

File No: 37224-1
Registry: Penticton

In the Provincial Court of British Columbia

REGINA

v.

GEORGE CIMBALA

**REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE WALLACE**

COPY

Crown Counsel: **A. Janse**

Defence Counsel: **A. Advani**

Place of Hearing: **Penticton, B.C.**

Date of Judgment: **October 5, 2010**

[1] THE COURT: These charges arose from the shooting of a St. Bernard dog on May 27, 2008, in a fairly rural area near Osoyoos, B.C. Mr. Cimbala is charged with wilfully injuring a dog and with causing unnecessary pain, suffering, and injury to a dog.

[2] Mr. Cimbala is 68 years old and has lived for 17 years on four acres of land located approximately three-and-a-half kilometres outside of Osoyoos. It is partially fenced and has a vineyard, his residence, and chicken coops on the property. He testifies he runs a chicken business selling eggs off his property.

[3] Mr. Cimbala describes his property at the time of the shooting as having three-quarters of the property fenced around it and a quarter of it wide open with nothing to prevent any person or animal from having access to the chicken coops. The photos that were taken and entered as exhibits show this configuration.

[4] Ms. Cotte lives in an area outside Osoyoos and is a nearby neighbour of Mr. Cimbala. She is and was at the time the owner of the St. Bernard dog whose name is Pepper. She moved to Osoyoos in 2007 to begin a vineyard business. On the evening of May 27th, 2006 Ms. Cotte was in her vineyard working and her young daughter was in the family home with

their two dogs, one being a Bichon Frise and the other one being Pepper. She describes Pepper as being approximately 120 pounds in weight and 19 months old.

[5] Somehow the dogs managed to escape the house without the daughter or Ms. Cotte being aware of it. A short time later, a neighbour came to the house and reported she had seen the dogs running loose. There is a busy road nearby and everyone was concerned that the dogs would be hit by a car. So Ms. Cotte immediately got into her vehicle to go and find them. After a short while, she saw them in Mr. Cimbala's field. She said she saw Pepper's tail wagging above the height of the grass.

[6] She stopped her vehicle, got out, and called the dogs to come to her. The little dog ran to her right away and Pepper began to, as she described it, saunter towards her. As that dog approached, Ms. Cotte noticed Mr. Cimbala coming towards her as well, waving what she thought was a stick. As he got closer, she realized it was a gun.

[7] She could see that he was very angry and, as he got closer, she said she heard him say, "You are lucky I did not shoot your dog." At that point, she thought it was a turn of phrase, not a threat. However, she saw him come up close to Pepper and then point the gun at the dog. She saw him pull

the trigger. The gun did not fire. Mr. Cimbala then re-cocked the gun, laid the butt of the gun right on the snout of the dog's nose and fired whereupon the dog fell.

[8] Ms. Cotte sat with the dog who she thought was going to die at that point. However the dog revived so she took it right away to a vet at the South Valley Veterinary Hospital. That doctor testified that Pepper was bleeding profusely from the face and, on examination, discovered the dog had only shreds of its left nostril left. Photos were entered and it was quite a grim looking injury. She also discovered there were fractures to the dog's palette.

[9] The wound was cleaned, the dog was sedated, and kept overnight at that hospital. On May 29th, the dog was taken to Kelowna to see a vet there. That is where the photos were taken. That vet said that half of the dog's nose was missing and the nasal cavity was exposed where the nostril had been blown off by the gun.

[10] I must comment that Mr. Cimbala showed no remorse at the time nor does he show any regret at this time. The charges he faces, as I indicated, are first of all that without lawful excuse, Mr. Cimbala maimed or wounded a dog. The Crown has proven it was Mr. Cimbala that shot this dog and that, as a result, the dog was maimed and wounded and, as indicated, Mr.

Cimbala himself has admitted that he shot the dog.

