

Citation: ☀ R. v. Gartner
2019 BCPC 307

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File No: 84955-3-C
Registry: Nanaimo

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

KEVIN PAUL GARTNER

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE T. GOUGE**

Counsel for the Crown:

T. Conway

Counsel for the Defendant:

M. Ritzker

Place of Hearing:

Nanaimo, B.C.

Date of Hearing:

November 6, 2019

Date of Judgment:

November 27, 2019

THE ISSUE

[1] Mr. Gartner has entered guilty pleas to three offences: (i) wilfully causing pain, suffering and injury to an animal; (ii) possession of stolen property; and (iii) possession of heroin. It is my task to sentence him for those offences

THE OFFENCES

[2] On May 3, 2019, Mr. Gartner was observed to attack and torture a rabbit. The incident, of approximately 12 minutes' duration, was captured on two security cameras. Mr. Gartner approached the scene on a bicycle with a cloth shopping bag dangling from the handlebars. The bag got trapped in the spokes of the bicycle. Mr. Gartner stopped and removed the bag from the spokes. He then extracted a living rabbit from the bag. He snapped his fingers into the face of the rabbit, plucked its whiskers, slammed its face into the side of a building and punched it with his fist. A veterinary expert tendered by the Crown offered the following opinion in relation to those assaults:

The face of the rabbit is particularly sensitive. The nose is especially sensitive to manipulation and important for breathing, scent detection and socialization. The skull of the rabbit is thin and very susceptible to trauma. The whiskers are very sensitive and thick with large firm follicles so plucking them is very painful.

Mr. Gartner then shook the rabbit violently while holding it suspended from its ears, and later by its tail, kicked the rabbit while in the shopping bag, folded the rabbit while holding it, squeezed the rabbit's chest and abdomen and flipped it back and forward on the concrete. In relation to those assaults, the veterinarian offered the following opinion:

The skin of the rabbit is thin and fragile and this rabbit has very little body fat, so there would be no protection from external trauma. The trauma of this violent nature would have resulted in pain and bruising. Internal trauma with organ damage and/or internal hemorrhage is highly likely.

* * *

Picking a rabbit up by the tail can cause it to deglove (skin pull entirely off the tail) or fracture but as a minimum be painful because it is too small to support the weight of the rabbit. The ears are sensitive and are not a proper way to support the rabbit.

Mr. Gartner pinched the rabbit's nostrils closed for three intervals, of 6, 12 and 18 seconds' duration. In relation to those assaults, the veterinarian offered the following opinion:

Rabbits are unable to breathe through their mouth so pinching the nostrils closed to a rabbit is suffocating rendering it unable to breathe. ... A rabbit's normal respiration rate is 30 to 60 breaths per minute (higher if stressed) so it may have resulted in fainting from lack of oxygen.

The veterinarian also commented at length on the rabbit's passive behaviour during the assault, and opined that such behaviour is indicative of an animal under extreme stress.

[3] During a search incidental to his arrest following the attack on the rabbit, Mr. Gartner was found to be in possession of a stolen passport, a stolen telephone and a small quantity of heroin.

THE OFFENDER

[4] Mr. Gartner is 47 years of age. He left school after grade 10. He has been unemployed for the past 10 years.

[5] Mr. Gartner's criminal record begins in 2010, and comprises one conviction for impaired driving, one for dangerous operation of a motor vehicle, two for breaking & entering, four thefts, one possession of stolen property, one mischief and one breach of probation.

[6] Sometime after May 3, 2018, Mr. Gartner was running away from a police officer who was attempting to arrest him for breach of a curfew. Mr. Gartner tripped and broke his ankle. His leg subsequently became infected and was amputated in August, 2019. He will remain in hospital for the next few months, and hopes to move to transition housing on his discharge from hospital.

[7] Mr. Gartner is addicted to methamphetamine and heroin. He has a prescription for methadone which he uses to manage his heroin addiction. His treating physician describes him in the following terms:

[Mr. Gartner] has struggled with Substance Use Disorder involving various illicit drugs since his late teenage years, and currently satisfies the Criteria or a Severe Opiate and Stimulant Use Disorder in very early remission.

* * *

Although early in remission from his Addictions, [Mr. Gartner] is following all recovery processes which should lead to sustained recovery. He is determined to have long-term remission and his efforts, to-date, are very encouraging.

