

**IN THE HIGH COURT OF NEW ZEALAND  
WHANGAREI REGISTRY**

**CRI 2008-488-67**

**OWEN KUNICICH**  
Appellant

v

**ROYAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS**  
Respondent

Hearing: 18 September 2009

Appearances: M A Gardam for appellant  
G R Anson for respondent

Judgment: 13 October 2009

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**JUDGMENT OF ALLAN J**

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*In accordance with r 11.5 I direct that the Registrar endorse this judgment  
with the delivery time of 3.30 pm on Tuesday 13 October 2009*

Solicitors:  
*Michael Gardam, PO Box 659, Whangarei*  
*G Anson, PO Box 248, KeriKeri 245*

## **Introduction**

[1] On 24 October 2008, following a summary hearing, the appellant was convicted in the Kaitaia District Court on the following charges:

- a. That between 4 December 2005 and 31 March 2006 at Awanui jointly with Laura Jane Kunicich he wilfully ill-treated animals, namely no more than 365 mixed aged sheep, being an offence created by s 28(1)(b) Animal Welfare Act 1999.
- b. That between 4 December 2005 and 31 March 2006 at Awanui jointly with Laura Jane Kunicich being the owner or person in charge of animals, namely no more than 365 mixed aged sheep, he failed to ensure the physical and health needs of those animals were met in accordance with both good practice and scientific knowledge pursuant to s 12(a) Animal Welfare Act 1999.
- c. That between 4 December 2005 and 31 March 2006 at Awanui jointly with Laura Jane Kunicich he ill-treated animals namely no more than 365 mixed aged sheep pursuant to s 29(a) Animal Welfare Act 1999.

[2] On 25 November 2008, the appellant was fined \$15,000 with Court costs of \$130 on the wilful ill treatment charge, and directed to pay expenses of \$1472.38. On the other two charges he was convicted and discharged. The appellant now appeals against both conviction and sentence.

## **Factual background**

[3] On 30 March 2006 two animal welfare inspectors, acting on information received, visited the appellant's property in Gill Road, Awanui. Neither the appellant nor his wife was home, but the attention of the inspectors, Mr Boyd and Ms Roberts, was attracted by what they saw and smelt. In a paddock immediately adjacent to the driveway leading to the homestead, the inspectors observed a significant number of dead sheep. They counted 25 such sheep in all; there were only 13 live sheep in that first paddock. One was dying and was put down by Mr Boyd.

[4] The inspectors then proceeded to an adjacent paddock where again they counted 25 dead sheep, along with 12 live sheep, including two that had come through from the first paddock.

[5] The inspectors were also struck by the smell. Judge Harvey, who heard the case, reproduced the following passage from the transcript of evidence in his liability judgment:

This was outdoors and the smell was so overpowering that it was making me retch at times Your Honour. It was also flies, a smallish fly, a lot larger than a sandfly but slightly smaller than your normal house fly and these creatures were absolutely prolific everywhere. I had to watch when speaking, opening my mouth or breathing not to breathe them in. They were so thick, so dense. I have actually personally never encountered flies in this number, in this quantity, ever in my life.

[6] Further inspection disclosed obvious fly strike in some sheep, to the extent that in some instances the fleece was hanging off the animal. A total of about six sheep fitted into that category. As is common they were exhibiting severe diarrhoea. Mr Boyd noted also that the paddocks in which the sheep were grazing consisted of rank kikuya grass, a type which features thick, fibrous material unsuitable for sheep, and providing only limited edible sustenance at the green tip of each stalk. Mr Boyd considered that the live sheep were very light in condition, some approaching emaciation.

[7] Some of the carcasses examined by Mr Boyd were of sheep that had been dead for up to two weeks. Most of the recently deceased carcasses exhibited signs of daggy rear ends and diarrhoea. Mr Boyd said the over-powering smell was apparent from the house. The carcasses were also visible from the house and from the driveway which afforded access to it.

[8] At the conclusion of his inspection of the paddocks, Mr Boyd taped to the ranchslider door of the homestead a notice pursuant to s 130 of the Animal Welfare Act, instructing the occupants to muster the sheep, call in a vet and put down any sheep that were beyond recovery.

