

In the Alberta Court of Justice

Citation: R v Kirkby, 2023 ABCJ 171

Date: 20230726
Docket: 211066055P1
Registry: Edmonton

Between:

His Majesty the King

- and -

Aaron Kirkby

Accused

Reasons for Sentence of The Honourable Justice L.G. Anderson

Overview

[1] Mr. Kirkby has pled guilty to killing a cat in September 2021. Slightly over a month after getting out of hospital and about a week after Mr. Kirkby's injection of anti-psychotic medication was due, Mr. Kirby's cat was making strange and hissed. In reaction, Mr. Kirby hit the cat's head against the wall about six times in succession. The cat immediately convulsed and died within seconds. He later phoned his foster mother and told his psychiatrist, which led to the matter being reported to police. When contacted by police, Mr. Kirkby gave a video-recorded statement, which became the only evidence to support the prosecution. The statement was played during the sentencing hearing. In the interview, Mr. Kirkby described the event, sobbing intermittently. He struggled to describe what he was thinking at the time or why he did this. The best description that he could give was that he was a shithead, and this eats away at him every day. The interview led me to conclude that he was very fond of this cat and his remorse is deep and genuine.

[2] Mr. Kirkby, now 27, has had a challenging history, much of it documented in several reports filed with the court. The reports include a thorough FASD Assessment performed when he was a child, numerous medical records, and a Gladue Report.

[3] Mr. Kirkby lives independently with some support, most importantly the long-standing support of his foster mother. He receives income through AISH (Assured Income for the Severely Handicapped) and, based on recent IQ testing showing an Intellectual Disability, he probably qualifies for additional funded support.

[4] Apart from having a Fetal Alcohol Spectrum Disorder, Mr. Kirkby has been diagnosed over the years to have Attention Deficit Hyperactivity Disorder, Post Traumatic Stress Disorder, Reactive Detachment Disorder, and more recently, a cannabis use disorder and unspecified psychosis.

[5] Mr. Kirkby was most recently in Alberta Hospital for a month, shortly before the incident giving rise to this charge. In testing done at that time, neuropsychiatric testing showed particular weaknesses with respect to complex attention, processing speed and executive function.

[6] Compromised executive functioning, a diminished ability to regulate his emotions and impulsivity were identified and referenced multiple times in the FASD assessment done when he was a child entering the school system and those traits continue to be reflected in the other more recent medical reports and assessments.

[7] I have no doubt that Mr. Kirkby's actions in relation to this matter are directly tied to his neurological challenges.

[8] The FASD assessment done when Mr. Kirkby was a child identified that as a result of the organic brain damage, he was "at risk for increased school learning difficulties as well as social, emotional, and behavioural difficulties" and he has no doubt experienced those difficulties. To date, however, those challenges have not resulted in any record of criminal convictions. I am satisfied that Mr. Kirkby is a generally pro-social person.

Positions of Counsel

[9] The Crown submits that Mr. Kirkby should be imprisoned for 15 months and then placed on probation for 15 to 18 months. The Crown also submits that there should be a ban on caring for pets for 15 to 20 years and that the Court should impose a DNA order.

[10] The Defence submits that the Court should impose a probationary sentence or, if a jail sentence is determined to be required, asks that the Court impose a Conditional Sentence Order to allow the sentence to be served in the community.

Principles and Objectives

[11] This offence is one that evokes a strong visceral reaction. It is a senseless killing of a helpless, sentient being. While in days gone by, pets may have been viewed in the eyes of the law as chattels, or mere possessions, those days are gone. (see *R v Chen*, 2021 ABCA 382) What Mr. Kirkby did in this case is, under today's *Criminal Code*, a criminal act, punishable by up to 5 years in prison.

[12] In determining a fit sentence, a Court must not let emotion dominate the process; the Court's decision must be principled. The sentence must firstly serve the basic purpose of sentencing which is to protect society and to contribute to respect for the law and the maintenance of a just, peaceful, and safe society.

[13] The most fundamental principle in crafting a just sentence is proportionality. The sentence must be commensurate with the gravity of the offence and the degree of responsibility of the offender. Other applicable principles are parity and restraint. Parity means that similar offenders doing similar things in similar circumstances should be dealt with in a similar way.