At this point any disruption in his current recovery (incarceration) may be Deleterious in the long-run.

His social worker describes Mr. Gartner as "... in the early stages of his remission...".

She says:

[Mr. Gartner] has been steadfast in his goals to stop using drugs, having a positive attitude about his life changing situation [i.e. the amputation of his leg], engaging and participating in services, and working hard to have treatment for his [substance abuse] disorder.

[8] Mr. Gartner was referred for a psychiatric assessment before sentencing. The assessing psychiatrist adopts the following assessment, offered by the veterinarian whose evidence is discussed above:

... the only remaining reason for this torture was for the pleasure of inflicting pain while having power and control over the animal. ... this type of wilful sadistic pleasure is unlikely to be quenched with what was seen on the video and ... Mr. Gartner remains a threat ... [to animals]

The psychiatrist also opines that:

... when speaking about the offence ... Mr. Gartner failed to show a level of emotion of remorse. His level of lamentations was for being caught. When pressed further on the matter, he did show an underlying level of resentment when he stated that, prior to the offence, he had been in hospital for six months and not one person had come to see him....

Similar themes predominated in Mr. Gartner's remarks when he addressed me at the sentencing hearing. He appeared to be much more affected by his own unfortunate personal history than by the suffering of the rabbit.

The psychiatrist assesses Mr. Gartner in the following terms:

Mr. Gartner presents as a man with a well-entrenched history of substance addiction and dependence. Mr. Gartner indicated that he actively uses drugs on a daily basis as well as being on methadone. Although unclear if his presentation was just the artifact of drug use, it is believed that Mr. Gartner does function under a level of diminished cognitive capacity. Given the level of drug use, it is questioned whether he also presents with an acquired level of brain damage.

* * *

Mr. Gartner was not able to provide any additional information that would lead one to believe that he will make any of the substantial changes that he needs to make in his life. It is believed that for him to make effective changes in his life, he will need to address his substantial issues with drug addiction as well as other criminogenic factors. Mr. Gartner does not have the ability to address these matters on his own and will likely require strongly enforced external barriers to stick to a new pattern.

DETERMINATION OF A FIT SENTENCE

[9] Because the Crown has proceeded summarily:

- (a) and this is Mr. Gartner's first conviction for possession of a controlled substance, the maximum penalty for Mr Gartner's possession of heroin is six months' jail and a \$1000 fine: *Controlled Drugs & Substances Act* SC 1996, c 19, s 4(3);
- (b) the maximum penalty for Mr. Gartner's possession of stolen property is six months' jail and a \$5000 fine: *Criminal Code*, section 787(1); and
- (c) the maximum penalty for Mr. Gartner's cruelty to the rabbit is 18 months' jail and a \$10,000 fine: *Criminal Code*, s 445.1(2)(b).

The Crown also seeks a period of probation and an order to prohibit Mr. Gartner from possessing animals for a period of 10 years pursuant to section 447.1(1) of the *Criminal Code*. Mr. Ritzker, for Mr. Gartner, did not oppose those orders.

[10] The imposition of a fine would be meaningless in this case. There is no reasonable prospect that Mr. Gartner will ever be in a position to pay one.

[11] Mr. Gartner was found in possession of a small quantity of heroin for his personal use. There is no suggestion that he has ever trafficked in the drug. He has no previous

conviction for possession of narcotics. The Crown seeks a 30-day jail sentence. I think that a 14-day sentence would be fit in the circumstances.

[12] Mr. Gartner has a long history of thefts and possession of stolen property. In the past, he has received 18-month sentences for those offences. Because the Crown has proceeded summarily in this case, the maximum sentence for this offence is 6 months. The Crown seeks a 45-day jail sentence, and that sentence is appropriate.

[13] In relation to the assault on the rabbit, I am guided by the principle that "... a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances": *Criminal Code* 718.2(b).

[14] In *R v. Camardi* [2015] AJ No. 341; 2015 ABPC 65; 28 Alta LR (6th) 399 @ paragraph 27, Justice Gaschler provided a useful summary of sentencing decisions in cruelty to animal cases. It appears from that summary that a fit sentence in a case of this kind would be between 90 days' and 2 years' incarceration.

