

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

**CRI 2009-404-330**

**CRAIG ALLEN**  
Appellant

v

**MANUKAU CITY COUNCIL**  
Defendant

Hearing: 23 November 2009

Appearances: Appellant in person  
S E Curran for respondent

Judgment: 15 December 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 pm on Tuesday 15 December 2009*

Solicitors/Party:  
C Allen, 76 Miller Rd, Mangere Bridge, Manukau 2002  
Brookfields, Auckland curran@brookfields.co.nz

[1] On 2 September 2009, the appellant, having pleaded guilty, was sentenced in the Manukau District Court on four charges laid by the respondent under the Dog Control Act 1996 (the Act). The charges concerned an incident on 10 July 2009 involving the appellant's four American Pitbull Terriers. Three of the charges were laid under s 57A of the Act, and alleged that the appellant was the owner of dogs that had rushed a person. The dogs to which those charges related were Snoop, Max and Jade respectively. The remaining charge was laid under s 57(2) and alleged that the appellant was the owner of Star, which had attacked a person.

[2] Prior to the hearing in the District Court, Jade and Snoop had been put down, the appellant not having reclaimed them following their seizure by the respondent.

[3] In the District Court Judge Blackie convicted and fined the appellant \$200, together with \$130 Court costs. He also made an order for the destruction of Star, but made no such order in respect of Max.

[4] Mr Allen's appeal is directed at the destruction order. He argues that the circumstances of the offence were exceptional and did not warrant the destruction of Star. If this Court on appeal declines to quash the destruction order, he asks that his guilty plea in the District Court be vacated, and that the proceeding be remitted to that Court for trial. He says he ought to be permitted to vacate his plea because he was misled as to the legal consequences of a conviction under s 57 by either or both of the duty solicitors who advised him in the District Court, and by counsel who appeared for the respondent there.

[5] Because the appellant's primary concern was the destruction order in respect of Star, I propose to deal with that aspect of his appeal first. I will consider his application to vacate the guilty plea only if that becomes necessary in the light of my finding on the first point.

[6] In order to place the argument in its proper context, it is necessary to outline the summary of facts which provided the basis for the appellant's guilty pleas.

## **Factual background**

[7] On 10 July 2009, the complainant, an animal control officer, received a radio call while patrolling in her vehicle. She was advised of the presence of two roaming dogs in Miller Road, Mangere Bridge. The summary of facts indicates that the officer was familiar with the dogs:

... as she has dealt with them in the past on attacking and uncontrolled complaints.

[8] Ms Curran, for the respondent, advised the Court that there had been no prior prosecutions of the appellant in respect of the dogs. Mr Allen himself told me at the hearing of the appeal that the complaints were confined to the noise made by the dogs; in other words, complaints about barking.

[9] I approach the appeal on that basis. Ms Curran does not argue that the offending was aggravated by previous behaviour of the type in issue here.

[10] When the complainant officer arrived at the appellant's address she found two uncontrolled Pitbull dogs on the footpath immediately outside Mr Allen's residence. She recognised them as Snoop and Jade. As she pulled into the driveway she saw that the right side of the gate at the entrance to the driveway was open. A third dog, Max, came out. A short time later the fourth dog, Star, came running to the end of the driveway where the complainant had parked her vehicle, baring its teeth. Star rushed towards the complainant's vehicle and jumped up and down at the driver's side, barking and growling aggressively. This caused the other dogs to rush at the vehicle. The complainant sought assistance by radio and waited in her vehicle while it came. In the meantime the four dogs were uncontrolled, rushing up and down the street in the vicinity of the property and barking at children in the grounds of nearby residences, and at vehicles.

[11] In order to attract the attention of the dogs and to keep them on the property pending the arrival of assistance, the complainant wolf-whistled on several occasions. That attracted them to her vehicle. Star was the most aggressive of the four dogs; on one occasion it jumped up against the vehicle, baring and snapping its

teeth, not far from the complainant's head (albeit that the complainant was at the time in her vehicle).

[12] A few minutes later another vehicle arrived outside the appellant's property. The driver of that vehicle wished to speak to the complainant, who wound down her window for that purpose. At that point Star rushed towards her vehicle, jumped, and bit the complainant's left hand. There was no resultant injury and the complainant did not require medical attention.