[9] On the following day Mr Boyd returned to the property. He observed that all the dead sheep had been removed. Mr Kunicich was present. He indicated that he and his wife had experienced dog attacks on the sheep, and that some of the sheep had been stolen. Initially he advised that there had been 300 sheep. Later he corrected that to a figure of 350.

[10] In the District Court Mr Boyd gave evidence that, when he pointed out to the appellant that the sheep were sick and dying, Mr Kunicich simply bowed his head and looked at the table.

[11] During his discussion with Mr Boyd, the appellant volunteered the fact that he had drenched the sheep two weeks earlier and also on the preceding evening, that is, after the s 130 notice was taped to the ranchslider.

[12] The thrust of Mr Boyd's evidence was corroborated by that of Mr Stocker, a veterinarian, and by Mr Godinet, an inspector and investigator with the Ministry of Agriculture and Fisheries. Mr Stocker confirmed the accuracy of Mr Boyd's evidence of what was visible on the property, and confirmed that the lambs were very thin and a few exhibited evidence of fly strike which, he indicated, can manifest itself very quickly and kill a lamb within two or three days if not rapidly treated.

[13] Parasitism, also evident, is treatable and preventable, but the appellant and his wife were using the wrong drench, Mr Stocker considered.

[14] It appears that Mr Stocker had no contact during his visit to the property with Mr Kunicich himself; rather he spent his time with either Mrs Kunicich, or her uncle, Mr Jim Jones. The precise character of the relationship between Mr and Mrs Kunicich is important to the factual narrative. I will return to it shortly. Mr Stocker considered it to have been likely that the sheep, which had been recently acquired, brought a worm burden with them. He believed the lambs ought to have been checked daily for both fly-strike and parasitism.

[15] Mr Godinet broadly supported Mr Boyd's evidence. He came to his present position from a background of some 31 years as a police officer, including half of that time as a rural sole charge policeman.

[16] The appellant gave extensive evidence in his own defence. He explained that the farm belonged to E Kunicich & Son Ltd, of which he is the sole director. He is a beef farmer. Although he had some experience of sheep farming when his father was alive, he had not engaged in sheep farming activities for some 30 years.

[17] The appellant is aged 67 years. He married his wife in April 2005. She is just 20 years old. It was the appellant's first marriage. At the time of the hearing in the District Court it appeared that the marriage had been going through what Judge Harvey described as a "rocky patch". There was some suggestion in the evidence that Mrs Kunicich and Mr Jones may have been taking financial advantage of the appellant in a number of ways. Although concluding that that was more likely than not, Judge Harvey did not consider his finding to impact upon the outcome of the prosecution.

[18] The circumstances in which the sheep were procured is, however, important to the case. There is little dispute about much of the relevant factual narrative, the argument on appeal focusing chiefly on the inferences to be drawn from established facts. The sheep were purchased by Mrs Kunicich against the appellant's wishes. On his evidence, she simply ignored him and brought the sheep onto the farm. He permitted them to remain, and indeed allocated paddocks that could be used to accommodate them. In so doing, he was forced to reduce his own beef cattle operation. Although he allocated paddocks to his wife's sheepfarming activities, the appellant said in evidence that responsibility for grazing patterns rested with his wife and her uncle.

[19] There was a suggestion that some sheep were affected by worrying dogs, but the sheep attacked were few in number and evidence about worrying by dogs ultimately played little part in the outcome of the prosecution. Of interest is Mr Kunicich's acknowledgement that he participated in talks with neighbours about the dog attacks.

[20] Mr Kunicich accepted in evidence that he knew sheep were dying on the property. He also accepted that, because his wife knew little about farming, it was necessary for him, despite her negative attitude, to provide advice and indeed practical assistance in the sheep farming operation. For example, he assisted her with drenching; he allocated paddocks and advised his wife about stock rotation, and he provided advice about matters such as crutching and shearing. He accepted that on occasion he got over the fence in order to assist cast sheep.

[21] In evidence the appellant accepted that he saw what was happening to the sheep, and in particular he was aware of dead and dying sheep because he drove up and down his driveway every day and had a good view of the paddocks in which the sheep were enclosed. He accepted that he was aware there were carcasses littering those paddocks, although he was inclined to suggest that the overpowering smell of which Mr Boyd spoke was not as bad as the latter claimed.

[22] At the time of drenching he was aware that stock numbers had rapidly reduced, and that the animals were in poor condition.

