

Overview

- [1] K.G.S. and J.P. are teenage males: K.G.S. is 16 years old, and J.P. is 15. They are in Youth Court, charged with an offence involving cruelty to an animal.
- [2] They are charged with injuring a dog – a puppy – which had been *kept for a lawful purpose*.
- [3] There is little evidence as to the actual size, or age, of this puppy, except that it appears to have been both quite small and quite young.
- [4] The questions in issue are:
 - 1) whether the dog was a domestic pet, and thus protected by the particular provision of our *Criminal Code* under which the two boys are charged, or, whether it may have been a stray, and thus not protected by law, and;
 - 2) whether the Crown has proven, beyond a reasonable doubt, that the puppy was stomped upon and/or kicked by J.P. and K.G.S. (or, either of them), as alleged by the Crown witnesses.
- [5] J.P. and K.G.S., along with another youth – a girl, S. – came upon this puppy as they walked along a residential street. The three youths were staggering drunk.
- [6] The Crown called two young and sober adult eyewitnesses, Catherine M. and Curtis K., to prove the charge against J.P. and K.G.S.
- [7] These witnesses testified that they saw what happened out on the street from their bedroom window. They said that the puppy ran up to this group of youths, at which point J.P., K.G.S., and S. repeatedly “stomped” upon and kicked the puppy, likely breaking its back legs.

- [8] Catherine and Curtis said that the puppy then crawled back to its owner's house on its front legs.
- [9] Upon seeing this, Curtis ran out of the house and yelled at the youths, who then promptly took off. They were arrested shortly afterwards by police near a local school.
- [10] Eventually, the local bylaw officer came to the house where the puppy had taken refuge, took possession of the wounded dog, and put it down.
- [11] J.P. testified in the trial.
- [12] His version of events is at odds with the evidence of Catherine and Curtis.
- [13] In a nutshell, he says that the puppy was injured accidentally. In his own drunken state he was unaware of the dog until he heard it crying after K.G.S. stepped on it and reacted with surprise, and that it must have been stepped upon, or kicked, by accident after it ran in among the group.
- [14] K.G.S. did not testify in the case.
- [15] It is important to note that drunkenness is not a defence to this charge against J.P. and K.G.S. If the evidence of Catherine and/or Curtis about the kicking and/or stomping is accepted, then the offence is made out. J.P.'s inebriated condition is relevant only in assessing his truthfulness as a witness; the Crown, for example, suggests that J.P.'s drunkenness should undermine his testimony.
- [16] I must also consider the question of whether either J.P. or K.G.S. may be guilty because of something done by the other, or another person, as explained in s. 21(1) and (2) of our *Criminal Code*, which deals with parties to an offence.

- [17] In addition, for cases involving the credibility of an accused who testifies in his trial, the Supreme Court of Canada has provided guidelines in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, which I must follow.
- [18] Respecting, first, this question of whether the animal was “lawfully kept,” counsel for both J.P. and K.G.S. suggest that ownership of this puppy was never established by the evidence. They say as well that even if ownership is not something that the Crown needs to prove, it is still reasonably possible that the injured puppy had been a stray dog, and thus not protected by the law.
- [19] I find that ownership of the puppy is not something that needs to be proven – it is not an essential element of the offence.
- [20] I also find that there is more than sufficient circumstantial evidence to conclude that this puppy was a domestic pet, and therefore a lawfully kept animal as required by law. It was not a stray.
- [21] Respecting the question of whether the Crown has satisfactorily proven that the offence occurred as Catherine and Curtis said it did, the arguments of both Crown and Defence counsel are succinct and to the point.
- [22] Defence counsel on behalf of J.P. and K.G.S. argue that the evidence of Catherine and Curtis should not be accepted – at the standard required in criminal proceedings – as proof of the offence. Counsel argue that their evidence should be viewed with caution because of their limited ability to see what actually happened down the street, in the dark. Defence counsel argue that it is quite plausible that events unfolded just as J.P. said they did; the puppy was stepped upon entirely by accident as it got caught in the feet of the staggering youths. The Defence suggest that the outrage which Curtis displayed when he ran outside and yelled at the youths was a natural response, because both he and Catherine made the honest but mistaken assumption, when they heard the puppy crying, that these youths were deliberately injuring the dog. The Defence suggest

that it was not unusual for the kids to run off when they were yelled at or accosted by an adult or older person – that they were young, drunk, and, because of this, perhaps felt morally at fault.

