



SHERIFF APPEAL COURT

[2024] SAC (Crim) 1
SAC/2023/000413/AP

Sheriff Principal C Dowdalls KC
Sheriff Principal G A Wade KC
Appeal Sheriff F Tait

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C DOWDALLS KC

in

Appeal by Stated Case against Conviction and Sentence

by

JAMES MURDOCH

Appellant

against

PROCURATOR FISCAL, PERTH

Respondent

Appellant: C. Neilson; Ward & Co, Perth

Respondent: A. Cameron KC (sol ad), AD; Crown Agent

9 January 2024

Introduction

[1] Following a summary trial at Perth Sheriff Court, the sheriff convicted the appellant of two charges in a complaint in the following terms:

“(001) you JAMES JOHN MURDOCH being a proper person within the meaning of the aftermentioned Act and having been made subject to a dog control notice on 27th January 2022 at... and being subject to the condition *inter alia* that your dog, namely your American Bulldog known by the name Storm, must wear a suitable collar and be kept on a fixed lead no longer than 1.5 metres and wear a suitably corrected fitted

muzzle when outwith the curtilage of your dwelling house, did on 14th February 2023 at... fail to comply with said condition in that you did allow your dog to exit the curtilage of your dwelling house at... whilst unmuzzled and without a lead.
 CONTRARY to the Control of Dogs (Scotland) Act 2010, section 5(1).

(002) on 14th February 2023 at... you JAMES JOHN MURDOCH were the owner of and in charge of a dog, namely an American Bulldog, known by the name Storm whereby said dog was dangerously out of control in any place in respect that said dog did run towards and attack another dog owned by JS, injuring said dog and said JS while she attempted to rescue her dog
 CONTRARY to the Dangerous Dogs Act 1991, section 3(1) as amended by the Control of Dogs (Scotland) Act 2010, section 10."

[2] On 14 September 2023, the sheriff sentenced the appellant to pay a fine of £400; to pay a compensation order of £500 to JS; and to have the American bulldog known as Storm destroyed.

The stated case

[3] The appellant now challenges his conviction and sentence by way of stated case. No issue is taken by the appellant to his conviction on charge (1). The appeal lies against the sheriff's conviction on charge (2). There are four questions posed in the stated case by the sheriff:

1. Was I entitled to make finding in fact 13?
2. Was I entitled to hold that the offence proved at charge (2) was an aggravated offence in terms of sec 3(1) of the Dangerous Dogs Act 1991?
3. Was I entitled to convict the appellant on charge (2)?
4. If the answer to question 2 is in the negative, was I entitled to make a discretionary destruction order on charges (1) and (2)?

[4] The salient findings in fact made by the sheriff were as follows:

1. The appellant, James John Murdoch is the owner of an American Bulldog known by the name Storm (hereinafter "Storm") with a microchip fitted...The appellant was the owner of Storm between 1 January 2022 and 15 February 2023.
2. On 18 January 2022 Storm attacked a dog then owned by TB, causing an injury to TB's dog, namely a puncture wound to its ear which required veterinary treatment.
3. On 27 January 2022 Storm was made subject to a Dog Control Notice... effective from that date.
4. In terms of said Dog Control Notice Storm was to be fitted with a suitable collar, wear a lead of no more than 1.5 metres long and be muzzled at all times when outwith the curtilage of [the appellant's home address], the dwelling house of the appellant.
5. On 14 February 2023 Storm was outwith the curtilage of [the appellant's home address]. At that time he was not wearing a lead not less than 1.5 metres long and was unmuzzled. At that time the appellant was the owner and in charge of Storm.
6. Whilst outwith the curtilage of [the appellant's home address] Storm attacked a dog then in the ownership and possession of JS.
7. JS was walking on...accompanied by her dog, a German shepherd/collie cross, when Storm ran towards her dog and gripped it by the head with its teeth. JS's dog was on a lead at the relevant time.
8. The Appellant attended shortly thereafter and with some difficulty succeeded in prising Storm's jaws apart after trying to do so for some 10 or more seconds thereby releasing JS's dog from Storm's grip.