[15] In *R v. Munroe* [2010] OJ No. 2579; 2010 ONCJ 226, Justice O'Donnell said @ paragraphs 2, 27:

On 17 April, 2008 Parliament gave effect to widespread concerns that the *Criminal Code* provisions concerning cruelty to animals had fallen drastically out of step with current social values and restructured those provisions. In addition to fine-tuning the offences themselves, Parliament took what had been a pure-summary conviction offence in the *Power* case, with a maximum sentence of six months no matter what the nature of the offence and created a hybrid sentencing structure with a maximum sentence of five years' imprisonment by indictment and a "super-summary" sentencing maximum of eighteen months' imprisonment. Accordingly, the overall maximum penalty for offences of this nature increased ten-fold.

* * *

The April, 2008 amendments to the *Criminal Code* were no mere housekeeping changes; rather, they represent a fundamental shift in Parliament's approach to these crimes. Such a dramatic change in a penalty provision is virtually unheard of in our criminal law.

In that case, Mr. Munroe was convicted of assaults on two dogs. Justice O'Donnell described the dogs' injuries in the following terms:

I do not propose to repeat the full details of the offences, which are more fully set out in my reasons for conviction, but one need only utter the words multiple lesions, blunt force trauma, lesion from a thermal, chemical or electrical burn, haemorrhage, separated retina, collapsed lung, fourteen rib fractures, perforation of the thoracic cavity and so on to get some flavour of the magnitude of these offences. These were not the fruits of a single act of misguided anger or frustration; they reflect multiple injuries of different types inflicted at different times over a prolonged period. What I have recited are merely the injuries shown by Abbey's autopsy, without even referring to Zoe's injuries. Quite apart from the repeated nature of the offences, which belies any possibility of a single act of immaturity or anger, there is the fact that the infliction of a chemical, thermal or electrical burn necessarily involves some element of deliberation, a calculated act of cruelty. The word "torture" is perhaps the only apt description here. It is perfectly natural to puzzle over how a mature human being could possibly inflict injuries of this nature and extent on two companion animals.

Mr. Munroe had no criminal record, no history of substance abuse and a history of stable employment. His ex-wife, the mother of his daughter, spoke well of him.

[16] Justice O'Donnell imposed a sentence of 12 months' jail, concurrent on each of two counts. On appeal, that sentence was reduced to 6 months: *R v. Munroe* [2012] OJ No. 4405; 2012 ONSC 4768. In allowing the sentence appeal, Justice Code said @ paragraph 96:

I am satisfied that a sentence of six months imprisonment, for this offence and this offender, achieves the proper balance of denunciation, deterrence and rehabilitation. The sentence is in addition to thirteen days of pre-trial detention, spent in protective custody, making it effectively a seven month sentence. There are few precedents to guide the appropriate range of sentence in a case like this, given the recent legislative change in the available penalties. However, two cases are helpful. In *R. v. Power* (2003), 176 C.C.C. (3d) 209 (Ont. C.A.), the Court upheld a ninety day sentence under the old legislation for the torture and killing of a cat. It was described as "within the category of worst offence" and as a case of "torture for torture's sake", albeit committed by a first offender who had pleaded guilty and expressed remorse. An effective sentence of seven months in the case at bar is more than double the sentence in *Power*. In *R. v. Connors*, (Prov. Ct.), Quantz J. imposed an effective sentence of six months imprisonment, under the new legislation, for the violent killing of a dog by

blunt force trauma. The dog suffered many similar injuries to Abby in the case at bar. The accused was not a first offender and he lacked Munroe's other positive antecedents. Quantz J. exhaustively reviewed the case law under the old legislation, where discharges, conditional sentences, and short intermittent sentences had routinely been imposed for the cruel and sadistic killing or injuring of cats and dogs. An effective sentence of seven months imprisonment in the present case, for a first offender with Munroe's otherwise impeccable antecedents, recognizes the change in the appropriate range of sentence brought about by the April 17, 2008 legislative reforms.

