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A.M. (Re)

**IN THE MATTER OF A.M., a young person within the meaning of
the Young Offenders Act**

[1998] A.J. No. 1376

Dockets: 70234554-Y1-0101, 70234554-Y1-0102, 70278205-Y1-0101

Alberta Provincial Court
Youth Division
Calgary, Alberta

Jordan Prov. Ct. J.

Oral judgment: October 15, 1998.

(7 pp.)

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C.46, ss. 445, 446.

Criminal law -- Wilful acts respecting property -- Cruelty to animals -- Causing unnecessary pain and suffering -- Evidence and proof -- Evidence and witnesses -- Burden of proof -- Proof of guilt beyond a reasonable doubt.

This was the trial of a young person, AM, on charges of injuring and endangering the life of a hamster, and of causing unnecessary suffering to a cat. The co-defendant, AK, pleaded guilty to the latter charge. Both young persons gave evidence regarding the torture and eventual death of the cat. However, each claimed that the other was the major assailant. Witnesses described AK as a chronic liar, and AK admitted that he had memory difficulties. The Crown claimed that AK accepted major responsibility and had no reason to lie, while AM was lying when he claimed that he was not paying attention.

HELD: AM was acquitted. The charge of injuring and endangering the life of a hamster was dismissed for lack of evidence. There was a reasonable doubt that AM caused unnecessary suffering to the cat. AK did not accept major responsibility, but minimized his involvement. He had every reason to lie in an effort to save face with his family.

Counsel:

D. Oko, for the Crown.

C. Lane, for the young person.

REASONS FOR JUDGMENT

1 JORDAN PROV. CT. J. (orally):-- A.M. is charged pursuant to Section 445 of The Criminal Code concerning the theft and death of a hamster and pursuant to Section 446 of The Criminal Code concerning the injury and death of a cat. Crown counsel admits that there is not enough evidence to convict on the charge pursuant to Section 445 and the young person is acquitted.

2 That leaves the charge of Section 446 concerning the death of the K. family cat.

3 There were two major witnesses in this trial being A.K., the co-defendant who pled guilty to this charge and the defendant himself A.M.

4 There were many striking similarities in the evidence given by A.K. and A.M., all touching on how the cat was tortured and eventually died. I do not propose to review the gruesome details except as necessary throughout my Reasons.

5 The essential difference in their evidence was that A.K. blamed the incident on the defendant A.M., while A.M. portrayed A.K. as the assailant.

6 The other evidence in the matter consisted of a note which was exchanged in school by A.K. and A.M. the evidence of Wendy Parker and Richard Stattler and an autopsy report on the cat. Wendy Parker is a member of the Calgary City Police but she was not able to shed any light on the incident which occurred. Her involvement in this matter was limited to an investigation which followed the death of the animal, and some contact with the Military Police at CFB Calgary. The autopsy report merely confirmed that the cat had died of a broken neck.

7 Richard Stattler had been a friend of both A.K. and A.M. but this relationship no longer existed at the time of trial. He described A.K. as a known liar and having had that reputation from the sixth grade on. (A.K. was in Grade 10 at the time Richard testified in this matter.) Richard had known him from Grade 6 until A.K. left the city to go to Edmonton months after this event.

8 Richard was very specific about the kinds of things A.K. lied about - things he had done, places he had been, people he had met. Richard also described the things A.K. had threatened in the past - to kill his father (A.K.'s father), smother his sister (A.K.'s sister) and push her down the stairs.

9 I have described Richard's evidence about A.K. because A.K.'s credibility is an essential element of this case. If A.K. is not to be believed, there is little other evidence on which a conviction may be founded unless of course A.M. is lying. But A.M. denies involvement in the torture and killing of the cat. Wendy Parker and Richard Stattler were unable to give any evidence about the incident itself, and the autopsy report, although consistent with what both A.K. and A.M. described, does not point to who did what.

10 I have grave misgivings concerning A.K.'s evidence. He has been described as a liar. He described memory difficulties when he was on a lower dose of Ritalin than he is now on - and when he wasn't on any at all, such being the case on the day when the cat was killed.

