

In the Provincial Court of Alberta

Citation: R. v. Rabeau, 2010 ABPC 159

Date: 20100507

Docket: 071133078P1-01-001

Registry: Calgary

Between:

Her Majesty the Queen

- and -

Jacob Michael Rabeau

Editorial Notice: On behalf of the Government of Alberta **personal data identifiers** have been removed from this unofficial electronic version of the judgment.

Reasons for Sentence by the Honourable T.C. Semenuk

INTRODUCTION

[1] The Accused has pled guilty to a single charge of killing a dog contrary to Section 445(1)(a) of the *Criminal Code*. The matter is before the Court for disposition. For the reasons that follow, a Conditional Discharge is granted and the Accused is placed on probation for 12 months.

FACTS

[2] The Accused is charged in an Information as follows:

Count 1: On or about the 2nd day of August, 2007, at or near Calgary, Alberta, did wilfully and without lawful excuse kill, maim, wound, poison or injure a dog that was kept for a lawful purpose, contrary to Section 445(a) of the Criminal Code of Canada.

[3] The facts in this case were adduced by way of a written **Agreed Statement of Facts** marked

in evidence as Exhibit 1 as follows:

1. *On August 2, 2007, Justin Kotulak was the owner of a four month old male Husky puppy named Shea. This puppy was a pet, kept for a lawful purpose. Kotulak and his puppy resided in the Queensland neighbourhood of Calgary, Alberta.*
2. *On August 2, 2007, the Accused drove a Buick LeSabre motor vehicle, Alberta Licence Plate F[...]3, registered to Michael Rabeau (the Accused's father). The Accused was the primary driver and had control over the vehicle since June 2006.*
3. *Late August 1, 2007, Kotaluk returned home from work and let Shea into the backyard. There was a piece of plywood enforcing the fence at the back of the yard and somehow, the puppy managed to get around that and out of the yard.*
4. *Shea had gone out through the alley and into a grass park "off leash" area bordering on the alley.*
5. *Two boys, 14-year-old Jordan McNaughton and 15-year-old Jordan Vanweelden were skateboarding in the neighbourhood on their way home.*
6. *The Accused, driving his Buick, with one or more passengers, attended in the back alley and stopped. The Accused exited the vehicle and was urinating on the grassy area bordering the off leash park when the puppy approached him.*
7. *The two boys describe the puppy as being excited; one described him as playing and romping and one as growling and aggressive.*
8. *The puppy approached the Accused in this excited state and the Accused believed the puppy was going to nip or bite at his legs.*
9. *The Accused finished urinating and ran to the back of his car with the puppy following him and continuing to bark. The Accused opened the rear driver's side door and removed a wooden object, either a 2 x 4 or a bat.*
10. *The Accused swung the wooden object at the puppy, connecting once with the puppy's skull.*
11. *Shortly after midnight on August 2, 2007, Kotulak noticed his dog had escaped from the backyard.*

12. *Kotaluk went into the back alley in search of his dog and saw a grey vehicle with, what happened to him, “several” occupants. When he approached the vehicle, he heard a male voice say “we just killed it”.*
13. *Kotaluk then spotted his puppy in the grass beside the off-leash area, bordering on the alley.*
14. *The puppy had severe head trauma and was bleeding from the ears and then started convulsing.*
15. *The car then drove off.*
16. *The Accused and passenger(s) then proceeded down the alley, turned around and came back towards and past Kotaluk, who stepped out of the way.*
17. *Kotaluk picked up Shea and carried him to the backyard, where the puppy died in his arms.*
18. *Another witness, Borys Jogota, was in the back alley and observed the car. He observed the same vehicle a few days later and was able to record the license plate of F[...]3.*
19. *On August 31, 2007 the police attended the Accused’s residence. Upon opening the door and seeing the police, Rabeau responded, “I know what this is about.”*
20. *The Accused was arrested (and appropriately “Chartered and Cautioned”) and provided a statement to the police on August 31, 2007. That statement is admitted as voluntary and complying with the Accused’s rights.*
21. *The Accused admitted involvement in the offence, although initially described kicking the puppy instead of using the wooden object.*
22. *The Accused was released on a Promise to Appear.*
23. *Both Kotaluk and Jigota estimated the puppy’s weight as between 8 and 10 lbs.*
24. *The Accused admits that it was his action that killed the puppy.*
25. *The Accused further admits that while he may have initially had cause to be concerned, he over-reacted and used more force than the situation called for.*

[4] In addition, the Crown adduced a Book of Photographs, which were also marked in evidence as Exhibit 2.

[5] As well, both a Pre-Sentence Report (PSR) and Forensic Assessment Outpatient Report (FAOS), were prepared and marked in evidence as Exhibits 3 and 4, respectively.

[6] Finally, Defence Counsel adduced a letter written by the Accused's parents, which was marked in evidence as Exhibit 5.