[23] The overall thrust of his evidence was that he took only a limited interest in the sheep because they had been purchased by his wife and were her responsibility.

[24] Mr Kunicich also dealt with financial matters in his evidence. He indicated that, in effect, he had lent money to his wife to settle the purchase price of the sheep. Initially he had instructed his accountant to make a claim for a GST credit on the purchase, regarding the sheep as having been purchased by the overall farming business. Later, after discussions with his accountant, a decision was taken to withdraw the claim for a GST credit.

### **The offences**

[25] The principal charge against the appellant was laid in reliance on s 28(1)(b) of the Act. Section 28 provides:

(1) A person commits an offence who wilfully ill-treats an animal in such a way that—

- (a) The animal is permanently disabled; or
- (b) The animal dies; or
- (c) The pain or distress caused to the animal is so great that it is necessary to destroy the animal in order to end its suffering.

(2) A person who commits an offence against this section is liable on conviction on indictment,—

- (a) In the case of an individual, to imprisonment for a term not exceeding 3 years or to a fine not exceeding \$50,000 or to both; or
- (b) In the case of a body corporate, to a fine not exceeding \$250,000.

[26] The phrase “ill-treat” is defined in s 2(1):

**Ill-treat**

... in relation to an animal, means causing the animal to suffer, by any act or omission, pain or distress that in its kind or degree, or in its object, or in the circumstances in which it is inflicted, is unreasonable or unnecessary:

[27] Criminal responsibility under the Act will of course rest only upon those who have a legal obligation in respect of animals. Section 10 of the Act provides:

**10 Obligation in relation to physical, health, and behavioural needs of animals**

The owner of an animal, and every person in charge of an animal, must ensure that the physical, health, and behavioural needs of the animal are met in a manner that is in accordance with both—

- (a) Good practice; and
- (b) Scientific knowledge.

[28] The term “physical, health and behavioural needs” is defined for the purposes of the Act in s 4 which provides:

**4 Definition of “physical, health, and behavioural needs”**

In this Act, unless the context otherwise requires, the term “physical, health, and behavioural needs”, in relation to an animal, includes—

- (a) Proper and sufficient food and water:

- (b) Adequate shelter:
- (c) Opportunity to display normal patterns of behaviour:
- (d) Physical handling in a manner which minimises the likelihood of unreasonable or unnecessary pain or distress:
- (e) Protection from, and rapid diagnosis of, any significant injury or disease,—

being a need which, in each case, is appropriate to the species, environment, and circumstances of the animal.

[29] Here the respondent does not allege that the appellant was necessarily the owner of the sheep; rather it contends that he was a “person in charge” of them. The phrase “person in charge” is defined in s 2(1):

**Person in charge**, in relation to an animal, includes a person who has the animal in that person’s possession or custody, or under that person’s care, control, or supervision:

[30] The second charge was laid in reliance upon s 12(a) of the Act, which provides:

## **12 Animal welfare offences**

A person commits an offence who, being the owner of, or a person in charge of, an animal,—

- (a) Fails to comply, in relation to the animal, with section 10; or
- (b) Fails, in the case of an animal that is ill or injured, to comply, in relation to the animal, with section 11; or
- (c) Kills the animal in such a manner that the animal suffers unreasonable or unnecessary pain or distress.

[31] By s 13, the Act provides that in the prosecution of an offence against s 12, it is not necessary for the prosecution to prove that the defendant intended to commit an offence. Accordingly, an offence under s 12 attracts strict liability. Under s 13(2), a defendant may advance a defence to a charge under s 12(a) if the defendant proves that he took all reasonable steps to comply with s 10. No such defence was mounted in the present case.

[32] The third charge was laid in reliance on s 29(a) of the Act which provides that a person commits an offence who “ill-treats an animal ...”. Section 30 provides



that in a prosecution for an offence under s 29(a), it is not necessary for the prosecution to prove that the defendant intended to commit an offence. Accordingly, as in the case of s 12(a), an offence under s 29(a) attracts strict liability.

[33] Section 30(2)(a) provides that a defendant may avoid liability if he proves that he took all reasonable steps not to commit a breach of s 29(a). No such defence was advanced in the present case.

[34] The maximum penalty for offences under ss 12(a) and 29(a) is, in the case of an individual, a term of imprisonment not exceeding six months or a fine not exceeding \$25,000, or both.

