

A Summary of the Nyki Kish Wrongful Conviction

Ms. Kish was convicted of second-degree murder on March 1, 2011, for the August 2007 stabbing of Ross Hammond in Toronto, Ontario. She was convicted on circumstantial evidence in a Judge alone trial. The conviction was largely based on confusing and often contradictory eyewitness testimony, related to a stabbing that occurred during a street fight involving multiple people and several smaller fights within it, that took place in the early hours of August 9, 2007. Ms. Kish was walking to a bar for last call when the violence erupted.

She had been in Toronto that night to celebrate her 21st birthday, and had just met many of the people with her that night.

At one point during these fights, Ms. Kish's left arm (her dominant arm) was stabbed and injured. Identification was the core issue at her judge alone trial, a matter that was complicated by the fact that Ms. Kish resembled, in appearance and dress, another female who was involved—arguably much more involved than Nyki—named Faith Watts.

- Crown witness, M. Stopford, could not distinguish Ms. Kish from Ms. Watts in appearance.
- Ms. Watts testified at the preliminary hearing that she had a knife and introduced it during one of the fights. She did not testify at trial, but her preliminary hearing testimony was introduced into evidence.
- It was Ms. Watts boyfriend, Douglas Fresh, who was being beaten while unconscious against a streetcar window by the victim, Ross Hammond, when witnesses M. Stopford and J. Paget—the only two witnesses to see a knife produced by a woman—disclosed that the woman produced a knife.
- Crown witness J. Paget asserted that he saw a knife in a woman's right hand. Ms. Kish is left-handed.

Despite the circumstances of the night, the case was quickly painted in the media as a 'panhandler murder', alleging that Nyki attacked and killed the victim in the case after her refused to give her month. Nyki was the sole person charged, and three and a half years later, Justice Nordheimer (then a judge of the Ontario Superior Court of Justice), sitting as judge alone, found that it was Ms. Kish who stabbed Mr. Hammond, or alternatively, that Ms. Kish was a party to the offence of second-degree murder because she brought the knife to the specific altercation in which Mr. Hammond was stabbed in the chest. In reaching the conclusions that he did, Nordheimer J. relied on the evidence of some, but not all, of the eyewitnesses who testified.

Ms. Kish has always maintained her innocence. Although she was prepared to testify in her defence, she did not do so on the advice of her defence counsel, John Scarfe (now Justice of the Peace John Scarfe) and Vanora Simpson.

On April 4, 2011, Ms. Kish was sentenced to life in prison with parole eligibility set at 12 years. She appealed her conviction to the Ontario Court of Appeal. The Court dismissed her appeal on March 10, 2014. Ms. Kish continues to maintain her innocence. She has not filed any previous applications to the Minister under s. 696.1(1).

In the milieu of a chaotic street fight involving **multiple** people—one that erupted spontaneously in the early Saturday hours of Toronto’s entertainment district among many intoxicated people, Faith Watts has been commonly thought to be the real guilty party. Faith looked close in appearance and Nyki and contributed to Nyki being wrongfully convicted by the closeness of their appearances. Faith was the only woman who introduced a knife into the altercation and did so while her boyfriend was being beaten while he was unconscious by Mr. Hammond. She testified that it was her who produced a knife, but was disarmed in the fight, but her evidence was disregarded.

The UBC Innocence Project (UBCIP) has uncovered new matters of significance that were not considered by the courts, and is currently asking for any person with information about the case to contact them, as they prepare a ministerial review application.

Case Timeline Summary

2007 – Nyki is arrested following a large street fight in downtown Toronto

2011- Nyki is tried and convicted in judge alone trial

2014 – Appeal denied

2019- UBC Innocence Project take Nyki’s case

Key Case Considerations

A significant amount of exculpatory evidence was not considered, historically in Nyki’s conviction. Under Canadian law, only evidence that was considered at the time of trial can be considered in a subsequent appeal.

- a. Many relevant details about Nyki’s capacity to and likelihood of having stabbed Ross Hammond were not considered at trial**

Nyki Kish was vocally against the use of weapons as a young person, and this was well known by many of the individuals with her on her birthday.

Nyki Kish is left-handed, and the only witness who reported seeing a female with a knife testified that he was certain that the knife was in her right hand. One of the females present that night (Faith Watts) testified at the preliminary inquiry of Nyki's case that it was she (Faith) who had a knife on her person, and that she introduced her knife into the fight that night when her boyfriend (Doug Fresh) was being beaten while unconscious by a man (determined in evidence to be Ross Hammond). Faith testified that Ross quickly disarmed her, a statement confirmed by witnessed.

Nyki Kish and Faith Watts looked very similar in appearance, and the trial judge concluded that it was Nyki who introduced the knife into the fight.

Doug Fresh and Faith Watts were dating, and had matching knife and multitool sets on their person, including holsters. Faith's knife holster was found empty on her person, but the matching knife was recovered in the back pocket of Ross Hammond.

Nyki Kish received a significant stab wound to her left forearm. The blade of a knife went directly through her left arm, severing nerves, tendons, and arteries. Her injury was presented by the crown as a "cut".

The judge concluded that Nyki must have stabbed Ross Hammond *after* being injured. But Nyki was unable to use her arm following being stabbed. Neither the extent of her injury, nor the fact that she was left-handed made it into evidence, and were not considered at trial.