ISSUE

[7] There is no joint submission in this case. The issue is a fit sentence. Crown Counsel submits the Accused ought to be sentenced to 21 - 30 days' imprisonment, followed by 12 - 18 months probation. Crown Counsel also wants the Court to make an Order pursuant to Section 447.1(1) of the *Criminal Code*, prohibiting the Accused from owning or having the custody or control or residing in the same premises as any animal for a period of two years. Defence Counsel submits that sentence is excessive, and that the Accused ought to be granted a Conditional Discharge with probation for 12 months. In the alternative, he submits sentence ought to be suspended, and the Accused placed on probation for 12 months. Defence Counsel opposes the Court making any Order pursuant to Section 447.1(1) of the *Criminal Code*.

LAW AND ANALYSIS

Range of Sentence

[8] An offence contrary to Section 445(1) of the *Criminal Code* is now a hybrid offence. In this case, the Crown has elected to proceed by summary conviction. The maximum penalty is a fine not exceeding \$10,000.00 or imprisonment for 18 months or both.

[9] To assist the Court in fixing a range of sentence, Crown Counsel has provided the Court with a Book of Authorities including: *R. v. Wicker*, 2007 ABPC 129; *R. v. Gehring*, (February 6, 2008, unreported judgment, ABPC); *R. v. Piasentin*, 2008 ABPC 164; *R. v. Presnail*, (2000) 264 A.R. 258 (ABPC); *R. v. MacKinnon*, (September 26, 2000, unreported judgment, ABPC); *R. v. Leehim*, (January 13, 2000, unreported judgment ABPC); *R. v. Charette*, (October 20, 1998, ABPC); *R. v. Zeller*, (1998) A.J.No. 351 (ABPC); *R. v. Vince*, (November 16, 2007, Transcript of Proceedings); *R. v. Peters*, (January 24, 2007, Transcript of Proceedings); and *R. v. Patrick*, (June 26, 2009, Transcript of Proceedings).

[10] Defence Counsel has also provided the Court with a Book of Authorities, including: *R. v. Priest*, (1996) J.J. No. 3369 (Ont. C.A.); *R. v. Campbell Brown*, (2004) A.J. No. 162 (ABPC); *R. v. Perreault*, (2007) N.S.J. No. 162 (NSPC); *R. v. Gamble*, (2008) S.J. No. 429 (Sask. Q.B.); and *R. v.*

B.J.M., (1976) A.J. No. 429 (ABCA).

[11] I have carefully reviewed all of the cases submitted by Counsel. Many of these cases were also referred to the Court in **Wicker**, *supra*. In an attempt to fix an appropriate range of sentence in that case, my Learned Colleague, Dunnigan, PCJ, at paras. 36 - 37, stated as follows:

The decisions vary in terms of the relative culpability of the offenders, and the extent of the injuries suffered by the animals subjected to abuse.

The cases, however, appear to have at least two common threads. First, the attack on the animal is often connected to a domestic relationship incident, invariably involving the offender exacting revenge on the other member of the relationship by injuring the pet. Second, the cases often disclose offenders attacking the animals in a blind rage, followed by an inability to comprehend or even recollect their actions.

[12] I agree with these observations. In the second class of case, the motivation for the rage is often connected to the pet urinating or defecating in a residence, or otherwise destroying property, and the offender losing control, and punishing the pet well beyond any notion of reasonableness and civility.

[13] In these types of cases, denunciation and deterrence are primary considerations in the sentencing process, and a short sharp period of imprisonment is usually imposed, even on an offender with no prior criminal record.

[14] The reason for this was succinctly stated in **Campbell Brown**, *supra*, by my Learned Colleague, Brown, PCJ, at para. 31 as follows:

Protection of animals is part of our criminal law because a person's treatment of animals, like the treatment of children, the infirm or other vulnerable parties, is viewed as a barometer of that person's treatment of people. As with all other criminal offences, harming animals amounts to harming everyone.

[15] The range of sentence for these types of cases is somewhere between 2 and 4 months' imprisonment. In some cases, a Conditional Sentence Order (CSO) may be granted. In some cases, if the sentence does not exceed 90 days, an intermittent sentence may be imposed. Depending on the circumstances of the offence and the offender, probation for 12 - 24 months may follow a period of imprisonment.

[16] That being said, there is a third category of case where the offender has a *bona fide* fear of an animal, either personally, or in relation to someone else, or some other animal, and overreacts by killing the animal.

[17] In this type of case, and depending on the circumstances of the offence and the offender, rather than imprisonment, a suspended sentence and probation or conditional discharge may be

granted. See: *Campbell Brown* and *Gamble*, *supra*.

Circumstances of the Accused

[18] Briefly, the Accused is 19 years of age. At the time of the commission of the offence, he was only 18 years of age. He comes before the Court as a youthful first offender without any prior criminal record. He is the youngest of three siblings. He appears to have had a very good upbringing, and continues to have a stable and supportive family. Although the Accused admits to experimenting with cannabis marihuana and consuming alcohol, there are no substance abuse or mental health issues in his life. While growing up in the family home, there were family pets, and there is no indication of any prior animal abuse by him. He moved out of the family home in 2008, and now resides in Calgary with his girlfriend.

[19] The Accused has a grade 11 education, but is working on upgrading to grade 12 at Chinook Learning Services. At the present time, he is also gainfully employed as an apprentice welder/iron worker. He is well regarded at his place of employment.

