cat?

21 Though the cat's owners were able to authorize its death, they were not able to authorize criminal acts. The owner of an animal may be able to condemn it to death, but the owner is not able to authorize a method of death the carrying out of which would contravene the criminal law. In other words, an owner cannot legally authorize the putting to death of his or her animal in a manner which violates section 446 of the Criminal Code.

22 Likewise, an owner of an animal can authorize its maiming, but cannot authorize a method of maiming that violates section 446 of the Code. For example, an animal's owner might authorize the amputation of a dog's leg as part of medical treatment administered by a veterinarian. The amputation would constitute a maiming of the animal, but the method of amputation would not be contrary to section 446.

23 Accordingly, while the actual killing of the cat by D.L. and C.A. was authorized, it remains to be seen whether the method employed was capable of authorization by the animal's owners.

24 Section 446(1)(a) reads as follows:

> (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 a bird....

25 That which C.A. did to the cat clearly constituted the wilful causing of unnecessary pain, suffering, and injury to the cat. I have found D.L. to have been a party to those acts.

26 The authorization of the cat's owners to kill the cat could not give C.A. or D.L. the lawful authority to cause unnecessary pain, suffering or injury to the animal. The legal authorization of C.A and D.L. to kill the cat could not excuse violations of section 446. The acts perpetrated upon the cat when it was in the kitchen clearly violated section 446.

27 Further, I am satisfied beyond a reasonable doubt that D.L. again violated section 446 when he struck the cat in mid-air with the hockey stick. The only reasonable inference, and the one which I draw, is that the cat was caused additional unnecessary pain, suffering, and injury when it was so struck.

28 Further, I am completely satisfied that when D.L. struck the cat several times with the hockey stick after it had landed on the ground, he again inflicted unnecessary pain, suffering and injury to the animal. I accept C.S.'s testimony that she saw the cat still breathing and moving during D.L.'s blows, and the cat only died part way through the beating. I draw the inference that those blows which fell before death caused unnecessary pain, suffering, and injury.

29 It is important to note that determining what is "unnecessary" requires one to consider what lawful purpose is being effected. In *R. v. Amorim* (December 5, 1994), Silverman Prov. J. (Ont. Prov. Div.) , the Honourable Judge Silverman adopted at paragraph 22 the following analysis of Lamer, J.A. (as he then was) in *R. v. Menard* (1978) 43 C.C.C. (2d) 458 (Que. C.A.) at pp 465-466:

> Thus men, by the rule of s. 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 satisly 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 pursuit of his purposes as a superior being, in the pursuit of his well-being, is obliged not 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 kills a pig. One cannot devote to the euthanasia of animals large sums 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.

30 I take *R. v. Amorim*, *supra*, and *R. v. Menard*, *supra*, to stand for the proposition 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 that pain, suffering, or injury was "unnecessary".

31 I am of the view that the killing of the cat was one event made up of three parts: the events in the kitchen, the striking of the cat in mid-air, and the striking of the cat's head when it was on the ground. The killing of the cat was authorized in law (i.e.: the cat's owner authorized the killing). However, the killing method adopted inflicted unnecessary pain, suffering and injury during all three parts. The killing of the cat could have reasonably been accomplished without that pain, suffering, or injury; therefore, that pain, suffering, and injury was unnecessary to effect the goal.

32 Accordingly, and in summary, I find as follows:

(1) The cat was kept for a lawful purpose.

(2) D.L. was a party to the acts of C.A.

(3) D.L. and C.A. were authorized by the cat's owners to kill it, and therefore acted with lawful excuse insofar as the charge under section 445 is concerned. Further, the instructions of the owners were such that there is doubt as to whether they authorized the maiming of the cat. Again, insofar as section 445 is concerned, I cannot find that C.A. and D.L. acted without lawful excuse in respect of the maiming and injuring of the cat.

(4) D.L. is therefore not guilty of the offence charged under section 445 of the Code.

(5) D.L. is guilty of an offence under section 446(1)(a) of the Code because he wilfully caused unnecessary pain, suffering, and injury to the cat both through his own direct acts, and by being a party to the acts of C.A. which caused unnecessary pain, suffering, and injury to the cat.

Verdicts

33 I find D.L. not guilty of count I [section 445(a)], and guilty of count 2 [section 446(1)(a)].

Accused acquitted on count one; accused convicted on count two.

Citing References (6)

Treatment	Title	Date	Type	Depth
Considered in	**1.** R. v. S. (J.) 2003 CarswellNfld 222 (N.L. Prov. Ct.)	Oct. 02, 2003	Cases and Decisions	
Considered in	**2.** R. v. Clarke 2001 CarswellNfld 189 (Nfld. Prov. Ct.) **Judicially considered 9 times**	July 17, 2001	Cases and Decisions	
Considered in	**3.** R. v. Presnail 2000 ABPC 61 (Alta. Prov. Ct.) **Judicially considered 6 times**	Apr. 28, 2000	Cases and Decisions	
Referred to in	**4.** R. v. Galloro 2006 ONCJ 263 (Ont. C.J.) **Judicially considered 8 times**	Apr. 07, 2006	Cases and Decisions	
—	**5.** CED Animals XII.1, §603-§611	2009	CED	—
—	**6.** CED Animals XII.4, §618-§625	2009	CED	—