9. During this incident JS had a grip of her dog's lead and was attempting to pull her dog away from Storm. This caused bruising to her wrist.
10. During this incident JS lost her balance and fell to the ground causing scratching to her thigh.
11. As a result of the incident JS's dog suffered puncture injuries to its head, particularly around one of its eyes which required veterinary intervention.
12. JS was injured by having a bruised wrist and scratched thigh as a result of pulling on her dog's lead and falling over in an attempt to rescue her dog from the attack by Storm.
13. At the relevant time Storm was dangerously out of control of the appellant. JS was injured as a direct result of Storm being dangerously out of control.
14. On 15 February 2023 at 16:40 hours Police Constables Thomas Mackie and Christopher McInnes attended at the appellant's home address where they charged him and were told by the appellant that his dog was in Crieff at his ex-wife's address.
15. On 15 February 2023 at 17:20 hours said Police Constables found the dog Storm at the appellant's ex-wife's address in Crieff. Said Police Constables seized the dog Storm. Storm was found to be microchipped with microchip number... when scanned.

Legislation

[5] The following provisions of the Dangerous Dogs Act 1991 ("the 1991 Act") Act were referred to:

"3. Keeping dogs under proper control.

(1) If a dog is dangerously out of control in any place (whether or not a public place)—

- (a) the owner; and
- (b) if different, the person for the time being in charge of the dog,

is guilty of an offence, or, if the dog while so out of control injures any person or assistance dog, an aggravated offence, under this subsection.

...

10. Short title, interpretation, commencement and extent.

(3) For the purposes of this Act a dog shall be regarded as dangerously out of control on any occasion on which there are grounds for reasonable apprehension that it will injure any person or assistance dog, whether or not it actually does so”

Submissions for the appellant

[6] Counsel for the appellant invited the court to answer all questions in the negative.

With regard to finding in fact 13, counsel submitted that the facts and circumstances spoke to a momentary and brief attack of JS’s dog by Storm. The circumstances of the attack were similar to those which occurred in *Tierney v Valentine* 1995 SLT 564; however, a point of distinction was that in *Tierney* the dog directly injured two children. By contrast, on the evidence led, Storm indirectly injured JS.

[7] In response to the Crown’s reliance upon *Thomson v Hutchison* 2010 SLT 158, counsel accepted that decision was authority for the proposition that whether there were grounds for reasonable apprehension that a dog would injure a person was not solely assessed by the owner’s apprehension, but on the whole of the circumstances. Counsel noted that in *Thomson* the incident lasted six to ten minutes. In *Tierney* the incident had ended within a short space of time and there was only one incident. In *McLaughlin v Harvey* 2014 SLT 961, the incident had lasted for between six to ten minutes. That was not the position here. The circumstances of this case were different in that the time period during which JS’s dog was attacked lasted seconds.

[8] The Crown also relied on authorities where the dog's refusal to obey its owner's commands was salient (*McLaughlin v Harvie; Thomson v Hutchison* 2010 SCCR 193). By contrast, in this case, the circumstances were less serious. Storm indirectly injured JS during the attack on her dog. That attack was quickly stopped by the appellant. Counsel submitted that the distinction between a "direct" injury and an "indirect" injury was relevant to the issue of whether it was appropriate for the sheriff to issue a destruction order.

[9] In the event that the court did not uphold the appellant's appeal against conviction, counsel submitted that the sheriff's decision to impose a destruction order was excessive. The appellant had put in place measures since the attack on JS's dog to prevent Storm from escaping his property again. Counsel advised that Storm was trustworthy in the company of the appellant's grandchildren.

Submissions for the Crown

[10] The advocate depute submitted that the sheriff was entitled to convict the appellant of an aggravated offence in terms of section 3(1) of the 1991 Act. The sheriff had set out his reasons for finding Storm to be out of control as follows:

1. Storm left the house of his own volition;
2. the appellant was not in control of Storm at the time;
3. Storm was unmuzzled and not on a lead at the time and;
4. the appellant had to prise Storm's jaws apart to release JS's dog.

[11] The sheriff considered Storm to be dangerously out of control for the following reasons:

1. when Storm left the appellant's property he ran straight towards JS's dog;

2. Storm immediately gripped JS's dog's head in his jaws, causing injury requiring veterinary attention and;
3. Storm only desisted when forcibly removed from the other dog by having his jaws prised open by the appellant.