[11] Mr. Cimbala's position is that he had a lawful excuse or rather one of two excuses that justify him shooting the dog. One is that he says he was fearful of the dog and, secondly, he felt he had a right to shoot it to protect his chickens who had been being killed by something.

[12] Mr. Cimbala testified in his own defence and, where a person testified on their own behalf, the Supreme Court of Canada has directed that I must follow a four-step test in assessing his evidence. First of all, do I believe Mr. Cimbala and, if so, does his evidence raise a defence or negate an essential element of the offence?

[13] Secondly, if I do not know whether I believe Mr. Cimbala or not, then I must acquit. In other words, even if I do not believe he gave evidence which negates an essential element of the offence or raises a defence, but I have a reasonable doubt, I must acquit. Thirdly, if I do not reject his evidence, I must acquit him.

[14] Lastly, even if I do not accept his evidence and have no reasonable doubt, as always, I must look at all the evidence which I do accept and, on the basis of that evidence, I must be convinced beyond a reasonable doubt of the accused's guilt.

So I will review the evidence in light of Mr. Cimbala's testimony.

[15] Mr. Cimbala says he needed to defend himself from the dog because it attacked him and he had to defend himself. His lawyer says he did not have time to stop and think about what to do. I do not agree. This was not a spur-of-the-moment reaction. Mr. Cimbala was not just in the field, came upon the dog, and reacted.

[16] In this case, the accused walked quite a long distance to his house as the photos of the property show. There was plenty of time for him to think on the way to the house. He had more time to change his mind on the way back to where the shooting took place, but he did not.

[17] As well, he had time to think while he was in the house and, while there, had options other than shooting someone's pet. He could have called the SPCA, advised he was afraid, and needed them to come out right away and help him. He did not. Going back out, with a gun, was not consistent with him feeling threatened by the dog. If he felt as threatened as he said, I would have expected him to stay inside the house where he was safe. If his true feeling was fear of the dog, why did he go back outside to where it was?

[18] When he did go outside, he saw the owner calling the dog to her, although I must comment that his evidence was very contradictory on many points, but especially this point. At one point, he said, she was screaming to call the dog. At another point, he said, she was there but he did not hear her calling the dogs at all. Again, if Mr. Cimbala's testimony were true that he really was afraid of this dog, that was the time to turn and walk away when he saw the dog approaching its owner.

[19] As well, I comment on the fact that while Mr. Cimbala had to walk a substantial distance to his house to get his gun, there is no evidence whatsoever that the dog chased him as he went or followed him at all. So, therefore, Mr. Cimbala was not in any imminent danger at any point in these proceedings.

[20] He says he was justified in his actions because the dog attacked him. His evidence at the trial was that he did not get closer than 10 feet.

[21] In addition to his own evidence, there is the evidence of a tape-recording that was taken when Mr. Cimbala was interviewed by an SPCA officer. In that interview, Mr. Cimbala testified or indicated to the officer, rather, that he took the muzzle of his gun up against the animal and used it to make the animal back up. So, once again, his evidence at

court is contradictory to the evidence I heard on the tape-recording when he says he did not get closer than 10 feet to the animal. Obviously, the barrel of the gun was not 10 feet long.

[22] Ms. Cotte testified she never saw Pepper lunge at or try to bite anyone and much less Mr. Cimbala. For that matter, Mr. Cimbala himself has never stated or testified in any way that the dog lunged at him or made a motion to bite him. Ms. Cotte says that the dog did turn and bark at Mr. Cimbala, but that was in response to him approaching very angry and shaking the gun.

[23] I find this is a natural thing for a dog to do when someone approaches its owner in a threatening manner and, in a roundabout way, Mr. Cimbala testified to the same thing here in court. I accept that the dog did not act aggressively until Mr. Cimbala approached Ms. Cotte in a hostile manner. Then all he did was bark.