[13] Thereafter, another animal control officer arrived, and together with the complainant, he was able to secure all of the dogs. Star, the most aggressive of the animals, was the last to be caught. She was by that time very aggressive, charging, baring her teeth and foaming at the mouth. All four dogs were seized on the day of the incident. Jade and Snoop were not reclaimed by the appellant and were later put down. Star and Max were claimed and released to the appellant on 27 July 2009, after a property inspection at the appellant's residence revealed that he had constructed additional fencing around his property which would effectively secure the dogs.

### **Legal principles**

[14] This prosecution was laid in respect of Star under s 57 of the Act, which relevantly provides:

#### **57 Dogs attacking persons or animals**

(1) A person may, for the purpose of stopping an attack, seize or destroy a dog if—

(a) the person is attacked by the dog; or

(b) the person witnesses the dog attacking any other person, or any stock, poultry, domestic animal, or protected wildlife.

(2) The owner of a dog that makes an attack described in subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding \$3,000 in addition to any liability that he or she may incur for any damage caused by the attack.

(3) If, in any proceedings under subsection (2), the Court is satisfied that the dog has committed an attack described in subsection (1) and that the dog has not been destroyed, the Court must make an order for the destruction of the dog unless it is satisfied that the circumstances of the offence were exceptional and do not warrant destruction of the dog.

[15] The section was the subject of extensive analysis by Heath J in *Halliday v New Plymouth District Council* HC NP CRI 2005-443-11 14 July 2005. There, in a judgment relied upon in numerous subsequent cases, His Honour noted that s 57 had been amended in 2003. Prior to that, the Court was required to make an order for the destruction of a dog, unless satisfied that the circumstances of the attack were exceptional and did not justify destruction. But the new s 57(3) focuses on exceptional circumstances of the “offence” rather than the “attack”. Heath J held that the amended provision required a broader assessment of the likelihood that the dog would behave in a similar way in the future, based on unusual or unique circumstances arising out of the particular offence.

[16] In that particular case, His Honour considered a number of factors that might be relevant in determining whether there were exceptional circumstances, including:

- a) The nature of the attack (including whether injury had resulted);
- b) The history of the dog’s owner;
- c) Whether the dog had behaved that way in the past;
- d) Steps taken by the owner to prevent such an attack occurring;
- e) The reasons why the steps taken did not prevent an attack on the occasion in question.

[17] But as Heath J pointed out, these factors were intended to be indicative only, rather than exhaustive.

## **The District Court decision**

[18] The Judge's decision was brief and presumably given in the course of the disposal of a busy list. Nevertheless, he correctly focused upon the applicable legal test. He noted that all of the dogs were American Pitbull Terriers, known for their vicious propensities. He noted also that the appellant was therefore required (in terms of s 32 of the Act), to take particular steps to ensure the security of the dogs, and to protect members of the public from attack.

[19] The appellant was not charged with an offence under s 32, and it is not suggested that he had failed to comply with the special security requirements imposed by that section. But as the Judge noted, no matter how elaborate the security system, breaches could occur. He referred to the occasions upon which dogs of this type had been responsible for very severe injuries to innocent people.

[20] Having made those preliminary observations he said that he considered Star to have been the leader among the four dogs, and responsible for the initial attack. He therefore found there were no exceptional circumstances and in consequence made an order for destruction.

## **Discussion**

[21] Cases in which the Court declines to make a destruction order despite a conviction under s 57 will be relatively rare. That follows as a matter of course from Parliament's choice of the word "exceptional" to qualify the circumstances in which it might be proper for the Court to refrain from making an order.

[22] As was said by Gendall J in *Milner v Hastings District Council* HC NAP AP5/04 1 April 2004:

...there has to be special or substantially unusual circumstances existing before the Court can exercise the power not to justify destruction. That is what exceptional means. The standard is not necessarily one of reasonableness of steps taken by the owner to secure the dog because otherwise the word "exceptional" would not have been used by the Legislature.

[23] Here the summary of facts upon which Mr Allen pleaded guilty set out circumstances plainly constituting an “attack” for the purposes of s 57, and of course that is reflected in the appellant’s guilty plea.

[24] In order to conclude that no destruction order ought to follow, the learned District Court Judge was obliged to consider whether the circumstances were exceptional. As a second step, if the Court did find exceptional circumstances, the Judge was required to consider whether or not those circumstances justified the Court in declining to make a destruction order: *Halliday* at [41].