### **The section 28 charge.**

[35] Judge Harvey found that the appellant was a “person in charge” of the sheep, and that he had therefore assumed certain obligations for their welfare under the Act. In reaching that conclusion he said:

[53] A useful starting point may be found in *Ministry of Agriculture and Fisheries v George* (2003) DCR 369. In that decision at [53] His Honour Judge Doogue said:

By way of further preliminary remark, I see no reason to conclude that a person having the immediate control of the animals is not in charge of them even although another person, such as an owner, has a right arising out of ownership of the animals to direct the first mentioned person as to how he or she should manage the animals while in his/her custody.

[54] I am of the view that even if I were to conclude that the defendant had no financial interest in these animals that would not mean he was not a person in charge.

[55] I am of the view that the defendant did indeed have a level of control or supervision over these sheep. He is an experienced farmer and, despite his disapproval, he ultimately allowed his wife to bring sheep on to his land and he not only allocated paddocks for her to use but also downsized his own operation to accommodate this. There is no evidence he charged his wife grazing fees. The defendant acknowledged in cross-examination that one of the reasons that he opposed his wife was that he knew that if the sheep arrived on his land he would need to assume some responsibility for them because his wife knew little, if anything, about farming.

[56] It is clear that whilst the sheep were on the land the defendant did involve himself in aspects of their care. He had discussions with his wife about topping the grass, drenching the sheep, crutching and shearing the

sheep and stock rotation. The fact that his wife may not have heeded the advice does not alter the fact that the defendant felt an obligation to give it.

[57] The defendant drove past the sheep on an almost daily basis. He assisted with the putting down of sheep that had been mauled by dogs, he righted sheep that became cast, and he assisted in the drenching of them some two weeks prior to the inspection taking place.

[58] I note that in evidence the defendant claimed that his wife still owed him money for the purchase of the sheep and there is at least a suggestion that he retained a financial interest in those sheep until he had been repaid. I also find it telling that the defendant had every intention of claiming the sheep as deductible expenses of his own business and claiming the GST on the purchases. The fact that his accountant ultimately discouraged him from doing so does not, in my view, detract from the fact that the defendant himself obviously felt that the sheep were part of his business operation.

[59] I have reread carefully the statement that was taken from the defendant by Mr Godinet. Whilst I accept that some care needs to be taken with the wording of the statement simply because the questions are not recorded, I have to say that the overall impression that I got was that the defendant was acknowledging at least some responsibility for this stock.

[60] Ultimately therefore the defendant did, by nature of the fact that he was the farmer with the experience take a supervisory role but, at times, a very much hands on role during the crucial period.

[36] Mr Gardam, for the appellant, subjected these findings to significant scrutiny. On appeal, he submits that the Judge was not justified in deciding that the appellant was a “person in charge” of the sheep for the purposes of s 28. While accepting that a person may be in charge of animals without having a financial interest in them, he submits that a non-owner ought to be regarded as having subordinate rights and powers over the animals, in comparison with the owner who was obviously Mrs Kunicich (who was also charged and has elected to be tried by a jury). Mr Gardam submits there is evidence that Mrs Kunicich was simply determined to ignore the appellant; the inference being, as I understand it, that the appellant must be taken to have had limited effective control over the sheep. I am unable to accord that submission any weight. Either the appellant was a “person in charge” or he was not. If he was, then he is subject to the duties imposed by the Act. Inter-personal difficulties arising between the appellant and his wife might perhaps be relevant in mitigation, but they cannot go to liability.

[37] Then Mr Gardam argues that the appellant’s action in allocating specific paddocks for the sheep is simply consistent with his desire to separate out his own

cattle operation from his wife's sheep grazing activities. I do not regard that as an important consideration. Rather, the allocation of specific paddocks by the appellant suggests that he was in a position to take control of places where the sheep were entitled to graze. In doing so he was, for example, in a position to determine whether there was sufficient feed in the paddocks so allocated.

[38] Mr Gardam submits also that the appellant was in no better position to make judgments about the care and maintenance of sheep than was Mrs Kunicich. Mr Gardam points out that there had been no sheep on the farm since the death of the appellant's father some 27 years ago.