11 Yet he testified in a fluid, detailed, and vivid fashion, so fluid there was not a pause, umm or ah. He had little difficulty recalling the essential events of the day and certainly had no difficulties we wouldn't expect from a witness testifying about events which occurred so long ago. The only important thing he didn't remember during his direct evidence, until after the Crown had prompted his memory during an adjournment, was that he had told A.M. to stop and

that A.M. had threatened him saying, 'If you try to stop me I will come after you. I will hurt you, your father, your sister and there will be nothing you can do about it'.

12 This ability to testify so fluidly despite an admitted difficulty with remembering what happened when his Ritalin dosage is not appropriate or when he has not taken it, causes me concerns, especially since he did not remember A.M.'s threats until prompted.

13 I am also concerned about A.K.'s motives to tell the truth as opposed to lying. Crown counsel admitted A.K. would save face with his family if he portrayed A.M. as the major culprit in this drama, but he argued that saving face would not be sufficient motivation for A.K. to perjure himself.

14 With all due respect to Crown counsel I disagree. It is certainly within the realm of possibility that a young man who has already pled guilty to participating in the killing of the family cat would go to great lengths to save whatever face he could in the eyes of his family.

15 I disagree entirely with Crown counsel's portrayal of A.K. as having accepted major responsibility for what happened and refer to the transcript of A.K.'s evidence at pages 31 to 32:

'Ms Oko: Okay, tell us what happened.'

Answer: A.M. had come over and we began to work on the project in my room and then moved to the basement. And we were kind of talking a bit about our project and I began to draw a picture, which I didn't finish.

Then what I remember from that is A.M. had gotten Pumpkin's cat treats off of the refrigerator and we had gone upstairs to my room and coaxed the cat into my room. I remember the door being closed and A.M. kicking and pushing the cat around. occasionally pushed him around a bit. Yes, I pushed him around. Then A.M. started kicking Pumpkin more and more harder and getting more and more serious.

I then remember leaving the room to go to the bathroom and leaving the door open and then when I went back to the remove [sic], the door was closed again and A.M. kicked Pumpkin again and he ran underneath the bed. I moved the bed out from the wall and I remember hitting Pumpkin, trying to get him out and he ran out. And A.M. shut the door all the way and then I moved the bed back and A.M. started kicking and hitting him again and he ran under the bed again. I have to move the bed a second time and he got out from under the bed.

I remember having a belt in my hand which A.M. asked if it locked in place and I said yes. And he took the belt and there was -- I remember holding Pumpkin and he was tying wire around his legs and then he took Pumpkin and lied him on his side and put his body weight on him with the belt around his neck and pulled on the belt again and held it there for a while and when he lifted up the pillow, there

was blood on the pillow and the mattress and all around the room. Pumpkin head was -- and he appeared to be dead.'

16 There is an elaboration later on when A.K. admits he held the cat while A.M. tied the wire around the cat's legs but even then A.K. portrayed A.M. as the major perpetrator.

17 I do not find that A.K., during his testimony in this proceeding, accepted major responsibility and that he has therefore no reason to lie. I find directly to the contrary. He minimized his involvement during his testimony and he had every reason to try to save face with his family.

18 I do not find the existence of the note in A.M.'s hand writing can provide reliable corroboration of A.K.'s evidence.

1. We do not have the original, only a photocopy. There is no way to determine if it has been altered in any way.
2. It is only a portion of the paper on which it was written. Would what was written above or below the portion we can view be inculpatory or exculpatory? Would it blame A.K.? Would it blame A.M.? We cannot speculate and the question remains unanswered.
3. The manner in which the note was found and provided to the authorities provides no guarantee of trustworthiness. A.K. had been cleaning his room at the end of the school year, months after this incident. He found a couple of notes but he destroyed them.

19 How fortuitous for A.K. that he preserved the very note from A.M. which, when limited to the words on its face, implicated A.M.

20 I cannot find that the existence of this note in its photocopied, partial state sufficiently reliable to corroborate A.K.'s evidence. (I note that it is no longer necessary that the evidence of a co-accused against his co-defendant be corroborated.) Having reviewed A.K.'s evidence about the note, the photocopy of the note, and the evidence of Wendy Parker and Richard Stattler, I have grave misgivings about its trustworthiness.

