

File No: 40401-1
Registry: Courtenay

In the Provincial Court of British Columbia

REGINA

v.

KYLIE NIKKELS

REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE CROCKETT

COPY

Crown Counsel:	R. Ellsay
Defence Counsel:	B. Movassaghi
Place of Hearing:	Nanaimo, B.C.
Date of Judgment:	January 24, 2018

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[1] THE COURT: Ms. Nikkels is charged that on April 9, 2016, at or near Courtenay, in British Columbia, she caused unnecessary suffering and injury to Bianca, a chihuahua dog, belonging to her grandmother, Ms. Williamson, contrary to s. 445.1(1)(a) of the *Criminal Code*. Count 2 charges that she wilfully and without lawful excuse killed the dog, contrary to s. 445(1)(a) of the *Criminal Code*.

[2] This matter came before me on for trial on August 1 and November 29, 2017, for the Crown's case, and continued today with Ms. Nikkels taking the stand in her defence.

[3] These are my reasons for judgment.

[4] The Crown's first witness was Ms. Sophie Williamson, the owner of the dog and grandmother of Ms. Nikkels. Ms. Williamson testified that she left her house at around 10:45 a.m. on April 9, 2016, and was gone for approximately 45 minutes. She went to get insurance for her van because she was going to drive Ms. Nikkels to her aunt's home to live.

[5] When she left, her granddaughter, Ms. Nikkels, was the only person home, along with two dogs, a pit bull named Cerby, who was owned by Ms. Nikkels, and a chihuahua, Bianca, who was owned by Ms. Williamson. The dogs were outside on an upper deck when Ms. Williamson left.

[6] When Ms. Williamson returned home, the dogs were gone and she found a note from Ms. Nikkels which she testified said, "I've just gone. Dee's picked me up to pick up some things I left at her house". And then underneath that, the note said, "call this number as soon as you get home", and then in big numbers, "9-1-1".

[7] Ms. Williamson called the number. Ms. Nikkels answered and said "Nana, I'm at the vet with Bianca". Ms. Williamson hung up and went to the vet. When she got there, Ms. Nikkels was crying and said, "I'm so sorry, Nana. I'm so sorry."

[8] Ms. Williamson had no further conversation with Ms. Nikkels until she was leaving the vet's office, at which point Ms. Nikkels said, "oh wait, Nana, I want to go back to your house and clean up the blood". Ms. Williamson responded, "no, I want to see what happened".

[9] When she got back home, Ms. Williamson found a napkin on the deck covering a small blob of what appeared to be blood. That is the only item that was out of the ordinary upon her inspection of the home.

[10] Ms. Williamson testified that Ms. Nikkels had been living at her house but she had been asked to leave because her behaviour was not appropriate. The issues of concern to Ms. Williamson were that Ms. Nikkels was taking Ms. Williamson's personal belongings and was using drugs.

[11] I heard evidence from both the attending veterinarian, Dr. Bessey, and a veterinary pathologist, Dr. Stephen Raverty. Their evidence was to the effect that Bianca had to be euthanized or she would have died as a result of the trauma to both the top and to the side of her skull. They could not say for certain what caused the damage to the skull, but it would have taken some force to create the holes in the skull.

[12] Dr. Raverty testified that a hammer-like object, with a rounded top and a handle of some kind would explain the nature of the damage to the skull, which

consisted of a circular hole at the top of the skull and a more linear fracture on the side of the skull. He could not say for certain that a hammer was the object used, just that the object would have to have similar components to make these injuries to the skull.

[13] The evidence of the two veterinarians was that there was no other significant injury to Bianca in the way of puncture wounds, shearing of muscles, or fracture of the delicate jaw bone, which one would expect if Bianca were attacked by a dog.

[14] I also heard evidence from three other Crown witnesses: an RCMP officer, an SPCA officer, and a civilian, Mr. Schultz. Their evidence is not material to my decision so I am not going to summarize it here.

[15] Ms. Nikkels testified that on the morning in question, she put her pit bull Cerby on the deck upstairs and left him there with Bianca. She testified that he had a chewable treat in the shape of a bone when she left him, which he had partially consumed. She then went downstairs to pack her things. She testified that she was not aware that her grandmother had left the house to buy insurance.

[16] About five minutes after going downstairs, she heard what she described as a very loud bang from the opposite side of the house, upstairs where the deck was. She went upstairs and Cerby met her at the top of the stairs. She described him as seeming terrified, and he had his tail between his legs.

[17] She went through the kitchen and saw Bianca lying on the deck. She had a small pool of blood near her head and her eye was protruding. She did not see anything out of the ordinary in the house or kitchen, but her focus was on Bianca.

[18] Ms. Nikkels picked up Bianca in a blanket. She called some relatives to see if someone could take her to the vet. Her sister suggested that she find a neighbour to take her, which she did. Mr. Schultz was that neighbour and he confirmed that he drove Ms. Nikkels with Bianca to the vet's office.

