

IN THE CROWN COURT AT LEICESTER

A20110014 & 15

90 Wellington Street
Leicester

14th October 2011

Before:

HIS HONOUR JUDGE PERT QC
(Sitting with Justices)

IN THE MATTER OF AN APPEAL AGAINST CONVICTION

BETWEEN:

DEREK HOPKINS
KEVIN ALLEN

Appellants

-and-

THE CROWN

Respondent

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Edial Farm Cottage, Edial, Burntwood, Staffordshire WS7 0HZ

MR P C MOTT QC appeared on behalf of the Appellants

MS C BRAY appeared on behalf of the Respondent

JUDGMENT

JUDGMENT

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JUDGE PERT: Leicestershire has a long history of foxhunting and is home to a number of the best-known Hunts. Foxhunting has long been a controversial issue. Matters came to a head in 2004 with the passage by Parliament of the Hunting Act and this, in effect, outlawed traditional foxhunting. The Act was, and is, extremely unpopular amongst a significant body of country people who hope one day to see it repealed.

Whether the passage of that Act was truly democracy in action or a demonstration of the will of a Parliamentary majority triumphing over a legitimate minority view might well be the subject of a lively philosophical or constitutional argument but it is not, however, on any view a matter for this court. Our task is simple. The question we have to ask ourselves in relation to each of these appellants and in relation to each of these charges is whether, applying the appropriate burden and standard of proof, it has been proved that either is guilty of one or other of the charges laid against him.

Each appellant faces an allegation that on 27th January he was hunting a fox with dogs. The law is set out in the Hunting Act 2004, section 1: “A person commits an offence if he hunts a wild mammal with a dog unless his hunting is exempt.” The only exemption under Schedule 1 of the 2004 Act which has potential application is the first, sub-paragraph 1: “Stalking a wild animal or flushing it out of cover is exempt hunting if the

A conditions in this paragraph are satisfied.” Sub-paragraph 2: “The first
condition is that the stalking or flushing out is undertaken for the purpose
of a) preventing or reducing serious damage which the wild mammal
B might otherwise cause to livestock, to game birds or wild birds, to food
for livestock, to crops, to growing timber, to fisheries, to other property or
to the biological diversity of an area, b) for obtaining meat to be used for
C human or animal consumption or c) for participation in a field trial.”

Sub-paragraph 4 says that the second condition is that “the stalking or
flushing out takes place on land a) which belongs to the person doing the
D stalking or flushing out or b) which he’s been given permission to use for
the purpose by the occupier or in the case of unoccupied land by a person
to whom it belongs.”

E Sub-paragraph 5: “The third condition is that the stalking or flushing
out does not involve the use of more than two dogs.” Sub-paragraph 6:
“The fourth condition is that the stalking or flushing out does not involve
F the use of a dog below ground otherwise than in accordance with
paragraph 2 below.” For reasons that will become clear, it is not
necessary to read out sub-paragraph 7 because, moving to paragraph 2,
G “Use of Dogs Below Ground to Protect Birds for Shooting,” sub-
paragraph 1: “The use of a dog below ground in the course of stalking or
flushing out is in accordance with this paragraph if the conditions in this
H paragraph are satisfied.” Sub-paragraph 2: “The first condition is that the
stalking or flushing out is undertaken for the purpose of preventing or

A reducing serious damage to game birds or wild birds which a person is
keeping or preserving for the purpose of their being shot.” Sub-paragraph
B 3: “The second condition is that the person doing the stalking or flushing
out a) has with him written evidence 1) that the land on which the stalking
or flushing takes place belongs to him or 2) that he’s been given
C permission to use that land for the purpose by the occupier or, in the case
of unoccupied land, by the person to whom it belongs and, 3) he makes
the evidence immediately available for inspection by a Constable who
D asks to see it. The third condition is that the stalking or flushing out does
not involve the use of more than one dog below ground at any one time.
E Insofar as the stalking or flushing out is undertaken with the use of a dog
below ground in accordance with this paragraph, paragraph 1 shall have
effect as if for the condition in paragraph 1(7) that was substituted this
F condition a) reasonable steps were taken for the purpose of ensuring that
as soon as possible after being found the wild mammal is flushed out
from below ground, b) reasonable grounds are taken for the purpose of
ensuring that as soon as possible after being flushed out from below
G ground the wild mammal is shot dead by a competent person, c) in
particular the dog is brought under sufficiently close control to ensure that
it does not prevent or obstruct the achievement of the objective in
H paragraph b), d) reasonable steps are taken for the purpose of preventing
injury to the dog and, e) the manner in which the dog is used complies