- [23] The Crown Attorney argues that the evidence of Catherine and Curtis is sufficient to make out the offence, and that they were never really shaken in their testimony respecting the “stomping” and “kicking” and that such actions are not the stuff of accident. At most, the Crown argues, it may be that the incident started off innocently enough as the puppy ran into the group, but that the evidence of Catherine and Curtis shows that what J.P. and K.G.S. were up to was nothing short of mean, drunken behaviour. The Crown points out that some of the youths were actually laughing at the time, and that even drunks would react differently if they had accidentally stepped on a puppy and heard it crying. The Crown says that J.P.'s evidence should be rejected, that he is lying. The Crown notes that J.P. was “blacked out” during important parts of the event, and that his memory is lacking in important detail.
- [24] I find that there are serious problems with respect to the evidence of Catherine and Curtis. Their ability to observe what they say they saw is a significant factor in assessing their evidence. Catherine, for example, acknowledged this during her cross-examination, although she stuck with her original evidence that the puppy was kicked and stomped upon. Curtis, however, made a significant concession during his cross-examination about what he might have seen.
- [25] In addition, I find that the evidence of J.P. raises problems in terms his own credibility. For example, his inability to recall important detail beyond the basic encounter with the puppy is problematic, as is his drunken condition. There are aspects of his testimony which are credible as well, and which I believe and accept. On balance, his story is plausible, and I am left with a reasonable doubt whether the puppy was kicked and stomped as the Crown witnesses said it was.

- [26] On the whole of the evidence, I am unable to conclude, at the standard required in a criminal case, namely, beyond a reasonable doubt, what happened, in terms of how this puppy came to be injured.
- [27] Accordingly, I acquit both J.P. and K.G.S. of the charge against them under s. 445(1)(a) of the *Criminal Code*.

Analysis

Does the Crown need to prove “ownership” of the dog?

- [28] J.P. and K.G.S. are charged that they did:

“...on or about the 15th day of October in the year 2008 at or near the Hamlet of [...] in the Nunavut Territory, did wilfully and without lawful excuse cause injure a puppy, the property of Nan[c]y M. that was kept for a lawful purpose contrary to Section 445 (a) of the Criminal Code.”¹

- [29] Both Catherine and Curtis testified that they believed the puppy belonged to Nancy. Catherine believed this because Nancy told her so, and Curtis believed Nancy owned the puppy because he had seen her kids playing with it.
- [30] Nancy was unavailable to be called as a witness, so Catherine’s statements about what Nancy told her are hearsay, and cannot be used to prove that Nancy owned the puppy.
- [31] The Supreme Court of Canada dealt with this question of what needs to be proven, in the well-known case of *R. v. Vézina*, [1986] 1 S.C.R. 2. The principle to be distilled from this case is that the Crown only needs to prove the so-called essential elements of the offence necessary to establish that the crime has been committed.

¹ The precise section number is 445(1)(a), and not simply 445(a), but that is not important in this case; previously, the section was in fact simply 445(a), and some of the previously decided cases reference 445(a). There is, however, no substantive difference, so it is just a matter of legislative housekeeping.