Lost and Deleted Video Evidence

In addition to the above stated, during her trial, a motion to dismiss the hearing was brought forward that key video evidence had been deleted by the Toronto Police Department. The presiding trial judge agreed in favour of Ms. Kish, finding that her S. 7 Charter rights had been violated, but ordered no remedy. The details are as follows:

a.) The One-of-a-Kind Pasta Video

A man lived above the restaurant he owned, called One-of-a-Kind Pasta. He reported to police that he witnessed the events and had relevant video showing the fighting. He watched the fight from his window, then came outside after the fight and walked behind Nyki and the police toward the ambulance. He testified that only males were involved in the fight. He testified that TPD officers came into his store and watched the video footage

with him and asked him to replay it many times, and he asserted that the fight was captured by his footage.

The TPD originally reported to Nyki's legal team that there was no relevant footage. A police note referencing the footage was found buried in disclosure in the years leading up to her trial. Nyki's defence investigated and called the man as a witness. They also called an IT witness, as the video footage had a missing segment by the time it reached Nyki's team—the segment that would have shown the fight. The specialist testified that there would have been no way that the footage could have been accidentally deleted.

Despite this, the TPD testified that, upon entering the business to capture the evidence, that they must have accidentally deleted the sole piece of the footage that would have shown fighting.

b.) The Missing Jewellery Store VHS Tape

Three and a half years after her arrest, Crown counsel in Nyki's case disclosed—during trial—that further video evidence had existed, but was also lost by the Toronto Police Department. This evidence came in the form of a VHS tape that went missing from an evidence box. It was provided by the jewellery store owner, the owner of the store next to One-of-a-Kind Pasta. Nyki's team called the store owner to testify, and he was able to demonstrate that the area captured by the video would have shown the area of the fight. There is no further evidence about this videotape.

b. The Second Assault Case

Lending to the unfair prosecution of Nyki Kish is a second case she was involved in shortly after her being charged with murder. Having received bail for the murder in September, 2007, Nyki was living on house arrest at her grandmother's house when she received a call in early October that she was being re-arrested on a different charge. Six Toronto Police arrived at her house shortly thereafter, and re-arrested her. The next day, the front page of the Toronto Sun read "panhandler killer strikes again". She was charged with an assault in Toronto that allegedly occurred at the same summer prior to the stabbing. In the aftermath of the proceedings, it became unclear as to whether an assault even occurred. Toronto police were caught, however, altering photo line up evidence.

Importantly, Nyki was at a family reunion at the time of the alleged assault. She was not in the city of Toronto and she produced photograph, video, and financial evidence supporting her alibi. She as well was able to call numerous witnesses, both family, and people she did not know, who all asserted she was not in Toronto. Instead of dropping the charge, the

alleged date of the offence was changed to the day prior. Luckily for Nyki, she was also able to prove she was not in Toronto on the day prior.

Nyki received bail for this charge, and the Judge who granted her bail concluded that the charge was the result of the Toronto Police being unhappy with the bail decision in the murder case.

Nyki remained charged with this assault for eighteen months, until at a preliminary hearing it became clear that the victim, a drug addicted woman with significant mental health issues, could not even be sure an assault occurred.

Nyki did not have a criminal record, and had she not been able to prove that she was not in Toronto in the second assault case, the police would have easily been able to paint her as a violent woman with a prior criminal record and a pattern of causing harm during her murder trial.

Judges Reasons

Because this was not a jury trial, the trial judge is required to provide written reasons outlining his decision to find Nyki guilty. The trial judge pieces together select bits of testimony from several witnesses (none of whom saw Nyki stab anyone), to infer that it 'must have' been Nyki. He specifically wrote that it was "irresistible" to conclude anything other than that the same person who introduced the knife into the fight must also be the one who is stabbed.

His reasons at many points read as contradictory, and many longtime advocates of Nyki conclude that they do not support a conviction made beyond a reasonable doubt. In fact, the trial judge could not conclusively say that he was confident that Nyki did stab Ross Hammond. Instead, he convicted her of "either" stabbing Ross Hammond, "or" introducing the knife into the fight. He concluded that this detail did not matter, as, in either instance, Nyki would be responsible for Ross Hammond's death. The judge selectively admitted portions of witness testimony while denying other portions of the same statements. By any characterization, the conviction was never demonstrated 'beyond a reasonable doubt'.

And though there was no evidence that Nyki was panhandling, the Judge concluded that she was, and then denounced panhandling, and added two years to her sentence to support the denunciation.

The Innocence Project, UBC and The Ministerial Review Process

Since 2019, the Innocence Project, an initiative that operates through the University of British Columbia's Peter A. Allard School of Law under the direction of the Project Director, Tamara Levy, have been gathering evidence to advance a Ministerial Review of Nyki's conviction (A 696 Application to the Minister of Justice).

There is no timeline for review and investigation of Nyki's case. The Minister of Justice can recommend that files be investigated by a team of Department of Justice Lawyers under his supervision, known as the Criminal Conviction Review Group. The Minister has the discretionary authority to prioritize cases where there is a strong likelihood that a miscarriage of justice has occurred.

Once the CCRG has investigated a file, they provide their findings to the Minister. The Minister has the authority to either:

- a.) Uphold the conviction,
- b.) Order a new trial, or
- c.) Refer the case back to the appellate court