[24] Several of the witnesses testified that the dog was big which alone can be intimidating and it does not take an expert to know that a St. Bernard is a very big dog. If the dog were or had been approaching Mr. Cimbala when he was alone in a field and barking loudly and viciously, there might be good reason to think he had to defend himself. But when this dog

was 10 feet away from him with its owner right there, it does not make sense to think that this dog was attacking him or he had to defend himself.

[25] In addition to the allegation that he was fearful and that was why he had to shoot this dog, Mr. Cimbala also testified that he was within his rights to shoot this dog because he believed the dog had killed his chickens. There is no direct evidence that this dog ever killed anything.

[26] It was proven that Mr. Cimbala had had some of his poultry killed. I asked him if he has fenced in his chicken coops so it is not wide open to any roving animals, be they domestic animals or wild animals like coyotes. He has not. There is certainly evidence that chickens were killed, but no one knows how that happened and no one saw this dog do it or any other dogs.

[27] There is evidence that there are quite a number of dogs in this neighbourhood that regularly run through the fields. In fact, Mr. Cimbala gave an interview to a local newspaper indicating that shortly before this incident with the St. Bernard, he had shot at a German Shepherd. At the time, he indicated he had shot and hit it in its hind quarters. In court, he indicated he did not know whether he shot it or not and whether his shot had connected or not.

[28] Taking all this into account, it appears likely that this dog, Pepper, was just in the wrong place at the wrong time and that Mr. Cimbala, as his friend and neighbour who testified said, had had enough of losing his chickens and took it out on this dog. I do not accept his evidence that he was fearful.

[29] He had certainly enough time to make himself safe rather than shoot this dog. Furthermore, he had the choice of, as Crown had indicated, shooting the dog outright. That is, he had six guns; he used only the one that would cause injury, as opposed to death.

[30] Counsel for Mr. Cimbala says this was a stray dog on his property and Mr. Cimbala was entitled to protect his belongings, being at that time his chickens.

[31] In that regard, one of the cases the Crown submitted is I think appropriate to refer to, and I do this because of the evidence we heard that it was "just a dog". I am not quite sure what was meant by that, but Mr. Justice Lamer of the Supreme Court of Canada, in the case of *R. v. Menard* in 1978, found at 43 C.C.C. (2d) 458, indicated that:

Within the hierarchy of our planet the animal occupies a place which, if it does not give rights to the animal, at least prompts us, being animals who claim to be rational beings, to impose on ourselves behaviour which will reflect in our relations with them those virtues we seek to promote

in our relations among humans. ... It will often be in the interests of man to kill and mutilate wild or domestic animals, to subjugate them and ... if they are too old, or too numerous, or abandoned, to kill them. This is why, in setting standards for the behaviour of men towards animals, we have taken into account our privileged position in nature and have been obliged to take into account at the outset the purpose sought.

"Without necessity," a phrase in the section with which the judge was dealing at the time:

... does not mean that man, when a thing is susceptible of causing pain to an animal, must abstain [from doing it] unless it be necessary ...

What it means is:

... 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.

[32] In this case, I find that Mr. Cimbala had absolutely no need to shoot this animal. He had every other means available to him, including just staying in his house, rather than getting a gun. Furthermore he was certainly entitled, if he wished, to shoot a gun in the air to try and scare this dog if the dog was running wild in the field. I accept that might have been an appropriate action to scare it away.

[33] To walk up to a dog with a pellet gun, with its owner standing within a few feet, and shoot the gun squarely into the face of a domestic pet can be nothing other than wilfully attempting to maim or injure and cause pain to a dog. I cannot think of any more deliberate action a person could take than to try and hurt a domestic animal by shooting a pellet gun into its face.

[34] Accordingly, I find you guilty, Mr. Cimbala, on both counts. I will hear counsel's submissions re: the other count as to whether you think it is *Kienapple*'d because I think it is.

[35] MR. ADVANI: I am sorry?

[36] THE COURT: Crown, do you agree?

[37] MR. ADVANI: Do I -- I am sorry?