- [32] If the Crown adds particulars – that is, more specifics – into the wording of the charge than is necessary to prove the offence, then this extra information is to be treated as surplusage which does not need to be proven in evidence.
- [33] There is one important exception to this rule: namely, if a Court concludes that the surplusage actually prejudices the accused, then the Crown may be required to prove the additional detail or information.
- [34] There are a number of cases following *Vézina* which illustrate how the surplusage rule works from time to time: see *Hawkshaw v. The Queen*, [1986] 1 S.C.R. 668, *R. v. M. (J. B.)* (2000), 145 Man. R. (2d) 91, [2000] M.J. No. 113 (C.A.), and *R. v. Whittaker* (1989) 95 A.R. 229, [1989] A.J. No. 469 (C.A.). All of these cases confirm the principle from *Vézina* and stress that the Crown is required only to prove the essential elements of the offence charged.
- [35] The question then, in the case of K.G.S. and J.P., is whether ownership of the animal is an essential element that needs to be proven in our case.
- [36] The previous cases across Canada which have dealt with s. 445(1)(a) of the *Criminal Code* suggest that the answer to this question is no, that ownership is not an essential element of the offence and therefore does not need to be strictly proven.
- [37] These cases say that an animal is kept for a lawful purpose, as required by the *Criminal Code*, if there is simply a keeper, or somebody who provides the animal with a home, or who harbours the animal, providing it with care and food. Many times this will be the legal owner, but not always.
- [38] The cases previously decided are clear that s. 445(1)(a) is designed to protect domestic pets. No protection is provided for strays.
- [39] So, it is the status of the animal, not the ownership of the animal, which is essential and must be proven.

- [40] If there is a reasonable doubt that the puppy in our case is a domestic pet, that it might reasonably be a stray, then J.P. and K.G.S. are entitled to an acquittal.
- [41] In the case of *R. v. Deschamps* (1978), 43 C.C.C. (2d) 45, [1978] O.J. No. 3757, from the Ontario Provincial Court, the accused shot and killed a cat. He was acquitted.
- [42] The judge in *Deschamps* said that the words of s. 445(a) which required that the animal be “kept for a lawful purpose,” contemplated a keeper of the animal and a measure of control to be exercised by that person.
- [43] *Deschamps* was a case where a neighbourhood cat came to one particular house – the Carol Foster residence – for food each morning. It never stayed or even ventured inside the house, since Carol was allergic to cats; nor did Carol’s kids even play with the cat – in fact it wandered off when the kids were around. The Court concluded that it was a stray which simply came for food each morning, but could not be called a domestic pet of the Foster family because they weren’t “keeping” it.
- [44] In the recent British Columbia case of *R. v. Dominic*, 2009 BCPC 145, [2009] B.C.J. No. 949, the accused was convicted under s. 445(1)(a) with wilfully and without lawful excuse killing a dog kept for a lawful purpose. The accused was heavily intoxicated at the time.
- [45] He had been partying in his apartment, and after a while the noise got so loud that a neighbour, Jason Crocker, came out to see what was going on. Jason had a clear and close view of what happened. He saw the accused, in a great state of agitation, standing on the apartment steps, swearing loudly. Jason saw the accused stomp down hard, twice, on a small brownish white dog that was sitting or lying on the apartment steps. The accused then stooped over, picked the dog up and threw it violently down to the ground near the bottom step, where it lay motionless and bloodied.

- [46] In his defence, the accused – citing his alcohol consumption – denied any recollection of having killed the dog or of even having intended to do so.
- [47] The judge in *Dominic* ruled that drunkenness was not a defence to this charge, and much of the case concerns this issue of what mental element is required to make out the charge. The Court ruled that the offence charged is one requiring only a general intent, meaning that the accused need only be basically aware of what he is doing or be reckless about what he is doing in order to be convicted. The accused does not have to foresee or intend the consequences of his actions before he may be found guilty.
- [48] In *Dominic*, the judge simply disbelieved the accused about his alcohol consumption, and also about not knowing or remembering what he was doing, and found on all the evidence that the crime had been made out.
- [49] Respecting this question, however, of ownership, the actual or supposed owner of the dog in *Dominic*, Marie Pete, was not called as a witness. Jason Crocker testified that he believed the dog lived in Ms. Pete's apartment unit, and that Ms. Pete took the dog out in the morning. Jason also said that he occasionally played with the dog.
- [50] The investigating RCMP officer involved with the case was required to dispose of the dog's body. He spoke to Ms. Pete about this and described her as being in a very distraught state. The officer referred to Ms. Pete as the owner. The Court allowed the officer's hearsay testimony about ownership to show the constable's state of mind – to show he believed that he was dealing with a domestic pet.
- [51] The judge concluded that although ownership was not strictly proven, Ms. Pete was the keeper of the dog and that she exercised control over it, including giving instructions about the disposal of the body, just like an owner would.