[17] Were it not for the *Munroe* decision, I would have considered a sentence of 12 months' jail to be appropriate for Mr. Gartner's assault on the rabbit. It seems to me that such a sentence would be consistent with the cases discussed in *Camardi*. However, the injuries inflicted by Mr. Gartner were very much less serious than those inflicted by Mr. Munroe. Mr. Munroe attacked two animals and Mr. Gartner one. Mr. Munroe was not entitled to the benefit of a guilty plea. Mr. Gartner is, although the sincerity of his remorse is very much in doubt. Mr. Munroe had no criminal record. Although Mr. Gartner's record is extensive, it includes no other violent crimes. In the end, if *Munroe* were correctly decided, a longer sentence for Mr. Gartner could be justified only on the ground that pro-social individuals like Mr. Munroe are to receive lesser sentences than anti-social individuals like Mr. Gartner. Given the well-established intersection among mental illness, substance abuse and economic opportunity, I find that difficult to justify.

[18] I am not obliged to follow *Munroe: Strata Plan BCS 4006 v. Jameson House Ventures Ltd* [2017] BCJ No. 2211; 2017 BCSC 1988; 6 BCLR (6th) 370 @ paragraphs 60 – 62; affirmed @ [2019] BCJ 789; 2019 BCCA 144; 22 BCLR (6th) 35. With all proper respect, I find the trial decision in *Munroe* to be more persuasive than the appellate decision, and do not think that either fully recognizes the gravity of Mr Munroe's offences.

[19] The Crown seeks a sentence of 6 – 8 months jail for Mr. Gartner's assault on the rabbit. In my judgment, a fit sentence would be 8 months.

[20] The next question is whether the sentences for Mr. Gartner's three offences should be served concurrently or consecutively. The governing principle was stated in *R v. Addow* [2014] OJ No. 2646; 2014 ONSC 3225 @ paragraphs 29 - 30:

As a sentencing matter, the decision whether to impose consecutive or concurrent sentences relates principally to whether the offender is being sentenced for different convictions related to separate events and committed at different times. This is subject only to the modifying effect of the principles of totality and proportionality: see Renaud, *The Sentencing Code of Canada: Principles and Objectives*, where the author affirms that:

Separate events or transactions ought to result in consecutive sentences if the result is a total term that is not unduly long or harsh, ... and that does not offend the proportionality requirement of s. 718.1 of the *Criminal Code*.

Dealing first with consecutive vs. concurrent sentences, the underlying principle is that offences that arise out of the same behaviour or delict normally receive concurrent sentences. Consecutive sentences are appropriate when the offences do not arise out of the same behaviour or delict by the offender, or where even though they may, different societal and sentencing goals have been mandated by Parliament, by enacting more than one offence dealing with the same potential factual circumstances.

It may be that the assault on the rabbit was causally connected to Mr. Gartner's drug habit, but there is no evidence to support that conclusion. There is no other factor or explanation to connect the three offences. A total sentence of 10 months or so would not be disproportionate. I conclude that the three jail sentences should be served consecutively.

DISPOSITION

[21] On count #1 of the information, there will be a sentence of 45 days' jail.

[22] On count #2 of the information, there will be a sentence of 14 days' jail, consecutive to the sentence on count #1.

[23] On count #5 of the information, there will be a sentence of 240 days' jail, consecutive to the sentences on counts #1 and #2.

[24] There will be a term of 2 years' probation, attaching to all three counts, on the following terms. Mr. Gartner must:

- a. keep the peace and be of good behaviour and attend court when required to do so by the court;
- b. report in person to a probation officer within 72 hours of his release from custody, and report thereafter as and when directed by his probation officer;
- c. reside at a place approved by his probation officer, and not change his place of residence without the prior permission of his probation officer;
- d. maintain a curfew between the hours of 9:00 p.m. and 6:00 a.m. daily, and remain within his residence during curfew hours unless he has the written permission of his probation officer to be outside his residence;
- e. in order to confirm his presence within his residence during curfew hours, present himself at the front door of his residence within 5 minutes of any peace officer knocking and making his presence known;
- f. not possess or consume any alcohol, any cannabis or cannabis derivatives, or any controlled substance, as defined by the *Controlled Drugs & Substances Act*, except with a valid medical prescription;
- g. attend, participate in and successfully complete any counselling program to which he is referred by his probation officer, including a residential treatment program if he is referred to one;
- h. not possess any weapons, as defined by the *Criminal Code*, or any imitations thereof.

[25] During the period commencing today and ending on December 31, 2030, Mr. Gartner is prohibited from owning, having the custody or control of, or residing in the same premises as any animal or bird.

The Honourable Judge Gouge
Provincial Court of British Columbia