A with any code of practice which is issued or approved for the purpose of
this paragraph by the Secretary of State.”

B We are told that a concession was made in the court below that if the
Crown were not able to prove hunting with dogs, no point would be taken
as to the conditions set out in paragraph 1 and in paragraph 2, sub-
paragraphs 1-4. That same concession was repeated in this court. The
C evidence of Mr Allen was that he carried at all times appropriate
permission from the owners of all of the land the Fernie hunts.

D Because we are bound by the concession, it forms no part of our
decision but we would observe that if it were thought that the mere
existence of such a folder of permissions was sufficient justification for
digging out a particular fox, we doubt whether that would satisfy the
E exemption.

F The second charge is an allegation of interfering with a badger sett.
That is said to be contrary to Sections 3 and 12 of the Protection of
Badgers Act 1992. Section 3 reads: “A person is guilty of an offence if,
except as permitted by or under this Act, he interferes with a badger sett
by doing any of the following things: a) damaging a badger sett or any
G part of it; b) destroying; c) obstructing access to; d) causing a dog to enter
a badger sett; or e) disturbing a badger when it’s occupying a badger sett,
intending to do any of those things or being reckless as to whether his
H actions would have any of those consequences.”

A Sub-paragraph 2 says that “A person is guilty of an offence if, except as permitted by or under this Act, he knowingly causes or permitted to be done an act which is made unlawful by sub-section 1 above.”

B A badger sett is defined in section 14 of that Act and it means “any structure or place which displays signs indicating current use by a badger”.

C The events said to found these charges arise from the activities of the Fernie Hunt on 27th January 2010. It is common ground that on that day Mr Hopkins was the huntsman and Mr Allen was the countryman
D formerly known as the terrierman, each of them employees of the Fernie Hunt.

E The huntsman was in charge of and responsible for the actions of the pack of hounds used on that day; Mr Allen was in charge of and responsible for the use of the terrier used on that day.

F We heard evidence from four investigators employed by the League Against Cruel Sports. Whatever their motive for being present on that occasion, the evidence that they presented to us was objective video and audio recording of what was happening. In each case it was possible to
G locate both in time and place the circumstances of the recording. In any event, there was no challenge to the accuracy of their evidence. Questions of interpretation of what they saw are, of course, matters for us.

H It is clear to us from the evidence that before the hunt took place that day at least two badger setts had been stopped up. One was on the

A footpath running northwest from Welham towards the Peak at Langton
Caudle; the second was the badger sett that was the principal focus of
attention on the foxhunting charge. We are satisfied that those setts had
B been recently blocked. They showed fresh spade marks, fresh soil, and in
the case of the first mentioned sett, one of the holes was blocked with
timber posts. One of those had plainly been recently pulled out of the
C ground and its bottom was still covered with wet clay. At least one of the
others, while older, looked to have a fresh break at the end.

D These two setts were stopped up on land that was to be hunted by the
Fernie. We were told that the area of country available to the Fernie to
hunt was divided into seven areas. This hunt took place in Area 6. An
obvious reason for stopping up a badger sett is to prevent a live fox using
E it as a refuge from hounds. We regard the stopping up as being capable
of being evidence, albeit in isolation and not conclusive evidence, of a
decision having been taken in advance that the Fernie would hunt live
F foxes.

G On 27th January 2010 Mr Shepherd and Mr Reeves were conducting
their observations from a public footpath by the school in Church
Langton. They arrived there between 10.00 and 10.30 in the morning.
The hunt was due to start at 11.00. At no time during the day did they or
the other team of Mr Tilsley and Mr Hill see anyone laying a trail.