[12] The advocate depute submitted that section 10(3) of the 1991 Act provides that a dog shall be regarded as dangerously out of control on any occasion on which there are grounds for a reasonable apprehension that it will injure any person, whether or not it actually does so. All existing Scottish authorities proceeded on the basis that section 10(3) was a complete definition. That was not the position in England and Wales. The advocate depute submitted that this court should hold that the definition in section 10(3) is not exclusive and that a dog may be seen as dangerously out of control based on its behaviour in a single incident and relying upon the straightforward meaning of the words of section 3(1) (*R v Gedminintaite* [2008] EWCA Crim 814 per Judge Hall at paragraph [9]). Applying that approach to the present case, for the reasons set out by the sheriff, Storm was dangerously out of control on the occasion libelled.

[13] Even if this court was not minded to apply the wider interpretation which the Court of Appeal of England and Wales adopted in *R v Gedminintaite* to section 10(3) of the 1991 Act, the advocate depute submitted that the test in section 10(3) was met in any event. The test under section 10(3) is an objective test. The reasonable apprehension is not restricted to the owner's apprehension; rather it is a question whether the court is entitled, in the whole circumstances, to conclude that there were grounds for reasonable apprehension that the dog would injure someone: *McLaughlin* per Lady Paton at paragraph [12].

[14] Based on the evidence led, the sheriff was entitled to find that there were grounds for reasonable apprehension that Storm would injure a person. On leaving the appellant's

property without a muzzle or a lead, the first thing that Storm did was attack another dog. Storm was already subject to a Dog Control Notice, due to a previous attack on another dog. The sheriff was entitled to have regard to the dog's breed, size and strength as a relevant factor: *McLaughlin* per Lady Paton at paragraph [13]; *Reid v Murphy* 2015 SCL 772 per Lord Bracadale at paragraph [13] and *McIlwaine v Procurator Fiscal, Airdrie* 2000 GWD 31-1211. It is not a prerequisite that a dog has previously injured a person: *Thomson* per Lady Paton at paragraph [13]. At the time of the attack it was foreseeable that an owner of a dog could be injured as a result of trying to save their own dog: *Thomson* per Lady Paton at paragraph [14].

[15] The sheriff had sufficient evidence to hold that Storm's attack amounted to an aggravated offence in terms of section 3(1) of the 1991 Act. Storm was dangerously out of control when he attacked JS's dog. JS was injured as a result of trying to rescue her dog. There was no need to show direct injury to JS. That was not a requirement of section 3(1) of the 1991 Act. There was a sufficient nexus between the actions of Storm and JS's injury to establish that Storm was dangerously out of control.

[16] The Crown took no position on the issue of sentence; however, the Advocate depute referred the court to *Hunter v Procurator Fiscal, Kilmarnock* 2019 JC 136 as authority for the grounds upon which an order for destruction could be issued.

Decision

[17] The appellant submits that the facts and circumstances of this case were such that it could not be said that there was a reasonable apprehension that Storm would injure a person. We reject that submission. *Thomson* is authority for the proposition that where a dog has not injured a person before, that does not preclude reasonable apprehension that it

might do so. On the facts of this case, as found by the sheriff, we are satisfied that there were grounds for reasonable apprehension that Storm would injure a person and therefore that, in terms of section 3(1) of the 1991 Act, was dangerously out of control. It was not necessary for the sheriff to find that Storm had previously injured a person to establish reasonable apprehension.

[18] Whether or not there is a basis for such reasonable apprehension is a matter for the court on the evidence available, not for the owner based on his perception of the dog's character. The fact that the dog was already subject to control measures as a result of a previous attack informed the sheriff at first instance and this court that a further attack was reasonably foreseeable if the dog was not controlled in the prescribed manner.

[19] Storm was dangerously out of control when he attacked JS's dog. JS was injured as a result of trying to rescue her dog. There was no need to show direct injury to JS. That is not a requirement of section 3(1) of the 1991 Act. Storm's behaviour was sufficiently connected to JS's injuries to establish that Storm was dangerously out of control. But for Storm's attack upon her dog, which she tried to rescue by pulling on the lead, JS would not have suffered injury. The sheriff was entitled to hold that Storm's attack amounted to an aggravated offence in terms of section 3(1) of the 1991 Act, to make finding in fact 13 and to convict of the aggravated offence. Having concluded that the offence was aggravated in terms of section 3(1) of the 1991 Act, the sheriff had no option but to make the order for destruction.

[20] Questions 1-3 in the stated case shall be answered in the affirmative; there is no need therefore to answer question 4. The appeal is refused.