- [52] In our case of K.G.S. and J.P., both Catherine and Curtis saw the puppy walking on the road in the near vicinity of Nancy's house immediately before it ran up to the youths.
- [53] Catherine and Curtis said that they saw the puppy crawling "back" towards Nancy's house on its front legs after it was injured.
- [54] The puppy was found in the porch of Nancy's house by the local bylaw officer, who had a discussion with her before taking it away to be destroyed. The officer said that he always gets permission from the "owner" before putting an animal down.
- [55] In addition, Curtis testified that he had seen Nancy's kids (in particular, Nancy's daughter) playing with the puppy.
- [56] There is more than ample evidence to conclude, at the standard required in a criminal case, that this puppy was a domestic pet kept by Nancy and her family and thus an animal kept for a lawful purpose as required by s. 445(1)(a) of the Criminal Code. It is speculation to suggest that this animal may have been a stray.

Curtis and Catherine's vantage point

- [57] Catherine and Curtis saw the incident with the puppy from an awkward viewpoint.
- [58] They were looking out the front window of their house, from the second storey. They were looking to their right, towards something happening on the same side of the street, on the next block down.
- [59] During the trial, three separate diagrams were made or drawn by Catherine, Curtis, and the defendant J.P., and entered into evidence.

[60] These drawings show:

- 1) the location of Curt and Catherine's house in relation to Nancy's house;
- 2) the spot where Curtis and Catherine say they first saw some youths (the defendants and a couple of female friends) walking outside their window;
- 3) the spot where the puppy got injured; and
- 4) the location of a street light.

[61] It is true, as Catherine says, that Nancy lives “next door,” but she also lives across a dividing street on the next block over. It appears from the diagrams that the two houses are set back a bit from the road, but there is no evidence as to how far.

[62] The diagrams made by Catherine and the defendant J.P. both show that the puppy was injured in front of Nancy's house. I accept that it did happen in front of Nancy's place, and not as Curtis marked on his drawing, at a spot in the middle of the intersection.

[63] Catherine said that generally it is possible for her to observe someone walking or passing by Nancy's house.

[64] Despite their vantage point, both Catherine and Curtis maintained that they were able to observe what was happening.

[65] Curtis said simply, in response to the prosecutor's questions, that he had no trouble observing the puppy getting kicked and stomped.

[66] Catherine agreed that it was “more difficult” for her to see down the street because of the angle and the fact that she was looking off to the right, but she added: “We were able to see what was happening.”

What Curtis and Catherine saw in the dark

- [67] Catherine and Curtis were up in their bedroom preparing to turn in for the night, when the sounds of boisterous revelry outside caught their attention, and their eyes, as they came to the window to see what was going on.
- [68] Four youths were passing by the house: two males and two females. They continued walking down the street towards Nancy's place, in the next block, and away from Catherine and Curtis.
- [69] Curtis estimates that these kids were about 25 feet away when he first saw them pass by.
- [70] It appears from the diagrams that Nancy's house, where the puppy ran up to them, was at least that same distance again.
- [71] Catherine said that although it was very dark, there was a street light which assisted her. This light was, however, across the street from Nancy's place, on the southwest corner of the intersection.
- [72] Both Catherine and Curtis were clear in their own minds that they saw the puppy get kicked and then stomped on, at various times, by K.G.S., J.P., and one of the two girls.
- [73] There is no question that Catherine and Curtis knew, and were familiar with, K.G.S., J.P., and one of these two girls, S. They had no trouble identifying these three youths as they passed by the house in the dark.
- [74] They could not, however, identify the fourth person, except to say that it was a female. Catherine said that she couldn't see the girl's face because it was dark and she was wearing black. Curtis said he could only tell that it was girl.