H Shortly after one o'clock, having been elsewhere, Mr Shepherd and Mr
Reeves returned to their viewpoint in Church Langton and filmed in the

A direction of Mill Farm and the timings that I'm about to go through come
from the timings on the video recording of what they then saw. At
13.03.13 the hounds can be seen coming from the direction of the fox
B covert just to the west of the pinnacle of Langton Caudle. At 13.03.30
they were on the hedge line that heads for the stream. The mounted field
had had to take a significant detour to get into that field and only a few
C were pursuing the hounds.

By 13.04.32 the hounds had crossed the stream and were running west
along the hedge line two fields away from the road. We were later to be
D told by Mr Allen that he had laid the trail the hounds were said to be
following and it had ended at a barn at the western edge of that hedge
line. We have great difficulty in accepting that. It was plainly impossible
E for the mounted field to follow the hounds across the stream at that point.
Indeed, they can all be seen making their way along the Cranoe Road. If
the hounds had continued to the western end of the hedge line, and
F therefore to the end of the trail, they would have reached it at a time when
those on horses were still on the Cranoe Road and near Mill Farm. We
are satisfied that at that time the hounds were pursuing a fox and were not
G following an artificial trail.

By about 13.05.28 the pack had turned and were running east on both
sides of that hedge. Some on the northern side headed up in a north
H easterly direction. Those trapped on the southern side struggled to get
through the hedge and to join the others at a point where by 13.06.22 they

A were plainly marking to ground. At 13.07.10 the huntsman and a quad
bike entered the field and the huntsman rode over to the hedge adjacent to
the pack of hounds. He remained there on horseback and made or
B received a phone call.

At 13.10.05 he beckoned with his arm and at 13.11.20 the quad bike
driven by Mr Allen arrived. It was not until 13.12.23 that the hounds
C were drawn off and taken a couple of hundred metres away. At 13.13.20
Mr Allen made his way through the hedge. At that point there were four
men stationary by the hedge including Mr Allen. At 13.15.10 the terrier
D was released and at 13.16.35 Mr Allen crawled through the hedge with
his spade. At 13.18.32 Mr Allen was tracking his terrier underground
whilst the others stood back and at that time he called forward two of the
E stationary men who went to him and started digging. The terrier was
retrieved at 13.20.58 and all stood back, looking at the hole that they had
dug. At 13.21.14 Mr Allen started digging again, having handed his
F terrier to one of the two men standing by. At 13.21.26 that man handed
the terrier to the last of the quartet, a man in blue jeans who continued to
take an active interest in the hole being dug.

G At 13.22.44 the hounds, or a good proportion of them, returned to the
area and were then pulled back again. At 13.23 the digging party all
stood back, looking at the hole, and at 13.23.12 the fox bolted and the
H man in blue jeans, still holding the terrier, raised his arm in what was
plainly a signal. At that time the hounds, the whippers-in and then the

A huntsmen all moved forward. The fox ran along the south side of the
hedge and into the road. There then appeared to be a degree of confusion
as the mounted field and those responsible for controlling the hounds
B were all stuck inside the field while the hounds were milling about in the
road. The fox escaped.

C We are satisfied that, whatever the result, the intention of digging the
fox out was that it would bolt and be pursued by the hounds to continue
the hunt. Later that afternoon Mr Shepherd and Mr Reeves were on the
road between Stonton Wyville and Cranoe near the junction with the
D Harborough Road when they saw a fox running along the hedge line of a
ploughed field between them and the Harborough Road. It ran into a
small copse to their left, itself turned left and crossed the road on which
E they were parked before heading south towards Langton Caudle.

Shortly afterwards the hounds followed the same path and a few
minutes later Mr Hopkins appeared by road and headed off in the same
F direction. At 16.07 on that day Mr Shepherd went to the scene of the dig
in the field just south of Mill Farm. There he filmed not only the stopped-
up holes, which had plainly been freshly done, but also badger paw prints,
G fresh bedding, badger hair and a fresh latrine as well as roots smoothed,
he said, by rubbing by badgers.