Restraint means, in part, that jail should be a last resort and no sentence should be harsher than what is necessary to accomplish the intended objectives of the sentence.

[14] A range of potential sentencing objectives are set out in s. 718 of the *Criminal Code*. They include denunciation, individual and general deterrence, rehabilitation, reparations, instilling a sense of responsibility and where necessary, separation from society.

[15] Sentencing is always an individualized process in which the relevant circumstances, including the aggravating and mitigating factors, must be considered.

Aggravating and Mitigating Factors

[16] Relevant circumstances include both the circumstances of the offence and the circumstances of the offender. In relation to the circumstances of this offence, the Crown submits that the fact the animal died is aggravating. Expressed another way, the Crown submits that of the different things that are covered by s. 445 (1) (a) – i.e., to kill, maim, wound, poison, or injure a pet – killing a pet is inherently more aggravating than anything else. The Crown concedes that he could not find any authority in the case law to support that submission despite it being a core tenet of the Crown’s position on sentence.

[17] I do not accept the Crown’s submission that the fact the pet died is an aggravating factor. The death does not make an underlying offence more serious; it is itself the offence. I would agree with the observation in *Chen* that deliberate cruelty is probably the most egregious form of animal abuse, particularly if it is prolonged as it was in that case (para 22).

[18] This is not to say that the offence is not serious. The abuse of a pet is always serious; based on *Chen*, denunciation and deterrence are primary considerations. Further, since 2008 when Parliament made this a hybrid offence with higher maximum penalties, sentences should generally be higher than they were when the maximum penalty was 6 months. The Crown has emphasized this point and the Court agrees, but the 2008 legislative increase in potential penalty must be kept in perspective. A 5-year maximum sentence is still one of the lowest maximum sentences provided in the *Criminal Code* for indictable offences.

[19] In addition to the gravity of the offence, a Court must look at the circumstances of the offender in crafting a proportionate sentence. In this regard, there are many mitigating factors.

[20] First, Mr. Kirkby pled guilty. A guilty plea is always mitigating but, in this case, it is exceptionally so. Mr. Kirkby took responsibility from the outset and his willingness to talk to police resulted in him providing the only evidence supporting his prosecution.

[21] Second, I am satisfied that Mr. Kirkby is genuinely remorseful and that the incident does continue to eat away at him.

[22] Third, Mr. Kirkby’s actions in committing the offence are the direct result of a neo-natal neurological condition that was not of his making.

[23] Fourth, notwithstanding the challenges faced by Mr. Kirkby, he has no criminal record. This might be better characterized as the absence of an aggravating factor but one worth noting.

[24] Fifth, the factors set out in the Gladue report are mitigating.

[25] Sixth, I can not ignore the fact that this event happened a bit more than a month after he had been released from hospital with a new anti-psychotic medication and a week later than the

releasing doctor had anticipated a review of the medication and new injection. I cannot be certain what effect this new regimen may have had on Mr. Kirkby's state of mind at the time of this offence, but neither am I prepared to hypothesize that he was in a healthy state of mind.

[26] I am satisfied that this is not a case of deliberate, in the sense of sadistic, abuse; this is a case of emotional dysregulation tied to a syndrome with which Mr. Kirkby has had to cope since birth and, all things considered, he has managed quite well.

[27] Regarding what sentence should be imposed, I am satisfied that the worst possible option would be a jail sentence. Not only would Mr. Kirkby be extremely vulnerable in jail and susceptible to anti-social influences, it would not be proportionate to his degree of responsibility.

[28] Although jail is not uncommon for offences of animal abuse, it is not a given.

[29] This type of behaviour must be denounced, but jail is not the only way to express denunciation. If it were, the Court would not be given other options; all crime must be denounced but not all crime requires incarceration as a response.

[30] I accept that denunciation and deterrence must be given primary consideration but, in these circumstances, I consider those objectives to be more muted than usual. Specific deterrence is not a realistic objective when the actions giving rise to the offence are caused by compromised executive function. General deterrence is always an objective but at least two things temper that objective in this case. Sending a deterrent message by making an example of someone whose actions are part of a disability has little, if any, societal value. Second, a message of deterrence aimed at showing others what negative consequences might flow from engaging in bad behaviour is not the only message to be considered in this case. The Court must also convey that it will give due credit when someone shows a willingness to step up and take responsibility even though it might result in the laying of a charge that would not otherwise be laid.