[38] THE COURT: That it is a *Kienapple* situation, that the facts on which the convictions rely are really exactly the same. It is two counts.

[39] MS. JANSE: I agree. Your Honour, I was just --

[40] MR. ADVANI: Yes.

[41] MS. JANSE: -- reviewing that and I think, while there

are some elements that are slightly different. But because the facts are exactly the same, Your Honour may find they are *Kienapple*'d and, if that is the case, the Crown would prefer a conviction be entered on Count 1.

[42] THE COURT: All right. So I will enter a conviction on Count 1 and enter a judicial stay of proceedings on Count 2. Just for the sake of the non-lawyers in the courtroom, sometimes actions can lead to more than one charge, but the law is that if it is exactly the same set of facts that could lead to conviction on both, then the courts only enter a conviction on one. So you do not get convicted several times for doing one thing only, in layperson's terms. I am sure that definition would not pass a law school test, but in layperson's terms, that is what it means.

[REASONS FOR JUDGMENT CONCLUDED]

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**REASONS FOR SENTENCE
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Crown Counsel:	A. Janse
Defence Counsel:	A. Advani
Place of Hearing:	Penticton, B.C.
Date of Judgment:	October 5, 2010

[1] THE COURT: Well, I must say this is a very difficult case to decide what an appropriate sentence should be. The *Criminal Code* sets out that there are some primary purposes and principles of sentencing under s. 718. First of all the sentence must denounce unlawful conduct; it must deter the offender and other persons from committing offences; where necessary, offenders are separated from society; I must assist in rehabilitation; the sentence should provide reparations for harm done to victims or the community, and it must promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community.

[2] Crown has taken the position that a jail term of four to six months is appropriate for this offence whereas counsel for Mr. Cimbala has indicated that a conditional discharge would be appropriate.

[3] Crown has filed for my consideration the case of *R. v. Folk* from Kamloops, a decision of Judge Harrison given on February 10th, 2009. That involved the killing of a dog but there are important differences between the facts in that case and the facts that I have heard in this trial. In the *Folk* decision, Mr. Folk went onto the dog owner's property while they were away and when the dog was tethered up and killed it, essentially because it would not stop barking.

[4] Mr. Cimbala's behaviour, while inexcusable, did not amount to him hunting down the dog when it could not escape and killing it, although from the victim impact statements I read, it might have been more of a blessing for Pepper if she had died than what she is going through now.

[5] On the other hand, the request of Mr. Cimbala's counsel, for a conditional discharge, while definitely in Mr. Cimbala's interest, I find does not adequately give weight to the need to deter others from committing similar offences out of anger and frustration. Nor does it reflect society's abhorrence for this type of behaviour.

[6] Many of the cases that are referred to in the *Folk* decision have to do with serious injuries to animals and pets, but some of them border on, I have to say, out and out almost sadistic behaviour, which is not the case here. I truly believe, Mr. Cimbala, that you had no intention when you started out your day that you were going to find an animal to hurt. I know that you did not do that.

[7] On the other hand, having had an animal yourself, a dog, I do not know how you could look that animal in the eyes and shoot it. It is just beyond me to understand how you could do that.

[8] I accept what your lawyer has said that you are at no risk to do this sort of thing again, that you have realized it was inappropriate and there are other ways to deal with these issues than by causing this kind of injury to an animal. In all the circumstances, I am making a conditional sentence order for a period of 30 days. This means it is a jail term, but it is served in your home under very strict conditions.

[9] The reason I am doing this is I think that the factors are aggravating enough that there has to be some very clear message that this cannot happen in a civilized community, civilized society. We live in an area where there are a lot of farms and fields and many people and pets and we need to be cognizant of the fact that, as I quoted from Judge Lamer, that we are the superior beings and we have a responsibility not to use that power inappropriately. Anyone who gets frustrated and as angry as you did needs to stop and think, before they take action, about what the consequences will be.