H Dr Pamela Mynott is the Secretary of the Leicestershire Badger Group
and a Director of the Badger Trust. She has an impressive CV. We were
satisfied of her expertise in this area and we were impressed with both her

A knowledge and her integrity. She visited the site on 1st February 2010.
She recovered fresh bedding, badger dung and badger hairs. She had not
B been given any details of the alleged incident. She stated unequivocally
that this was a badger sett in current use.

Professor Stephen Harris organised the first national badger survey in
Britain and wrote the final report on behalf of the Nature Conservancy
C Council. He first introduced widely the concept of different types of
badger setts and gave them their names. He has unrivalled expertise in
surveying badgers in the field and identifying their field signs. He has
D reviewed the video evidence supplied by Mr Shepherd and what he saw at
four o'clock on the afternoon of the 27th and he too is unequivocal that
this was on 27th January 2010 a badger sett in current use, as could be
E seen from the signs there available.

The appellants were interviewed under caution by the police. We are
told that on legal advice they each answered "No Comment". We were
F told no more as to the reasons. Granted the terms of the caution, the fact
that the tale each had to tell was a clear one and granted that each was
able to give an account of what was going on in each of the DVDs, we
G were surprised firstly that they were given such advice and, secondly, that
they took it.

We heard the evidence of Mr Hopkins, the first appellant. He has been
H the huntsman of the Fernie since 2000 but has thirty years experience in
his line of work. His evidence was that on 27th January 2010 the Fernie

A was involved in trail hunting. He told us three trails were laid. He knew
nothing about badger setts having been stopped up in advance. He had
B been following the second trail that day set by Mr Allen when the hounds
accidentally came across a fox which went to ground. The decision to dig
the fox out and despatch it was that of the Master. Neither in the case of
C that fox nor in the case of the fox later pursued beside the Harborough
Road was he deliberately engaged in foxhunting. That was his evidence.

We found him an unconvincing and unimpressive witness. When
D pressed, he made it plain that he had no means of knowing at any one
time whether the hounds for which he bore responsibility were following
an artificial trail laid by a fellow employee or chasing a wild mammal.
Indeed, his evidence was that the third trail was laid by Mr Milligan, who
E then went home, making it impossible (for him at least) to advise the hunt
that it was going the wrong way. Mr Hopkins' evidence was that
someone might radio him to tell him the hounds were way off the proper
F track and that that was sufficient to absolve him of responsibility for
ensuring that his hounds did not pursue a fox.

It is plain to us that in the case of both foxes seen that day they were
G being pursued by the hounds of the Fernie Hunt with the knowledge of
those responsible for the running of that Hunt.

As to Mr Hopkins' conduct when the fox went to ground, we are
H satisfied he gave no proper attention to the question of whether or not this
was a sett in current use. He remained on horseback. He accepted in

A evidence he took no steps to examine any of the setts beyond that which
he could see from his vantage point on horseback across the hedge from
the point where the horses were marking to ground. It is of course worthy
B of note that this is a large sett on land regularly hunted by the Fernie.

Kevin Allen was an even less impressive witness. He was, in our
judgment, shifty and evasive. Whilst we have no doubt that the Fernie
C Hunt had the equipment for necessary for trail hunting and did on
occasion indulge in trail hunting, we do not accept his evidence in
particular as to the setting of the second trail that day. We are quite
D satisfied that his evidence as to the conduct of the badger sett by Mill
Farm is wholly at variance with the video evidence that we have seen and
the inferences properly to be drawn from it. He was plainly engaged in
E digging a fox out so that it could continue to be pursued by the Hunt. He
was doing so on what was plainly a badger sett, a fact that even now he
will not acknowledge. Furthermore, it was plainly a badger sett in current
F use.

The evidence of Simon West did not greatly assist on the central
issues. He spoke of the first time the hounds broke away when being held
G in the field opposite Mill Farm. As to the hounds breaking away in
pursuit of the fox once it had bolted he can give no explanation. He
denies that he saw the signal from the man holding the terrier. It defies
H common sense that such a signal should be given at such a moment for no

A reason yet no-one concerned with the hounds seems to have seen it even
though it was at the point at which the hounds set off in pursuit of the fox.