[25] In his notice of appeal Mr Allen raised two matters that might be thought relevant to an assessment of exceptional circumstances:

- a) He denies that the respondent had previously dealt with his dogs in respect of complaints of attack. As to that, the Judge did not refer to the appellant’s previous history as a dog owner; plainly that was not taken into account;
- b) He denies the allegation that Star had bitten the complainant officer’s hand. Again, the Judge did not refer to that circumstance. It is common ground that the bite was minor and that no injury was sustained.

[26] At the hearing of the appeal Mr Allen suggested that the two mature dogs, including Star, were likely to have been attracted to the complainant by her wolf-whistling, aimed of course at attracting their attention. He also advised the Court that the dogs were somewhat naïve and may well have considered they were entitled to get into the complainant’s car, because he permitted them inside his own van.

[27] The difficulty for Mr Allen on this appeal is that the dogs concerned are American Pitbull Terriers which have a known propensity for precisely the type of behaviour that occurred here. For the purposes of s 32 they are classified as dangerous dogs, as a result of which certain additional obligations are imposed upon Mr Allen as owner.

[28] The respondent accepts that the appellant had taken significant steps to keep the dogs under control and secure on his property. Nevertheless, the gate at the end of his driveway did become unlatched (it is not known how), with the consequences that followed.

[29] The circumstances of this case cannot be classed as “exceptional” for the purposes of s 57(3), and indeed, Mr Allen did not suggest that any particular factor took the case out of the ordinary. These dogs were inherently dangerous. It was for Mr Allen to ensure that they were properly secured at all times. Despite his best endeavours, he failed to keep them secure. The result was a frightening attack, led by Star. In my assessment, the District Court Judge properly applied the law and came to a decision that was not only open to him but was virtually inevitable.

[30] It is necessary therefore to turn to Mr Allen’s application for leave to vacate his guilty plea and to be retried.

### **Vacation of guilty plea**

[31] The general rule is that the Court will entertain an appeal from conviction following a plea of guilty only where there is evidence of a miscarriage of justice. Provided that the defendant fully appreciated his position and made an informed plea of guilty, the consequent conviction cannot be impugned: *Udy v Police* [1964] NZLR 235; *R v Stretch* [1982] 1 NZLR 225.

[32] In *Udy* at 237-238, the Court indicated that an appeal against conviction following a guilty plea will be entertained only in special circumstances. Examples are those where a defendant has not effectively entered a plea at all, where his plea has been entered under some obvious mistake, misunderstanding or apprehension, or where the appellant may not have appreciated the nature of the charge, or may not have intended to admit his guilt. Self-evidently, such circumstances are more likely to arise where the appellant was unrepresented in the lower Court.

[33] But it is not enough for a defendant to make an error as to the consequences which might follow a guilty plea (for example mistake as to a mandatory penalty) or



the possibility of confiscation proceedings following conviction, or the effects of conviction on a defendant's immigration status: *R v Sheikh* [2004] 2 Cr App R 13 (CA); *Alhosan v Police* HC AK CRI 2004-404-511 10 August 2005.

[34] Mr Allen asserts that he was misled during the period leading up to the entry of the guilty plea on his behalf. The respondent denies that and filed an application for leave to adduce further evidence by affidavit at the hearing of the appeal. The affidavit is that of a solicitor employed by the respondent, who appeared for the respondent in the District Court and had dealt with Mr Allen throughout.

[35] I granted the respondent leave to file that affidavit, given that Mr Allen sought to advance his appeal by way of unsworn assertion at the hearing of the appeal. The respondent's deponent, Ms Castro, set out in her affidavit the detail of what occurred in the course of this prosecution. She said that the respondent wrote to the appellant on 30 July 2009, advising him that there would be a prosecution under s 57(2) of the Dog Control Act 1996 for owning a dog that attacked a person. The charges were laid on 31 July 2009. Eventually the respondent chose to lay three charges under s 57A, alleging that three of the appellant's dogs (Snoop, Max and Jade) had rushed a person. The fourth charge was laid under s 57(2) and alleged that Star had attacked a person.