[19] Sometime prior to going to the vet, Ms. Nikkels wrote the note to her grandmother and covered up the pool of blood with a napkin.

[20] She testified on cross-examination that she and her grandmother had never gotten along well. She initially testified that Ms. Williamson wanted her to move out because she was out late at night, but later agreed under cross-examination that Ms. Williamson had accused her of taking her things and using drugs. Ms. Nikkels denied she had done those things.

[21] Ms. Nikkels testified that when she said she was sorry to her grandmother at the vet's office, she meant she was sorry for Ms. Williamson's loss and sorry that Bianca had been injured while she was the one at home.

[22] Both counsel agreed this case involves an assessment of credibility, in particular of Ms. Nikkels. The law which I must apply is set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, and the B.C. Court of Appeal's decision in *R. v. C.W.H.*, 3 B.C.A.C. 205. I summarize the principles from those cases as follows:

- (1) if you believe the evidence of the accused, you must acquit;
- (2) if you do not believe the evidence of the accused but his or her evidence leaves you with a reasonable doubt, you must acquit;

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- (3) if you do not know whom to believe, then you have a reasonable doubt and must acquit;
- (4) even if you are not left with a reasonable doubt by the evidence of the accused, you must still ask yourself whether on the whole of the evidence you are satisfied beyond a reasonable doubt that the accused is guilty.

[23] As well, I must apply the test for conviction based on circumstantial evidence. Defence counsel provided me with the case of *R. v. D.D.*, 2015 BCSC 1507, a decision of Mr. Justice Schultes. He summarized the law on circumstantial evidence at paragraph 143 of his decision, and I am going to quote from parts of that paragraph but not all of it. So I am quoting now:

The test for a conviction based on circumstantial evidence is well summarized in the recent case of *R. v. Robinson* . . . beginning at para. 35:

[35] In order to reach a guilty verdict based on circumstantial evidence, the court must be ". . . satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty."

[24] The court then quoted from the decision of *R. v. Ngo*, a British Columbia Court of Appeal decision, at paragraph 54, and I am quoting again:

[54] In considering whether the circumstantial evidence supports an inference of guilt beyond a reasonable doubt, the trier of fact must not examine each individual circumstance in isolation. Instead, the proper approach is to consider whether all the evidence, taken together, establishes the guilt of the accused and is inconsistent with any other rational conclusion.

[25] Further down in that quotation, this is the quotation of the *Robinson* case, at paragraph 36. The court states:

[36] Gaps in the evidence cannot be bridged by speculation or conjecture. If there is another rational inference arising from the evidence, a guilty verdict cannot be found on the basis of circumstantial evidence.

[26] So that is the end of my quotations of the case law.

[27] Defence counsel submits that the evidence does not meet the requisite standard to prove beyond a reasonable doubt that Ms. Nikkels caused the injuries to the dog. There are many other possibilities for how the injuries occurred so it is not the only rational inference that can be drawn from the evidence.

[28] In addition, he submits that Ms. Nikkels testified in a straightforward, credible manner about what occurred that day and I should believe her, or that at least her evidence should leave me with a reasonable doubt.

[29] The Crown submits that, given the experts' explanation of the injuries to Bianca, and the fact Ms. Nikkels was the only one home of the time, there is no rational inference to be drawn from the facts other than that Ms. Nikkels caused the injuries and therefore the Crown has proved the case beyond a reasonable doubt.

[30] I have listened carefully to all of the evidence. In particular I listened to Ms. Nikkels and I watched her today as she testified. I listened to the expert evidence about the nature of the injuries to Bianca and the cause of them, blunt force trauma to the head in two places.

[31] While I cannot say for certain that everything Ms. Nikkels has told the court is the truth, nor can I say that she is not stating to the best of her recollection what took

place that day. While she may have been unsure about the sequence in which she did things and hesitant to reveal that her grandmother thought she was stealing and using drugs, those aspects of her testimony are not fatal.

[32] In summary, I do not know whether to believe her or not.

[33] At the end of the day, I do not know what happened to Bianca. There are many possibilities for how she could have incurred these injuries which were suggested to and by the veterinarians: being hit, thrown or dropped onto an object of the shape described by Dr. Raverty. Both doctors testified about the fragility of a dog the size of Bianca, who was 1.9 kilos, according to Dr. Raverty. Cerby, by contrast, was approximately 85 pounds.

[34] Cerby could have picked up Bianca and dropped her. He could have chased her or accidentally knocked her into some furniture. This could account for the bang described by Ms. Nikkels. There are a number of possibilities, in other words rational inferences, to be drawn from the evidence.

[35] In conclusion, I have a reasonable doubt about whether Ms. Nikkels caused the injuries to and the resulting death of Bianca.

[36] Accordingly, I find her not guilty on both counts.

[REASONS FOR JUDGMENT CONCLUDED]