- [75] There is also no question that Catherine and Curtis were watching these youths, from the time they first passed by the house, up to and until the puppy crawled away from them after it got hurt.
- [76] Catherine said that she had her eyes on the group during the entire episode with the puppy for a full five minutes. I have concluded that this five minute estimate is suspect and that things happened much quicker than this, but that the estimate itself is not particularly important.
- [77] Both Catherine and Curtis thought that the youths were under the influence of alcohol. Catherine said that there was nothing remarkable about how they walked, that they walked normally. Curtis said they were staggering.
- [78] Curtis said that the puppy approached the youths in a friendly fashion. He saw the puppy crossing the road and, "I don't know, it got kicked."
- [79] Catherine testified that the puppy was crying loudly when it was being stomped on, and that while it was being stomped on by one person, the others, she thinks, were watching or laughing. Curtis said that K.G.S. and S. were laughing when the puppy was being kicked and stomped, but that J.P. was quiet.
- [80] Curtis said it was S. who first kicked the puppy after it ran up to them; that J.P. then "went for it," by stomping on it, followed by K.G.S. who "went right after," and kicked the puppy when it was already screaming. Curtis agreed, however, that he could be mistaken as to this exact order of things.
- [81] Curtis gave a demonstration of a stomp, by jumping into the air and landing with both feet.
- [82] Catherine also demonstrated a stomp in court, by lifting one leg high, and then bringing it down, hard.

- [83] Catherine testified initially that “she thinks” it was a male who first kicked and then stomped on the puppy, followed by another person, whom she also thought was a male, who stomped on it as well.
- [84] Catherine had some difficulty remembering who did what as well as the sequence of the kicking and/or stomping. She was allowed, in court, to refresh her memory, from a signed statement that she made to the police shortly after the event. She then testified that she thought it was K.G.S. who stomped on the puppy first, followed by J.P., and then maybe it was the girl, S., who stomped on it after that.
- [85] Catherine was asked by the prosecutor if she had any doubt about this sequence: K.G.S. stomping the puppy first, followed by J.P. doing the same. Her reply was that “I don't really remember that night all that well.”
- [86] Catherine told J.P.'s lawyer that she is sure that she saw J.P. kick the puppy, but she could not recall the sequence of whether he was the first, second, or third person to do so.
- [87] Catherine agreed with J.P.'s lawyer that the four youths were walking away from her, and had their backs to her, at the point when she saw the puppy being injured. She also agreed that this would make it more likely that she might be confused about “who was doing what.”
- [88] It was not clear whether Catherine might have been confused only about which of the young people were kicking and stomping the puppy, or about the sequence of events, as opposed to being confused about whether there was any kicking or stomping going on at all.
- [89] In fairness to Catherine, I take her answer to mean that she may have been confused only about who did the kicking and stomping as well as the sequence or order of events.

- [90] Catherine also told J.P.'s lawyer that she did not remember seeing J.P. bend over to pick up the puppy.
- [91] This is important because I find that J.P. did, indeed, bend over and try to pick up the puppy.
- [92] J.P.'s lawyer suggested to Curtis that when the puppy ran up towards the youths, he (Curtis) had no way of knowing, when he saw the puppy getting stepped on, whether this was "on purpose or an accident." Curtis agreed that he didn't know.
- [93] This type of testimony, when a witness tries to impute motive or intent to another person, is not helpful. It is not admissible evidence.
- [94] J.P.'s lawyer suggested to Curtis that J.P. did not stomp on the puppy – that J.P., rather than stomping on the puppy, simply bent over and picked it up.
- [95] Curtis replied, "I didn't see that."
- [96] Curtis appeared to concede that J.P. may have bent over to pick up the puppy, but not that he picked the puppy up as opposed to stomping on it.
- [97] J.P.'s lawyer suggested to Curtis that after the puppy was first injured, the youths were milling around, and that he (Curtis) might have been mistaken as to the exact order of who did what.
- [98] Curtis agreed with this proposition, but the answer is frankly of little value to the defence case, because people can hardly be expected to record a precise sequence of events in their memory.