B Charles Millington told us that he was asked at about 1.15 to lay a third
trail starting in the vicinity of Stonton Wood. He did so, starting at about
1.35. He described the trail that he laid including the point at which it
C crossed the Harborough Road and continued southwards. At the
conclusion of his trail-laying, he went home without telling anyone where
his trail had gone. It's hardly a surprise therefore that the hounds were
D following a live fox alongside the Harborough Road at 2.45 and that no
steps were taken to alert the Hunt. While of course accidents will happen
and the hounds in a well-run hunt may start after live prey, this is, to our
E mind, an example of the use of a trail to mask the fact that along the route
the hounds picked up and followed the scent of a live fox and that that
was the intention of those pursuing it.

F Mr Caruana gave evidence as an expert on the question of the badger
sett. He had not himself visited the site until this year but disagreed with
Dr Mynott as to what she had seen and with Professor Harris as to his
G interpretation of the video evidence. We had earlier watched the
recording he made earlier this year. We found both in the recording and
in his live evidence that he lacked the objectivity required of an expert
H witness. We were more impressed both with the qualifications,
experience and evidence of Dr Mynott and Professor Harris. As to each

A of the specific findings Mr Caruana made, we preferred and were sure
about their evidence where it differed.

B Mr Mott helpfully summarised his final submissions in writing and we
turn to them. We are satisfied that the tunnel in question was part of the
sett. The terrier had been put down what we find to be a badger hole and
worked its way through to a point where it had cornered the fox. We
C have only Mr Allen's word for the fact that the terrier was distressed and
that therefore, by necessary inference, the tunnel was narrow. We are not
prepared to take his word for that. He doesn't accept that any part of the
D structure was a badger sett. We are satisfied that what was found in the
field and hedge was one badger sett. The distance involved does not
change that fact. If it is one sett and any part shows signs of current use,
E then it is a sett in current use.

We agree with Mr Mott that an honest mistake as to the structure being
a badger sett would afford an excuse but we are satisfied this is not a case
F of an honest mistake. No effort was made by either man to examine the
sett properly. We are satisfied in the case of each man he knew it was a
sett in current use.

G As to the suggestion that Mr Hopkins did not share responsibility for
the dig, we reject it. This was a joint decision on behalf of the Hunt to dig
out the fox without regard for any signs that the sett might be in current
H use. The hounds were called away for that to happen.

A Turning to the hunting charge, we have dealt with most of the points
that Mr Mott raises in the course of the judgment. Dealing with specific
B issues, we are in fact each satisfied that there was a Horn Call at the point
at which the hounds made off but that's not instrumental in our decision.
C We make our decision independent of that fact. And again, as I indicated
to Mr Mott in the course of his submission, it may not matter but we don't
D think that the white things by Mill Farm were doves. We are satisfied that
the flock of doves was elsewhere and the white things may have been the
odd hound now moving through that part of Mill Farm. Again, that's not
instrumental in our decision.

E The Masters of Draghounds and Bloodhounds' submissions to a
Government Inquiry, cited by Professor Harris in his report, make two
F important points about the use of hounds to hunt an artificial scent.
Firstly, dedication of the highest level is required to prevent hounds
G hunting a wild animal. Secondly, hunting an artificial scent provides an
ideal conduit by which an individual could hunt covertly. We are
perfectly satisfied that no real attempt was made to prevent the Hunt from
H hunting a wild animal. The reason for this was indeed that the notion of
trail hunting was a cover.

H It may be that these appellants feel that they have the support of a
significant number of people and it may be in that they are correct. It may
be they feel that a day will come when this Act is repealed and in that
they may be correct. But the law is the law and no worthy cause is well-

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served by cynical subterfuge which, in our view, is what we have seen in this case. We have directed ourselves appropriately as to the burden and standard of proof and are quite satisfied that each appellant is guilty on each charge and each appeal is accordingly dismissed.