[39] But the appellant is now 67 years old. There were sheep on the family farm until he was about 40 years old. The evidence is that he has farmed the property all his life. While it may be that he did not run sheep on the farm in recent years, the Court is entitled to draw the inference that he does have experience of sheep farming, and certainly a great deal more experience than Mrs Kunicich. By reason of his greater farming experience generally and his knowledge of sheep farming in the past, he was in a position to provide advice to his wife, and did so. The fact is that, as the Judge found, the appellant was obliged to assume a degree of control over the sheep by default, because once they had arrived on the farm, his wife simply lacked the knowledge and experience to undertake their care unaided.

[40] Mr Gardam submits that this was really a simple case of a farmer permitting another person who had a role in the management of the farm, to purchase and bring stock onto the farm – the appellant does not become liable simply because he happens to be living on the farm himself. However, that submission overlooks the body of evidence upon which the District Court Judge relied in determining that the appellant actually assumed responsibility in several important respects for these sheep. It was not simply a case of permitting them to be on the farm.

[41] Mr Gardam also submits that the District Court Judge failed to take into account the negative and confrontational stance adopted by Mrs Kunicich towards her husband. He argues that there was evidence that she simply ignored certain advice given to her by the appellant. But the answer to that contention is that,

although she may have been at odds with the appellant, she had no relevant experience, and was obliged ultimately to accept his advice and active participation in animal management.

[42] For his part, the appellant assumed control, because there was no-one else to do so.

[43] There was also criticism of the learned District Court Judge's reliance on financial evidence. There was some rather vague evidence as to the possibility that Mrs Kunicich might have borrowed money from the appellant in order to purchase the sheep. That evidence was somewhat inconclusive and it does not appear that Judge Harvey relied upon it to any significant degree.

[44] Of greater significance is the fact that the appellant initially sought through his accountant to claim a GST credit for the purchase of the sheep. While that claim to a credit was eventually abandoned, the importance of the initial claim for present purposes is that the appellant clearly regarded the sheep as part and parcel of the overall farming operations conducted on the farm owned by a company of which he was the sole director.

[45] That evidence is not consistent with the contention advanced by Mr Gardam, that the appellant regarded the sheep throughout as the responsibility of his wife, and that he stepped in to assist on limited occasions only.

[46] Mr Gardam further submits that there is no presumption arising from the fact that the property is owned by a company of which the appellant is sole director. That is no doubt correct, but ownership of the farm was not regarded by the District Court Judge as relevant to ultimate criminal liability; rather, the Judge, properly in my view, had regard to the element of practical control assumed by the appellant over the sheep (for example with regard to paddock allocation), by reason of his indirect ownership rights in respect of the farm property.

[47] Mr Gardam also argues that the Court is entitled to take into account the dynamics of the relationship between Mr and Mrs Kunicich on the one hand and

enforcement officers on the other. He says that Mrs Kunicich, a woman of firm views, displayed a level of dominance over her husband, and was the primary figure in dealing with officers of the respondent.

[48] In my view, evidence about that is of limited assistance in determining whether the appellant was a “person in charge” for the purposes of the Act. As earlier observed, personal difficulties between the couple and the degree of dominance exerted by Mrs Kunicich may perhaps have some bearing at the sentencing stage, but they are not relevant to liability. Moreover, it must not be forgotten that this is a case in which the appellant had effective control over the farm, was 67 years old and with a lifetime of farming experience. Mrs Kunicich on the other hand was just 20 years old and had no appreciable farming experience. Against that background it is not tenable for Mr Kunicich to argue that he was so far under the domination of his wife as to be exempt from criminal responsibility.

[49] There was, in my view, ample evidence upon which to base a finding that the appellant was a “person in charge” for the purposes of the charges laid against him. Indeed, despite Mr Gardam’s closely reasoned argument to the contrary, the findings of the learned District Court Judge were really inevitable.

### **Wilfulness**

[50] The second limb of Mr Gardam’s argument rests upon the proposition that the appellant did not do or omit any act wilfully, and so ought not to have been convicted.

[51] As Judge Harvey correctly concluded, assistance in the application of s 28 is to be gleaned from the decision of the Court of Appeal in *R v Hende* [1996] 1 NZLR 153, which dealt with the offence of wilfully ill-treating a child in a manner likely to cause unnecessary suffering. There, in respect of an offence of which mens rea was a necessary ingredient, the Court said that the prosecution must prove:

- a) ill treatment;

- b) that unnecessary suffering was likely to follow;
- c) that the ill treatment must have been inflicted deliberately with a conscious appreciation that it was likely to cause unnecessary suffering.

