

IN THE HIGH COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY

No. M.414/84

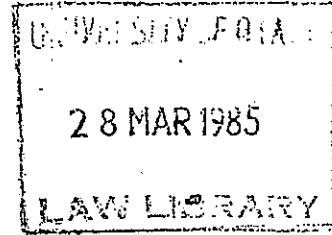
BETWEEN ANETA CAMPBELL  
Appellant

A N D POLICE  
Respondent

Hearing: 5 September 1984

Counsel: G.K. Panckhurst for Crown  
P.N. Dyhrberg for Appellant

Judgment: 5 September 1984



ORAL JUDGMENT OF HOLLAND, J.

This appeal is in respect of a conviction entered under section 56(4) of the Dog Control and Hydatids Act 1982, namely that the appellant was the owner of a dog which attacked a person. It is common ground that the dog, a German Shepherd bitch, with a litter of pups of some six or seven weeks age, was left in an enclosed and fenced yard while the owner was away from the house for the greater part of the day. The dog escaped from the fenced yard and attacked a young girl delivering papers and caused at least some breaking of the skin for which medical treatment was required.

In order to appreciate the precise offence it is necessary to set out the first four subsections of section 56 which are as follows:-

"(1) Any person who sees a dog attacking any person, stock, or poultry, or who is himself attacked by any such dog, may forthwith either seize or destroy the dog.

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(2) Any constable who has reasonable grounds to believe that a dog has attacked any person, stock, or poultry may, if that dog is at large, -

(a) Seize that dog; or

(b) If the seizure of the dog is not practicable, and he is accompanied by a person who saw the attack and identifies the dog, destroy the dog.

(3) Where pursuant to subsection (1) of this section a dog is seized by any person other than a dog control officer or dog ranger, that person shall ensure that the dog is returned to its owner or delivered into the custody of a dog control officer or dog ranger.

(4) The owner of any dog that makes any such attack commits an offence and is liable on summary conviction to a fine not exceeding \$500 in addition to any liability he may incur for any damage caused by the attack; and, where the dog has not been destroyed, the Court may, on convicting the owner, make an order for the destruction of the dog."

In the District Court the defence before the District Court Judge was that the offence was one within the category of cases defined by the Court of Appeal in Civil Aviation Department v MacKenzie (1983) N.Z.L.R. 78 as one of public welfare regulatory offences. It has been suggested by a writer that the effect of this decision is that there are now offences of strict liability as opposed to absolute liability and counsel for the appellant submits that this is one of strict liability only and that accordingly evidence can be produced by the defendant which will excuse the defendant of the criminal consequences of the offence. I am prepared for the purpose of this case to accept that an offence under section 56(4) of the Dog Control and Hydatids Act 1982 is one of that type of case referred to in Civil Aviation Department v MacKenzie as a public welfare regulatory offence. It seems clear from the judgment of the majority of the Court of Appeal at p85 that in order to succeed by way of

defence the defendant will have to establish on the balance of probabilities total absence of fault. In the latter part of the same paragraph of the judgment reference is made to the earlier case Police v Creedon (1976) 1 N.Z.L.R. 571 where it is emphasised that a high standard of care is properly expected and "he must prove that he did what a reasonable man would have done". At the bottom of the page the judgment says that the "proof of absence of fault in this case lay with the appellant". There may be room for argument as to whether there is any distinction between "total absence of fault", "absence of fault", or doing "what a reasonable man would have done". Again I do not find it necessary to resolve these difficulties and I am prepared to hold that it was open to the appellant to establish by way of defence that she had done what a "reasonable man" would have done and that on the establishment of those facts she was entitled to an acquittal.

