

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

ANJALO ABEYWICKREMA

Before Justice Lloyd Dean
September 17th, 2010

K. Bertholet **for the Crown**
K. Shannon **for the Accused**

REASONS FOR SENTENCE

DEAN J.:

[1] Anjalo Abeywickrema is charged with cruelty to animals pursuant to s. 445.1 (1)(a) of the Criminal Code.

THE FACTS:

[2] On May 10, 2010, James Trepanier of the Humane Society received a call regarding a dog in distress within the city of Windsor, Ontario. Upon attending at the location he discovered a black lab retriever mix approximately 2 years. As he approached, the dog became aggressive towards him. He was ultimately able to secure the dog. He noticed the dog's penis area was red and black and appeared bloody. He took the dog back to the local Humane Society where it was examined by veterinarians.

They discovered the penis had a condom on it which was secured in place by a piece of black bicycle tire inner tube. As a result the dog was unable to urinate. It was the veterinarian's opinion that the dog would not have been able to urinate for the previous 12 to 24 hours. They determined the dog would need penile amputation and extensive surgery. As a result of the owner of the dog being unknown at the time it was decided that the dog would be euthanized. It was the veterinarian's conclusion that the act of placing the condom on the dog and securing it with the inner tube resulted in the injuries and suffering. There were no other signs of injuries or signs of struggle on the dog.

[3] From their investigation, police were able to determine that Mr. Abeywickrema was the dog's owner. The police attended at his apartment on May 12 and spoke to him. He gave his version of events for the date of May 9th. He indicated he had taken his dog for a walk to the park. At one point in the park he removed the dog's leash and collar and the dog ran off chasing a bird, and then later indicated it was a cat. He said the dog ran into an apartment building and he never found the dog after that. He indicated this happened between 7:00 p.m. and 7:30 p.m. He said he looked for the dog for approximately 25 minutes and then returned to his home because he was suffering chest pains. He called an ambulance. It turns out he was suffering a heart attack and he was ultimately taken to a Detroit, Michigan hospital.

[4] The police were able to determine the call to the ambulance was between 10:00 p.m. and 10:30 p.m. and they felt there were several inconsistencies in the accused version of events. The police obtained a search warrant on May 13 for the accused apartment. They observed several items of interest including a piece of black bicycle tire inner tube. Once the warrant was executed, the accused was arrested.

[5] At the time of these events the accused was on parole stemming from a manslaughter conviction. Corrections Canada has issued a suspension regarding his parole. Prior to his hearing regarding the revocation of his parole he was interviewed by his parole officer while in custody at the Windsor jail. At the beginning of the interview he continued to stick to his original version indicating he did nothing untoward involving the dog. He offered an explanation for having the piece of inner tube in his apartment, indicating he had recently patched a bike tire. After a video appearance in court that same day, the accused requested to speak to his parole officer again and gave the following statement. Mr. Abeywickrema described his dog as being very difficult to control from the day he brought it home. He reiterated that it would regularly pee in his apartment and would attempt to hump his leg and other objects around the apartment. He stated that on a few occasions the dog had ejaculated on his furniture or whatever else it had been humping. The offender admitted that some time during May 9, 2010 he placed a condom

on the animal in an attempt to stop it from humping and ejaculating. He noted that he tied the condom on with a piece of inner tube to ensure that it did not come off. He stated that it was never his intention to hurt the dog and he did not realize the inner tube would cut off circulation to the dog's penis. Mr. Abeywickrema stated the condom did not have any effect on the dog's humping and he decided he would take it for a walk in an attempt to calm it down. While out walking the dog he attempted to take the condom off the dog but it bit his right hand just below his thumb. He showed his parole officer what appeared to be a fresh scar on his right hand. He stated that during this removal attempt the condom ripped and he was unable to remove all of it. He then took the dog to the park where he released it from the leash, at which time the dog ran away. He then stated that everything he had previously disclosed to the Windsor police from this point forward regarding his search for the dog was the truth. He was adamant that had it not been for his heart attack he would have continued to search for the dog as it was never his intention to harm it. He claimed this was the first time he had ever put a condom on the dog.