[99] Curtis made, however, one important admission or concession to J.P.'s lawyer. The exchange between the lawyer and Curtis is worth quoting verbatim (from p. 53 of the transcript):

“Q. [JP's lawyer]: Would you agree that you might be mistaken when you describe [J.P.] as having stomped with both feet on the puppy? It mightn't not have happened that way?

A. [Curtis]: I really couldn't tell.”

[100] The prosecutor questioned Curtis about this answer and Curtis returned to his original story, that he saw J.P. jump in the air and land on the puppy with both feet, adding, however, that he couldn't tell if it appeared to be accidental or “on purpose” because the puppy was right in front of J.P., and he (Curtis) was looking at J.P.'s back. He said that it appeared K.G.S., however, had kicked the puppy “on purpose,” as opposed to accidentally. Again, this type of so-called evidence, where one witness attributes motive or intent to another, isn't of any use.

How big was this puppy?

[101] The bylaw officer did not give evidence about the approximate size or age of the puppy.

[102] Catherine testified that it was a “little puppy,” and ventured a guess that it was about “two months or something like that.” Curtis was asked how old he thought the puppy was, and said: “I don't know, it was just a pup, like it just started walking or something.”

[103] I accept that Catherine and Curtis saw the puppy crawl away from the group of youths using only its front legs, and that the bylaw officer felt that the injuries were severe enough to warrant putting the animal down.

[104] As a matter of common sense, this question regarding the size of the puppy is relevant to the amount of force it might take, for example, to crush the animal's back legs.

- [105] The larger, or more mature, the puppy, presumably, the more force would be required. The smaller, or more tiny, the puppy, presumably, the less force would be required to inflict a severe injury.
- [106] In turn this might help to determine whether certain injuries may be more, or less, consistent with one type of force (for example, stomping or kicking), than another (for example, stepping on an animal).
- [107] The breed of the animal, in the case of a dog, might also factor in, as a variable, to such an analysis, as would the size of the person inflicting the force.
- [108] In this case, however, beyond lay generalizations as to the size and approximate age of the puppy, there is no evidence capable of any forensic assistance.
- [109] The injuries, however, to this puppy were serious, likely, as Curtis said, its hind legs were broken; both Catherine and Curtis saw that it crawled back towards Nancy's place on its front legs only.
- [110] It is impossible, however, to work backwards from the injuries, and to draw any common sense inferences that the injuries were more, or less, likely to have been caused in the manner described by Catherine and Curtis, than in the scenario presented by J.P. Absent any precise information about the size, or, perhaps the age of the puppy, such an exercise is speculative.

The defence evidence of J.P.

- [111] J.P. testified that he and his friends, K.G.S. and S., had polished off a 40-ounce bottle of vodka some time before they ventured out into the street, and eventually the general vicinity of Curtis and Catherine's house, where they encountered the puppy.

- [112] He said that he was blacked out at some point, and that he was “half-cut.” Nonetheless, he was able, in court, to trace his route on a diagram.
- [113] He said the both K.G.S. and S. were also intoxicated, and staggering. He had no memory of a fourth youth, the second female in the group, until he was arrested near a local school, when he says, she was there too.
- [114] He said that despite his drunken condition, he first remembered seeing the puppy after he heard it crying and both he and K.G.S. reacted with apparent surprise to find the dog under their feet.
- [115] He testified that “we were staggering. [K.G.S.] stumbled on it.” He testified that “we didn’t see any dog until we heard it crying.”
- [116] J.P. said that he tried helping the puppy; he tried to pick the puppy up after he heard it crying under his feet. But, he said, that he shook the puppy off, or dropped it right away, when it bit him on the hand, drawing blood.
- [117] He testified that the puppy fell to his left, towards S., who shook it off with her foot. Next, he said, he heard Curtis yelling and the group just took off and walked away. Curtis and Catherine said that they ran off, which I accept was the case.
- [118] J.P. testified that he did not kick the puppy or stomp on it. He said that he did not see anyone else stomp on it either.
- [119] J.P. was questioned vigorously by the Crown Attorney.
- [120] He admitted that he was so drunk that he blacked out some of the time, and specifically before they encountered the puppy as he was walking. J.P. said that “I was able to walk, but I was half-cut. I knew what I was doing, but I black out some time.”
- [121] J.P. agreed with the prosecutor that “everything is vague and a big fog,” and that his memory is “pretty bad.”