There is a further interesting argument as to the admissibility of similar facts because it is apparent that on some previous occasion this dog had, unfortunately for it and no doubt the policeman concerned, bitten a policeman. The appellant gave evidence that following that incident she had fenced the yard and she did not believe that the dog could get out without someone opening the fence. I again do not find it necessary to determine the issues of similar fact evidence but would find it surprising indeed that if a defence such as that prescribed or explained in Civil Aviation Department v MacKenzie is available that evidence of a dog's previous conduct was not relevant either to determine the question of total absence of fault or doing what a reasonable man would have done. I also do not need to rely on the line of cases making a special exception in

respect of the propensity of animals. I say that because the issue here before the District Court Judge was essentially what did this appellant do and was it in the circumstances the acts of a reasonable person in the light of the obligations imposed under the Dog Control and Hydatids Act 1982. The facts of this case did not warrant investigation of earlier acts which were not relied on in the District Court and in any event are not relied on by this Court.

The appellant fails on her own testimony. The interviewing constable gave evidence as to her explanation. He said that she told him that she normally kept the dog chained up at the rear of her home and that the dog had puppies at the moment and she thought this was the reason for the dog's behaviour as the dog was normally well behaved. She also referred to the fact that some young children had been playing with the dog that day and she felt that the dog could have possibly got free through them. When she was giving evidence herself she did not say that she normally had the dog chained up. She said it was normally kept in her house or in the back yard. Her reference to the fencing of the yard was brief in the extreme. She said:-

"There is a fence that runs right from one corner of the house to the house which means she cannot get out to the front and from the garage from the back giving entrance to my back door. And that is the whole backyard".

She also said she believed that the dog could not get out. With a number of puppies it is extraordinary indeed that evidence was not given as to the precise nature of the fence. Any reasonable dog owner must have foreseen the possibility of the puppies getting out of the area and the dog following, even though normally the dog would be

contained by a fence. It was accordingly necessary in my view for the appellant to prove that the fence was both dog-proof and puppy-proof. Her evidence fell far short of that. In addition she must have realised that young puppies were an attraction for children and that there was a possibility, and quite a reasonable possibility, of children attracting the puppies, playing with them and possibly either opening a gate or creating an opening in the fence. She gave no explanation as to why the dog was not chained. I am satisfied that the District Court Judge reached his conclusion that she had not acted reasonably without in any way being influenced by the previous occurrence of the bite of the policeman.

Counsel has applied to me for leave to call further evidence on the basis that he assumed that evidence of similar facts was inadmissible and he had conducted the case in that way. He wished to call evidence to explain the previous incident and what had been done. Quite apart from the fact that I consider it too late at this stage for him to call such evidence, I have permitted him to tell me from the Bar the evidence that he intended to call. It really was related to the circumstances of the first biting rather than the precautions that were taken, and the finding that the District Court Judge made against the appellant, and which I have upheld, is that in relation to the steps taken following the incident, or more appropriately the steps taken on the day on which this attack took place were inadequate. I am accordingly satisfied that applying the most favourable interpretation of the law to the appellant possible she was still properly convicted.

I wish to record that I have not in the course of this judgment given a concluded finding as to the application of Civil

Aviation Department v MacKenzie, nor as to whether a test as wide as that of a reasonable man is the appropriate one. That can be reserved for another case where the facts render the distinction important for the result of the case. They do not in this case. The appeal is dismissed.

The appellant was fined the sum of \$200. Counsel has submitted to me that that is out of line with the normal fine for a first offence of this kind. The maximum penalty is \$500 but the appellant should be reminded that an order can be made that the dog is destroyed. No such order was made, nor do I suggest that it should have been made. But I doubt if the appellant can legitimately say, as her counsel submitted, that this was at the higher end of the scale of penalties. Nevertheless no evidence was obtained by the District Court Judge as to the financial circumstances of the appellant who is described as a housewife in the summons. In the circumstances I am satisfied that the fine was substantially higher than was required and that the appeal against sentence should be allowed and in lieu of the fine of \$200 there should be imposed a fine of \$100. The order for costs in the District Court shall stand.

The appellant can be grateful to her counsel who has allowed this dog the benefit of a refined legal argument presented with some skill and ability but the facts of the case do not seem to me to support the interesting points that were raised. But everything that can be said on behalf of this dog and the appellant has undoubtedly been said. It will remain for another Court on another occasion to decide whether the owner of a dog which attacks another person is the alter ego of his or her dog and absolutely liable or whether some defence is still available to such a person.

A. D. Holland

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