[52] To the same effect is the more recent judgment of the Court of Appeal in *R v R* [2009] NZCA 356. Where ill treatment involves positive, cumulative acts of deliberate cruelty, the conclusion that the defendant's actions were undertaken with a conscious appreciation the behaviour was likely to cause unnecessary suffering may be self-evident. But if the ill treatment simply involves omissions or neglect arising out of negligence, then there may be scope for an argument that the omissions were not deliberate and did not occur when the defendant had a conscious appreciation of likely consequential unnecessary suffering: see *R v R* at [20].

[53] That is the thrust of the submission advanced by Mr Gardam. He maintains that the Court ought not to have found that the appellant had acted wilfully because on the evidence he had simply endeavoured to assist his wife. Mr Gardam submits that if the appellant's assistance was insufficient, with the result that the sheep suffered, that is not enough to lead to an inference that the ill treatment was deliberately inflicted with a conscious appreciation that it was likely to cause unnecessary suffering. Mr Gardam refers by way of example to the appellant's actions in assisting with the drenching of the sheep on two occasions, to the evidence of the speed at which fly strike can manifest itself, and to the appellant's ignorance that kikuya grass was unsuitable feed for lambs. Such considerations, he argues, need to be taken into account in any assessment of wilfulness.

[54] Notwithstanding Mr Gardam's detailed submissions, the evidence unequivocally establishes in my opinion that the appellant did not do enough to care for the sheep, and that he must have been aware that he was failing in his obligation. Initially there were about 350 sheep. By the time Mr Boyd counted them there were 81. As Judge Harvey found, that is an appalling mortality rate which the appellant, as an experienced farmer, must have realised was the result of malnutrition or disease. The appellant drove past the paddocks in which the sheep were pastured

every day. By the time the respondent's inspectors arrived there were literally dozens of dead sheep in paddocks adjacent to the driveway and the house. Moreover, the live animals were in poor condition and some of them were visibly suffering from fly strike.

[55] As the Judge held, the appellant as an experienced farmer must have known the animals were deteriorating. There is evidence that the appellant and his wife were using an inadequate type of drench. There is also evidence that kikuya grass is unsuitable for lambs. The appellant, being the person in control of the animals, was obliged to comply with his statutory duty. If his knowledge was insufficient to stem the phenomenal death rate, then he was required to seek assistance from those who could provide proper advice. After all, this was a rural community; veterinary advice must have been readily available. The evidence is that the paddocks were strewn with carcasses of sheep that had been dead for up to two weeks. Mr Boyd considered that the stench was as bad as anything he had ever encountered. The appellant simply must have known the steps he had taken to care for the sheep were inadequate, in the light of the sights and smells that confronted him every day.

[56] The Judge said:

[77] The defendant was clearly aware that there was something wrong with the sheep and whilst he may not have been aware of the specific cause of their poor condition, the fact that the sheep were dying should have been enough to put him on notice and prompt him to take action. He took none. He was aware that his wife had limited experience, not just within a general farming context but also in relation to farming sheep, which he knew to be tricky. In light of this, I am of the view that the defendant must have had a conscious appreciation that his failure to step in and assist would cause the sheep to suffer unreasonable and/or unnecessary pain or distress. He did not act and I am of the view that this was deliberate and, accordingly, he will be convicted on the charge of wilfully ill-treating the sheep.

[57] I agree. The facts of this case effectively speak for themselves. In my opinion the appellant was properly convicted.

## **Remaining offences**

[58] The appellant appeals against his conviction on the remaining two charges only upon the basis that he was not a “person in charge” of the sheep. I have ruled against him on that point. The appeals against conviction on the remaining charges must also fail.

## **Appeal against sentence**

[59] Mr Gardam submits that the fine of \$15,000 was manifestly excessive, in the light of:

- a) the absence of any previous convictions;
- b) the provision of a number of references from experienced farming people who attest to the appellant’s sound farming practices over many years;
- c) the failure of the District Court Judge to acknowledge in a sentencing context the difficulties the appellant faced in respect of the initial arrival of the sheep onto his property and of controlling them thereafter;
- d) asserted inconsistency with a fine of \$13,000 upheld by the Court of Appeal in *R v Albert* CA126/03 19 December 2003.