[10] The consequences have to be severe enough to make people stop and think and I cannot see that a suspended sentence would actually send that message. So there will be a 30-day conditional sentence order.

[11] The terms of the order are that you report to a conditional sentence supervisor - I do not think, though, he

will get over there by today - I will say within 24 hours and thereafter as directed.

[12] You shall supply your conditional sentence supervisor with your residential address and not change that address during the term of the order. You shall be in your residence on a curfew from ten o'clock at night until six o'clock the following morning all seven days a week during the term of your order.

[13] You shall present yourself to your door or your telephone if requested by a Corrections officer or peace officer or their designate who are checking that you are obeying your curfew.

[14] You shall not be outside your residence during those hours unless it is a medical emergency or you have the written permission of your conditional sentence supervisor and you carry that permission on you whenever you are outside your residence during the curfew.

[15] You shall attend for and complete under the direction of and to the satisfaction of your conditional sentence supervisor any programs or counselling as directed, specifically with respect to anger management.

[16] You are not to be outside your residence in possession of

any firearm during the term of your conditional sentence order.

[17] I am also going to make an order under s. 447.1(1) (b) that you pay restitution in the amount of \$4,276 to the Cotte family for the invoices that they have submitted to the Crown up to 2008. I am not going to order any more payment because the Crown does not have the dollar figures for me. It will be up to the Cottes whether they want to pursue reimbursement for more of the costs involved.

[18] I am going to direct the probation office that if requested by the Cottes, that you attend a victim-offender mediation, and I am only saying that because I do not want this incident to keep eating either side up. Sometimes we demonize people in our own minds because of our anger which is really just adopting what led to this whole incident in the first place, and sometimes the only way to get over that is to sit down face to face and express your anger in a more healthy way.

[19] So if the Cotte family asks for it, I am directing that the probation office organize a victim-offender mediation and that you shall attend, Mr. Cimbala. But if they do not want it, it is not going to be organized.

[20] Anything else?

[21] MS. JANSE: It was just of some concern if Your Honour's intention is that he complete anger management treatment --

[22] THE COURT: I know, 30 days.

[23] MS. JANSE: -- I am wondering about the reality of this in 30 days. Perhaps a --

[24] THE COURT: All right, I will follow this up -- I will make the restitution a part of a probation order, too, and I will make a probation order six months to follow the conditional sentence order.

[25] The terms of the probation order will be that you report as directed by your conditional sentence supervisor at the end of that sentence to a probation officer, which may be the same person with just a different responsibility, and thereafter as directed. There is a term that you continue to or undertake any counselling or program as directed and the restitution order will be part of the probation order. It is to be paid within five months of the start of the probation order, the restitution.

[26] Anything else?

[27] MS. JANSE: Sorry, Your Honour, to --

[28] THE COURT: The victim --

[29] MS. JANSE: -- keep up my notes, so basically --

[30] THE COURT: The victim-offender mediation should be part of the probation order, too.

[31] MR. ADVANI: I am sorry, I did not get that part?

[32] THE COURT: The victim-offender mediation, that should be a term of the probation order, as well.

[33] MS. JANSE: So, essentially, Your Honour, all the conditions in the CSO except for the curfew and "Present at the door" to be included in the --

[34] THE COURT: Right.

[35] MS. JANSE: -- probation order? Okay, thank you.

[36] THE COURT: Excellent. Thank you. All right.

[37] MS. JANSE: And that is all.

[38] MR. ADVANI: So those conditions will still be a part of the conditional sentence --

[39] THE COURT: Yes.

[40] MR. ADVANI: -- or no? They will be?

[41] THE COURT: They are part of the conditional sentence, the curfew and the checking on curfew, but they are not a part of the probation order. So the two orders are the same except for those terms are in the CSO and not in the probation.

[42] MR. ADVANI: So the victim-offender thing will be in both?

[43] THE COURT: Both, yes.

[REASONS FOR SENTENCE CONCLUDED]