Background of Offender

[6] The following information was disclosed in the presentence report. Anjalo Abeywickrema is the seventh of 10 children born to his biological parents in Makadura, Sri Lanka. His father was reported to have been a police officer prior to his retirement. The accused reports that he has had no contact with his father for over 13 years. His mother taught school when the offender was young however became a full-time homemaker as the family grew. He reported that his mother passed away from cancer approximately 14 years ago. His parents had a good relationship with no separations and there were no family violence or substance abuse issues in his family. He described his family as a lower middle-class family and reported that he had very good parents. He had to work hard as a child and there were some financial concerns in the home. He left the paternal home at age 24 to get married. He and his wife had two children and he described the marriage as stable. They were residing together when he emigrated from Sri Lanka at the outbreak of war. He planned to make arrangements for his wife and children to follow once he was settled. He immigrated to Mexico where he remained for two days prior to illegally crossing the border into the United States. He was held in a detention camp in Texas for six months and then reportedly, with the assistance of a religious organization, immigrated to Canada as a political refugee. He initially maintained regular contact with his wife and children in Sri Lanka and sent them money. As the war continued in Sri Lanka he lost contact with them after three years, and has had no communication with them since. He reported that he has not had contact with any family members in over 13 years. He believes that he has a sister in Las Vegas and some family members residing in Italy. Since coming to Canada on December 10, 1987 the offender has resided on his own, with friends, and was also involved in three common-

law relationships. He resided in Toronto for approximately one year. In 1993 he met a lady, who had a son from a previous relationship. They formed a common-law relationship after six months and have one son, who is 16 years old. His relationship with this lady lasted six years. He indicates the relationship ended as a result of financial problems. He stated that he lost his job and began arguing with his common-law spouse. He reported there was no physical violence in the relationship. Following the separation he maintained contact with his son and the relationship with his ex-spouse improved, however there was no reconciliation.

[7] His ex-spouse described the offender as an excellent father and verified that he has maintained contact with his son. While in custody in a Federal institution he sent cards and gifts to his son and when he was released on parole his son spent every weekend with him. His ex-spouse reported that the offender developed a gambling problem, began using substances and associating with negative peers and this caused the relationship to deteriorate. She indicated that he could be easily influenced. She indicates that she terminated the relationship and he took the breakup hard and threatened to seek custody of the children. Eventually they again developed an amicable relationship. The accused indicates that he was involved in two additional common-law relationships and each lasted approximately 3 years.

[8] On June 4, 2007 the offender was sentenced to four years in addition to time served as a result of being convicted of manslaughter. He was released on parole on February 1, 2010 and lived briefly at a halfway house before establishing his own residence. He was residing alone at the time of this offence. He is uncertain if this residence will be available when he is released. His ex-spouse has remarried and the offender and her husband have become friends. She indicated that the offender is welcome to reside at their home and she feels this would be good for their son.

[9] While on parole there were no supervision concerns prior to his parole being suspended as a result of his arrest for the offence before the court. A report from Correctional Services Canada indicated that he attended all supervision meetings and was open to guidance and feedback. He was involved in a domestic violence program and his response to that program was described as positive. While on parole, three urinalysis were completed with all results returning negative. There were no concerns regarding substances.

[10] The offender has a history of depression and has attempted suicide in the past. He has also been under the care of a psychiatrist. The depression seems to have been

initiated by the separation with his ex-spouse and loss of employment. Apparently after he secured employment he began to feel better about himself and he stopped seeing the psychiatrist.

[11] While being treated in the hospital for his heart attack the offender indicates he was transferred to the psychiatric ward and began seeing a psychiatrist once again. He reports that he was prescribed some medication for depression. He has indicated that he would like to continue seeing a psychiatrist.

Purpose and Principles of Sentencing

[12] I have reviewed the entirety of s. 718 - 718.2. I have reproduced here the relevant parts of those sections applicable to the case before me:

718.1 The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - (i) ...

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

...

shall be deemed to be aggravating circumstances;

- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

[13] **Aggravating Factors**

1. The accused was in a position of trust/authority being the owner of a dog, and he abused that position, causing the dog to suffer life ending injuries.
2. The accused misled police initially when he was informed of his dog's fate.
3. The accused prior record, in particular his conviction for manslaughter.
4. The accused was on parole at the time.

[14] **Mitigating Factors**

1. The accused has pled guilty.
2. Although delayed (misled police) the accused did ultimately confess.
3. The accused, in the pre-sentence report and in open court, expressed remorse for his actions.

Position of the Parties

[15] Ms. Bertholet for the Crown acknowledges that the cases supplied by the Crown suggest the usual range of sentence in similar cases has been two to four months jail.