Sentencing Principles

[20] In all sentencing cases, the ultimate disposition for an offender must reflect the fundamental purpose and all the principles of sentencing provided for in Section 718 of the *Criminal Code*. The sentence must be in accordance with the fundamental principle of proportionality found in Section 718.1 of the *Criminal Code*. As well, the sentence, in accordance with Section 718.2 of the *Criminal Code* must account for any relevant aggravating and mitigating circumstances and be tailored to fit the Accused before the Court. “Individualized” sentencing, as opposed to “tariff” sentencing, has been endorsed by the Supreme Court of Canada in *R. v. McDonnell*, (1997) 1 SCR 948 and *R. v. Proulx*, (2000) 140 CCC (3d) 449.

[21] What are the Aggravating and Mitigating circumstances in this case?

Aggravating

1. The nature of the offence is serious in this case, because the Accused killed a 4-month-old Husky puppy that only weighed between 8 and 10 pounds.
2. In killing the dog, the Accused used a 2 x 4 wooden object or bat, hitting the dog once on the skull. He retrieved the wooden object from his motor vehicle after he finished urinating in an alleyway. Hitting the dog was unnecessary. Even if he had a *bona fide* fear of the dog while urinating, he could have simply got into his vehicle and driven away.
3. The offence took place next to an off leash park, where the Accused could reasonably expect dogs to be running at large.

4. According to the FAOS report, the Accused has a possible adjustment disorder, with slight depressive and anxious symptoms. According to the PSR, the Accused admits to a tendency to “get angry over small stuff”.

Mitigating

1. The Accused has entered a guilty plea to the charge.
2. I accept the fact that finding himself exposed when urinating in the alleyway, around midnight on the date in question and after working a 14 hour shift, the Accused was tired and had a *bona fide* fear of the dog, who was growling and being aggressive. The dog was running at large at the time, having escaped from the safety of his owner’s backyard.
3. The offence in this case was impulsive. The Accused simply overreacted to a fearful situation he found himself in. There is no indication that the offence was planned or deliberate and the Accused in hitting the dog once, did not intend to kill the dog out of anger.
4. The letter written by the Accused’s parents and adduced in evidence satisfies me that the offence was out of character. The Accused is really a dog lover and there has been no history of animal abuse in his family. In fact, he and his common-law girlfriend have a dog living with them at the present time.
5. According to the FAOS report, the Accused’s overall risk of re-offending is low.
6. According to the PSR, the Accused is a suitable candidate for community supervision.

Conditional Discharge

[22] The seminal case dealing with the test to be met for the granting of discharges in Alberta, is the decision of the Alberta Court of Appeal, in ***R. v. MacFarlane***, (1976) 3 Alta. L.R. (2d) 341.

[23] The two-prong test to be applied is that the Court must be satisfied that the granting of a discharge is in the Accused’s best interest and not contrary to the public interest.

[24] It was pointed out in ***MacFarlane***, *supra*, that it is in everyone’s best interest to be granted a discharge so as to not acquire a criminal record. I also note the six factors stated in ***MacFarlane***, *supra*, in determining whether the granting of the discharge would be contrary to the public interest. In particular, I note the caution stated that it would be a most “exceptional case”, where a crime involving violence would be dealt with by way of an order of discharge.

[25] In terms of the public interest, Crown Counsel submits that in a case such as this, the Accused's criminal conduct ought to be made a matter of record. She points to the aggravating factors in the case, and the need to emphasize the principles of denunciation and deterrence in animal abuse cases.

[26] Defence Counsel submits that the Accused is a youthful first offender, and that the offence is out of character. There are no serious substance abuse or mental health issues in his life. He is otherwise a responsible, hardworking, young man. He relies on the decision of the Ontario Court of Appeal in *Priest, supra*, where the Court stated that in relation to youthful first offenders, the primary sentencing principles ought to be individual deterrence and rehabilitation. He submits that the moral blameworthiness of the Accused is reduced, and relies on all the mitigating factors in the case in support of his submission. He submits that the Accused's conduct need not be made a matter of record, and that exceptional circumstances are present.

DISPOSITION

[27] After detached reflection, I find the submission made by Defence Counsel compelling. This is a case like *Gamble, supra*, where a conditional discharge was granted. I view the circumstances in that case as being more serious, because the accused meant to kill the dog. Once in her motor vehicle, she too could simply have driven away. Instead, she ran over the dog twice to ensure it was dead. The accused in that case was also a mature individual, not a youthful offender.

[28] Accordingly, I order the Accused be discharged on conditions prescribed in a Probation Order. The Probation Order will be for 12 months, on the Conditions stated in the attached Order.

[29] In the exercise of my discretion and having regard to the circumstances of this case and all the mitigating circumstances in this case, I decline to make an Order pursuant to Section 447.1(1) of the *Criminal Code*.

[30] Finally, there will be no Victim Fine Surcharge in this issue.

Dated at the City of Calgary, Alberta, this 7th day of May, 2010.

T.C. Semenuk
A Judge of the Provincial Court of Alberta

Appearances:

R. Freiheit
For the Crown

W. DeWit
For the Defence