- [122] J.P. admitted to the prosecutor that he does not know whether his friend K.G.S. stepped on the puppy accidentally or on purpose. This answer must be put into context; he is not inside K.G.S.'s mind. He told the prosecutor (from p. 93 of the transcript): "Like I don't know. Well you could ask him, but I don't know if he purposely stepped on that puppy because while I was talking to him he stepped on that puppy face to face."
- [123] J.P. was insistent, however, that despite his own drunkenness, he remembers that he and K.G.S. were face to face when K.G.S. accidentally stepped on the puppy, that K.G.S. was not looking at the puppy when he stepped on it, and that they both reacted with surprise.
- [124] J.P. was not shaken in the assertion that both he and K.G.S. were not looking at the puppy when it cried; they were both taken by surprise when K.G.S. must have stepped on it.
- [125] J.P. then demonstrated, rather feebly, by jiggling his leg, how S. tried to shake off or struggle with the puppy when, as he says, it "caught" her foot after he dropped it.
- [126] J.P. testified that he felt bad about the puppy because it was crying. He said he doesn't know if S. was upset about the puppy; she was drunk. Similarly, he said he doesn't know if K.G.S. was upset about the puppy, but he maintained, again, that K.G.S. was surprised by the puppy and accidentally stepped on it.
- [127] J.P. denied that he was laughing after the puppy was injured, which coincides with what Curtis says. J.P. also told the prosecutor that neither K.G.S. nor S. were laughing either. J.P. said that they were all just loud, yelling, and drunk.
- [128] I prefer and accept the evidence of Catherine and Curtis that the group, or at least some of them, were laughing. I do not think, however, it is all that probative of credibility, or that it helps much in terms of determining what happened.

[129] J.P. testified that shortly after he was arrested, he showed his bloodied hand to the arresting officer, who instructed him to go and wash it off.

[130] This officer was not a witness in the case, but I accept J.P.'s evidence that his hand was bitten as he attempted to pick up the puppy.

The legal guidelines which must be applied in assessing J.P.'s evidence

[131] Both youths are presumed innocent. K.G.S. and J.P. do not need to establish their innocence. The burden of proof remains upon the Crown throughout this trial. This burden never shifts to the accused. The standard of proof required to establish guilt is a high one. It is only proof beyond a reasonable doubt that can displace the presumption of innocence. Suspicion alone is not enough, nor is it enough that an accused is likely or probably guilty.

[132] J.P. has given up his right to silence. He has testified in his own defence.

[133] If I believe his evidence, then I must find him not guilty.

[134] If I do not believe his testimony, but find that the evidence raises a reasonable doubt about an element of proof, then he must be given the benefit of this doubt.

[135] If I do not know who or what to believe, the law demands that an accused be acquitted.

[136] Even if I reject the accused's testimony and find that it does not raise a reasonable doubt, a conviction can only be recorded if I am satisfied on all the evidence that the Crown has proved its case beyond a reasonable doubt.

Conclusions

[137] This is a case where Catherine and Curtis told the truth, as they saw it, in court, under oath, and Catherine in her statement to police as well.

[138] The question is, what did they see?

[139] They maintain that they saw K.G.S. and J.P., along with S., kick and stomp the puppy.

[140] There are understandable differences between the evidence of Catherine and Curtis, as well as within their own individual testimony, about the sequence of events: about who did what, and in what order. But this is not important. I would not expect the witnesses to recall, for example, which youth did what first, or second.

[141] It concerns me however, that Catherine, who said she was watching what the youths and the puppy for five minutes, did not remember seeing J.P. bend over to pick up the puppy. Catherine's time estimate is suspect, but I am more concerned with what she did not see, or did not remember seeing.