[16] In this case the Crown suggests the appropriate sentence is in the range of 8 to 9 months given the aggravating factors, and also suggests primary concerns are the protection of the public and the objectives of denunciation and deterrence. Ms. Bertholet suggests that rehabilitation should play a less significant role because the accused has already had the benefit of rehabilitation efforts while on parole. Despite that, she also asked this court to consider placing the offender on two years' probation once his jail sentence has completed. As well the Crown is seeking a five-year section 447.1 order.

[17] Ms. Bertholet went through the case law, referring to the facts of each case and to some degree attempted to distinguish those cases from the present one. I took from her submissions that although the acts done to the animals in those cases may have been

more egregious, it is the personal circumstances of this particular offender, specifically his past conviction for manslaughter and the fact he was on parole, that should lead this court to impose a much higher sentence than what was imposed in those other cases.

[18] Mr. Shannon, defense counsel, suggest an appropriate sentence is one of three months, perhaps slightly more due mainly to the accused past record and the fact that he was on parole. Mr. Shannon concedes that whatever jail sentence is imposed it should be consecutive to the sentence the accused is currently serving (once his parole is formally revoked).

Case law and Analysis

[19] On the date submissions were made with respect to the appropriate sentence I commented on the case law that was provided to me by counsel for my consideration. I will not repeat all of what I said on that occasion, but once again I would like to point out that in the cases I was given, in my view, the offenders committed more brutal acts against animals than in the case before me today. At the end of my reasons I will list the cases referred to by counsel.

[20] Section 718.1 expresses the fundamental sentencing principle that a sentence must be proportionate to the seriousness of the offense and the level of responsibility of the offender. Section 718.2 (b) expresses that a sentence should be similar to sentences imposed on similar offenders for similar offenses committed in similar circumstances.

[21] While I wish to make it clear that I am not of the view that any one particular principle of sentencing is to be given more weight than another, there are clearly cases where certain principles are more applicable and given more prominence depending on the facts of the case and the circumstances of the offender.

[22] While I am mindful that the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise, in my view the law is clear that the sentence I impose today should not be a substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes. To the extent possible, this ensures that convicted persons are not left with the sense of injustice or grievance. In each case, the court must impose a fit and just sentence taking into account the principles of sentencing as well as the unique circumstances of the

offender having regard as to the nature of the crime and the specific circumstances in which it was committed.

[23] I am aware that this case has generated some significant public outrage and media attention. Their concern, and indeed some of their reaction, is understandable. Many are here in court now to hear the passing of the sentence.

Sentence

[24] Having considered all of the above I am of the view that a sentence of four months jail is appropriate.

[25] The aggravating factors the crown points to, in particular the past record of the accused and the fact he was on parole is partially offset by the mitigating factors coupled with the particular circumstances of this case. In my view it should be acknowledged that the offender attempted to take the condom off of the dog before the dog had suffered any apparent physical injury. But for the offender having suffered a heart attack the dog may have been spared suffering any injuries. The sentence I have imposed has taken that fact into account. That being said, I am also mindful that but for the offender putting the condom on and tying it, the court would not be dealing with this matter today. The accused has acknowledged that both putting the condom on the dog's penis and tying it on with the inner tube was inappropriate.

[26] The jail sentence will be followed by two years of probation. The terms of probation are as follows:

1. Report within 24 hours to a probation officer as directed and thereafter be under the supervision of a probation officer or anyone authorized by your probation officer to assist in your supervision and report at such times and places as that person may require.
2. Attend and actively participate in any counselling as directed by your probation officer.
3. Attend and comply with a psychiatric/psychological assessment and complete any treatment program as directed.
4. Abstain from the purchase and possession of alcohol or other intoxicating substances.

5. Abstain from the purchase and possession of all non-medically prescribed drugs.
6. Not to be in a position of trust, responsibility, or care of any animal.

[27] There will also be a section 447.1 order for five years prohibiting the offender from owning, having the custody and control of, or presiding in the same premises as an animal or a bird.

[28] There is no victim fine surcharge.

List of cases referred to:

R. v. Wicker, [2007] A.J. No. 566 (A.P.C.)

R. v. Brown, [2004] A.J. No. 201 (A.P.C.)

R. v. Fowlie, [1998] N.B.J. No. 539 (N.B.C. Q.B.)

R. v. Zeller, [1998] A.J. No. 351 (A.P.C.)

R. v. Karolev [1992] Y.J. No. 186 (Y.T.C.)

R. v. Cooper, [2007] A.J. No. 262 (A.C.A.)

Dated: September 17, 2010

Justice Lloyd Dean
Ontario Court Justice