Conclusion

[31] The main question that I have wrestled with is whether a suspended sentence and probation is the most appropriate sentence or whether a Conditional Sentence Order (CSO) is more appropriate.

[32] If a probationary sentence is sufficient, then a CSO is not available. Jail must only be imposed when no other sanctions are considered reasonable, "paying particular attention to the circumstances of Aboriginal offenders" (s. 718.2 (e) *Criminal Code*).

[33] I have concluded that a suspended sentence with probation, for a period of 2 years, is reasonable and is the appropriate sentence. I find it appropriate because, first and foremost, it is proportionate to the gravity of the offence and the moral blameworthiness of the offender. Further, it is at least as good a vehicle for rehabilitation and probably better than a CSO. Lastly, in these circumstances I am not satisfied that a CSO would have any greater deterrent value than a suspended sentence.

[34] Apart from the notional stigma of a CSO being a jail sentence, the deterrent value from a CSO usually lies in (a) the conditions restricting liberty such as house arrest and curfew (which can be extremely onerous for the young person who thrives on being out socializing with friends, for example) and (b) the threat that if conditions are breached, the order can be collapsed and the person can be required to serve the remainder of the sentence in a jail.

[35] I am not satisfied that a condition requiring Mr. Kirkby to spend more time isolating in his apartment would, from his perspective, be an unwelcome change but I am satisfied that it would neither be rehabilitative nor, given his circumstances, healthy.

[36] Regarding the potential consequences of a breach, the potential consequences of breaching probation when sentence is suspended can be every bit as serious as breaching a CSO and the potential consequences do not diminish the closer one gets to the end of the order. With a CSO, the worse case scenario for breaching is limited to jail for the time remaining on the order. When sentence is suspended, not only can a person be charged with the offence of breaching the probation order; one can be brought back before the Court and sentenced to anything that could have been imposed initially. The Sword of Damocles can be at least as sharp when sentence is suspended than it is under a CSO.

Pet Prohibition

[37] I have concluded that a lengthy ban against caring for pets is required, not as a punishment but to minimize the risk of the type of reaction displayed in this case being repeated. Pursuant to s. 447.1 of the *Criminal Code*, Mr. Kirkby will be prohibited from owning or having the care, custody or control of an animal or bird for 10 years.

DNA Order

[38] The Crown seeks a DNA Order which the Court has the power to impose because the Crown has elected to proceed by indictment and the offence is punishable by up to 5 years. The Order is discretionary. The Crown has the onus to show that an order to provide a sample of DNA for inclusion in the DNA Databank is in the best interests of the administration of justice.

[39] The Crown has not met its onus.

Victim Fine Surcharge

[40] I am satisfied that given Mr. Kirkby's limited income, a victim fine surcharge would be a financial hardship. It is waived.

Conditions

[41] The conditions of the probation order will be as follows:

- (a) You must keep the peace and be of good behaviour;
- (b) You must report to a probation officer within 5 working days from today and thereafter as the probation office directs;
- (c) You must come to court if directed by your probation officer;
- (d) You must reside at a residence approved by your probation officer and not change your address without the prior approval of your probation officer;
- (e) You must keep the probation officer advised of any change in your name or occupation;
- (f) You must attend for whatever assessment, treatment or counselling is directed by your probation officer relating to psychological or psychiatric issues or substance abuse including the abuse of cannabis, providing proof that you have attended as directed if requested by the probation officer;

- (g) You must sign a waiver allowing third parties to provide information required by your probation officer to properly supervise you;
- (h) You must remain under the care of a psychiatrist at Forensic Assessment and Community Services (FACS) in Edmonton or their designate and take the medications prescribed, unless otherwise directed by the court should you object to taking the medication prescribed;
- (i) It is recommended that you attend upon an FASD support program as directed by your probation officer;
- (j) The probation officer can exempt you from any of these conditions if it is for a rehabilitative or humanitarian purpose.

Dated at the City of Edmonton, Alberta this 26th day of July, 2023.

L.G. Anderson
Justice of the Alberta Court of Justice

Appearances:

C. Lim
for the Crown

K. Buchanan
for the Accused