[60] It is true that Judge Harvey did not specifically refer to the absence of previous convictions when imposing sentence, but he was plainly well aware of the appellant’s good general reputation in the community, and of the supporting references. He said:

However, I also accept that you are a farmer of many years standing. You are well thought of in the community and the fact that the Informant is not asking me to make a prohibition order indicates that it is accepted by the Informant that generally you are a good farmer.



[61] The appellant was clearly treated by the Judge as a first offender in good standing in the community. The reference to the absence of a request for a prohibition order is of some significance here. In bad cases the Court will often impose both a fine and an order, pursuant to s 169 of the Act, disqualifying the defendant from being the owner of, or exercising authority in respect of, an animal or animals of a particular kind or description. For a farmer, of course, such an order would be potentially crippling, but none was sought or imposed in this case. The appellant's good previous record must have played some role in the respondent's decision not to seek an order.

[62] Mr Gardam was critical of the Judge's decision not to regard the difficult relationship between the appellant and his wife as a mitigating circumstance. In that respect the Judge said:

I am of course aware that there were personal domestic circumstances that made it perhaps more difficult for you to act than might otherwise have been the case. I accept that both you and your wife have been charged with these offences but for reasons that do not matter today they are being dealt with in different jurisdictions. I accept that because of the situation existing in your house at the time, it may have been difficult for you first to stop these animals coming on to your property in the first place and, secondly, for exercising control over them once you realised, as you must have done, that things were going tragically wrong. I mention those factors simply to indicate that I have not overlooked them but of course they do not mitigate this offending in my view. The very fact that you are a good farmer of long standing simply indicates that you must have known that things were going badly wrong.

[63] In my opinion, the issue of whether or not to make a discrete allowance for the difficult relationship between the couple was within the discretion of the sentencing Judge. Any allowance that might have been made would have been relatively small. Ultimately, as is always the case in respect of appeals against sentence, the outcome of the appeal must turn on whether the penalty imposed was within the range properly open to the Judge.

[64] It is sufficient to refer by way of comparison to two cases in which wilful ill-treatment resulted in financial penalties. In *SPCA v Kaitaia Rodeo Association* DC KAI 17 May 2002 (unreported), the Court imposed a fine of \$10,000 following a guilty plea by the Rodeo Association, a non-profit organisation. The Association

had, by omission, permitted a mare to become seriously emaciated, with the result that the mare's foal had died of malnutrition. The mare exhibited cuts, bruises and skin loss to a large part of her body, such injuries having occurred while she was struggling on the ground. It was necessary to put the mare down. The Association entered a guilty plea at an early stage. Judge Everitt noted that the Association was a non-profit making organisation and said that had it been in the business of making a profit from the animals, the penalty would have been far more severe.

[65] The other case is *R v Albert*, to which I have referred earlier. This case concerned a number of horses found in a starving condition on a property at Mangamuka. One horse, a stallion, had to be destroyed. Twelve of 43 horses on the property were identified as being either emaciated, or bordering on emaciation.

[66] Veterinary opinion was that the property could support no more than 20 horses, pasture levels being well below an acceptable level for grazing horses. There were no signs of supplementary feeding. The sentencing Judge accepted that it was not a case of premeditated cruelty, and that the starvation of the animals was unplanned. But the defendant was simply negligent. He had been involved with horses for a long time and was well aware of their needs. Fines totalling \$13,000 were imposed. The appellant was also prohibited from having custody of any horses for a period of 18 months.

[67] In dismissing the appeal the Court of Appeal noted that "given the significant increases in maximum penalties available for offences against animals under the Animal Welfare Act, the fines imposed cannot be said to be manifestly excessive".

[68] The present case was, in my opinion, clearly more serious than either of those discussed above. Three-quarters of a substantial flock perished. Many of the surviving sheep were in very poor condition.

[69] Mr Boyd, who is the manager of National Operations for the SPCA and has nearly 40 years experience as an inspector, had never encountered a situation where three-quarters of a flock has perished through starvation or parasitism. There cannot be the slightest doubt that the penalties imposed by the learned District Court Judge

were well within the available range. Indeed, it might properly be said that they erred, if anything, on the side of leniency.

## **Result**

[70] For the foregoing reasons the appellant's appeals against conviction and sentence are dismissed.

**C J Allan J**