[36] Ms Castro says that on 13 August 2009 she served a copy of the summary of facts upon the appellant. The summary identified the charges and the relevant maximum penalties for each offence. In relation to the proposed charge under s 57 the summary included the following provision in respect of maximum penalty:

A fine not exceeding \$3,000, in addition to any liability the owner may incur for any damage caused by the attack and the Court must make an order for the destruction of the dog unless it is satisfied that the circumstances of the offence are exceptional and do not warrant destruction of the dog.

[37] The summary of facts also included an allegation that Star had jumped up and bitten the hand of the complainant.

[38] On 18 August 2009 the matter was called for the first time in the Manukau District Court. The appellant duly appeared. A Registrar's adjournment was granted

because the appellant had not yet obtained legal advice and told the Registrar that he wished to do so. The adjournment was granted until 2 September 2009 to enable the appellant to take such advice.

[39] On that date, both Ms Castro and the appellant re-appeared. Despite his earlier indication, Mr Allen was not represented by counsel. Ms Castro suggested he speak to a duty solicitor. Mr Allen responded to the effect that he had spoken to a duty solicitor on 18 August 2009, and that he wished to enter guilty pleas.

[40] Ms Castro says that Mr Allen was advised that a conviction under s 57 would attract a mandatory order for the destruction of the dog that had attacked a person (Star). She says also that she told Mr Allen she would not seek a destruction order but that she:

... firmly advised him that it was in the Judge's hands. He appeared to understand this.

[41] Ms Castro then says in her affidavit:

13. The matter was called before His Honour Judge Blackie and the appellant pleaded guilty to all charges. His Honour asked the appellant if he had a lawyer, and the appellant insisted that he did not need one. Judge Blackie did not accept this, however, and stood the matter down for the appellant to speak to a duty solicitor.
14. The appellant asked for my assistance in obtaining the services of a duty solicitor, and asked me again if I intended to seek the destruction of Star. I told him that I would not seek a destruction order but firmly advised him that the law provides for a mandatory order upon conviction, unless the circumstances of the offence are exceptional.
15. I reiterated that my decision not to actively seek a destruction order was largely irrelevant because an order is mandatory upon conviction, in the absence of exceptional circumstances. I told him for the second time that it was in the Judge's hands.
16. I accompanied the appellant to one of the duty solicitors and, after handing over a copy of the summary of facts to the duty solicitor, I immediately left them together to discuss the matter. I did not see the appellant or speak with him again until the matter was recalled.
17. When the matter was recalled, the appellant appeared, together with the duty solicitor, and confirmed his guilty pleas to all charges, including the 'attacking' charge under s 57(2).

18. I handed up a copy of the summary of facts, and His Honour Judge Blackie asked the appellant whether he accepted its contents. He advised the Court that he did accept the summary of facts.
19. I addressed the Court on penalty, and in doing so, did not actively seek a destruction order. I left that issue in the hands of the Judge, who would have been aware from the summary of facts that destruction was mandatory under s 57(2) unless the circumstances of the offence were exceptional.
20. The duty solicitor then made brief submissions on the appellant's behalf.

[42] At the hearing of the appeal Mr Allen said that he saw the duty solicitor for a total of some 45 minutes, but that he nevertheless did not appreciate that the Court was bound to make a destruction order unless exceptional circumstances existed. He said he was given to understand that the making of an order was discretionary and he appears to have assumed that, given that counsel for the respondent had assured him that the respondent would remain neutral in respect of the making of a destruction order, no such order would be made.

[43] I cannot accept on the material before the Court that Mr Allen was in any doubt about his legal position, and in particular, as to the difficult position he was in with respect to the making of an order for Star's destruction. His primary (and indeed perhaps sole) purpose in getting legal advice from the duty solicitor was to avoid the making of a destruction order for Star. Given the circumstances, and in particular the Court's limited jurisdiction to decline to make a destruction order, the available options must have been at the forefront of the advice he got from the duty solicitor. Moreover, he was represented by the duty solicitor before Judge Blackie when he pleaded guilty and submissions in mitigation were advanced.

[44] In those circumstances there can be no question of a miscarriage of justice. The Court simply has no jurisdiction to remit the case for rehearing in the District Court as is sought by Mr Allen.

## **Result**

[45] For the foregoing reasons I decline to remit the case for rehearing in the District Court. The destruction order must stand.

[46] The appeal is accordingly dismissed.

**C J Allan J**