21 The question I must then ask is whether there is anything in A.M.'s evidence which would enable me to conclude that, despite the frailties in A.K.'s evidence, the Crown has proved its case beyond a reasonable doubt.

22 I do not find that such is the case.

23 Crown counsel made much of the point that A.M. had stated that he wasn't paying attention to what was going on and that is why he did nothing to help the poor animal. It was Crown counsel's opinion that A.M. was clearly lying because it was obvious that A.M. was paying attention and that these lies could point only to his guilt.

24 I note that A.M. when being cross-examined by Crown counsel backtracked from his statement that he wasn't paying attention and stated that those words had been poorly chosen.

25 We then learned that A.M. was emotionally unstable at the time of this incident and that he was subsequently treated medically for depression. A.M.'s counsel used the words 'emotionally detached' to explain A.M.'s behaviour that day. agree that this is a more apt description than what A.M. went on to describe as a poor choice of words.

26 I do not make a finding that A.M. was lying, but then again, I do not find that he was telling the truth either.

27 The only conclusion that I can draw is that the Crown has not proved its case beyond a reasonable doubt.

28 I am mindful of the Ontario Court of Appeal decision in *Regina v. Wade* (1994), 89 C.C.C. (3d) 39 in which the Court stated that the burden of proof beyond a reasonable doubt does not apply to a single witness, that all evidence must be considered. I believe I have done that.

29 I am also mindful of the Supreme Court of Canada instructions given in R. v. Lifchus (1997), 118 C.C.C. (3d) 5, concerning reasonable doubt.

'Reasonable doubt must not be imaginary or frivolous. The Crown is not required to prove its case to an absolute certainty, an unrealistic high standard that could seldom be achieved. It is not a doubt based on sympathy or prejudice. It is based on reason and common sense. It must be logically connected to the evidence or absence of evidence. It is not proof beyond any doubt. It is more than proof that the accused is probably guilty. It is a standard of proof that is inextricably intertwined with the principle of the presumption of innocence.'

30 Lastly I have reviewed what some have called the masterful judgment of Wood, J.A. in R. v. Brydon (1995), 95 C.C.C. (3d) 509, (B.C.C.A.) Wood, J.A. there reviewed the case law concerning several forms of reasonable doubt instruction. He stated:

1. It is a doubt based upon reason as opposed to doubt based upon imagination or speculation.
2. Proof beyond a reasonable doubt may be described as being achieved when there is moral certainty in your mind that the accused committed the offence.
3. If you conclude that the accused probably committed the offence and no more, then you have a reasonable doubt.
4. If you feel sure that the accused committed the offence, you do not have a reasonable doubt.
5. On the other hand you must not set up a standard of absolute certainty that the Crown must meet in order to prove guilt.
6. A reasonable doubt is a real doubt, a substantial doubt, an honest doubt, a sensible doubt, a serious doubt.
7. A reasonable doubt is the sort of doubt that would influence or cause a person to hesitate to act in his/her everyday affairs or the most important of his/her own affairs.
8. A reasonable doubt is a doubt which you decide is reasonable in the circumstances of the particular case.

9

Proof beyond a reasonable doubt is proof that convinces the mind and satisfies the conscience.

10. You must not convict the accused unless you have excluded every reasonable hypothesis consistent with the innocence of the accused.

31 These words have provided me with invaluable guidance as I struggled to articulate my decision and I will refer briefly to some Woods, J.A.'s points.

I am not morally certain that A.M. committed the offence; I believe that he probably did it, but that is the most I can conclude. I am not sure.

My doubt is not based on speculation. Crown counsel conceded that A.K. could indeed be motivated to save face in the eyes of his family - although he has a different belief than I as to how far A.K. might go to save face.

32 I conclude by saying that I cannot in good conscience find beyond a reasonable doubt that A.M. committed this offence.

33 He is acquitted.

JORDAN PROV. CT. J.

cp/qi/s/drk/DRS