[142] The fact that she does not remember seeing J.P. attempt to pick up the puppy calls into question her evidence that the puppy was kicked and stomped on. It lends support to the defence suggestion that Catherine and Curtis were understandably upset when they saw the puppy and heard it crying, and that they made the honest, but mistaken assumption that the youths were inflicting injuries upon the puppy and that this affected their observations.

[143] Catherine's insistence that she saw J.P. and K.G.S. kick and stomp the puppy are called into question by her admission that the fact it was dark, and the youths had their backs to her, made it more difficult to see what was happening.

- [144] In addition, her angle of observation from the second storey window down the same side of the street, is problematic in assessing her evidence, despite her assertion that she could see. It's true that there was a street light, but it was on the opposite side of the street, at the intersection. She was, for example, unable to identify the second female because of the darkness, when the youths were nearer to her house than Nancy's place.
- [145] The ability of Curtis to observe what happened between the youths and the puppy is affected by the same factors: darkness and a less than ideal vantage point.
- [146] In addition, Curtis made a significant concession. He testified in chief that J.P. came down with both feet onto the puppy and demonstrated this in court quite clearly. This was an important aspect or contextual detail of Curtis' evidence, not something peripheral, such as the sequence of events. But later, in cross-examination, when J.P.'s lawyer put the proposition to Curtis that he might be mistaken about this, about JP having stomped the puppy with both feet, Curtis simply replied, "I couldn't really tell."
- [147] I am unable to work backwards from the injuries to conclude that the puppy was injured in the manner that Catherine and Curtis said it was.
- [148] J.P.'s evidence is not without problems. He does not, however, bear the burden of proving his innocence, or of disproving the Crown's case.
- [149] On the one hand his testimony is specific about what he, K.G.S., and S. did with the puppy. On the other hand, it is a bare bones account.
- [150] By his own admission, his memory is poor. He was "blacked out" at some point, most importantly, as he was walking along the road before the puppy ran up to the group.

- [151] Such a blackout scenario is common in our courts. A person does things when they are drunk, aware basically of only what they are doing without concern for the consequences, and simply doesn't remember doing these things.
- [152] Logically, this leaves open the possibility that J.P. did in fact do what Catherine and Curtis said he did, and simply does not remember it, in which case he is guilty.
- [153] But criminal trials are rarely just a matter of applied logic.
- [154] J.P. does not admit to such a possibility, that he might have stomped on the puppy, and simply does not remember it because of a blackout. His evidence is to the opposite. Further, he is clear about certain things which I accept. For example, about trying to pick up the puppy and getting bitten, and about showing his bloodied hand to the arresting officer.
- [155] On balance, his story is plausible. I found that J.P. was fairly candid in answering the prosecutor's questions. He was confused by some of the questions on minor peripheral matters, but clarified things to my satisfaction. Overall, I did not find that his memory was in any way selective. He had had quite a bit to drink on the night of the incident, but I think he tried the best he could to recall the detail of that night, and did not falter from his essential position. In this particular case, J.P.'s evidence has provided a scenario which benefits K.G.S. as well as himself.
- [156] I am left with a reasonable doubt whether the puppy was kicked and stomped as the Crown witnesses said it was.
- [157] I have carefully examined what Catherine and Curtis say they saw, and what J.P. said happened. I am unable to conclude what happened, in terms of how this puppy came to be injured. I am left with a reasonable doubt about whether the puppy was injured by being kicked and stomped, as the Crown witnesses said it was.

[158] Since this is a case involving joint accused, I have considered both s. 21(1) and (2) of the *Criminal Code*. Given the previous findings, above, there is no basis for separate criminal liability for either J.P. or K.G.S. respecting the activity of the other, or respecting the activity of the girl, S.

[159] Accordingly, K.G.S. and J.P. are acquitted.

Dated at the City of Iqaluit this 4th day of September 2009.

Justice N. Sharkey
Nunavut Court of Justice