



**SHERIFF APPEAL COURT**

**[2018] SAC (Crim) 5  
SAC/2017/000703/AP**

Sheriff Principal C D Turnbull  
Sheriff N A Ross

OPINION OF THE COURT

delivered by

SHERIFF PRINCIPAL C D TURNBULL

in

APPEAL AGAINST SENTENCE

by

DESIRE FELDWICK

Appellant;

against

PROCURATOR FISCAL, EDINBURGH

Respondent:

**Appellant: Mackintosh; Thorley Stephenson, Edinburgh  
Respondent: D Small AD; Crown Agent**

16 March 2018

- [1] This appeal relates to Sasha, a Rottweiler cross type dog.
- [2] At Edinburgh Sheriff Court on 9 August 2017 the appellant pleaded guilty to an amended charge in the following terms:

“(001) on 24 July 2017 at ..., Loanhead, Midlothian you Desiree Feldwick, having been the subject of a Dog Control Notice imposed on 1 November 2016, were the owner of a dog, namely a Rottweiler cross type dog named

Sasha whereby said dog was dangerously out of control in any place in respect that said dog while untethered and unsupervised did repeatedly bite a Greyhound type dog named ... to its injury and did make contact with JT, c/o Police Service of Scotland, on the body to her injury; CONTRARY to the Dangerous Dogs Act 1991, Section 3(1) as amended by the Control of Dogs (Scotland) Act 2010, Section 10."

[3] The circumstances giving rise to the offence are that on the morning of 24 July 2017, three women, including JT, were out walking their dogs. The women heard a noise from nearby bushes and then saw Sasha running towards them. Sasha was aggressive and went for JT's dog, biting and snarling at him. JT's dog was bitten to his rear leg, shoulder and abdomen. JT attempted to intervene and, in doing so, she and Sasha came into contact with each other, whereby Sasha's teeth injured JT's left hand. JT was left with minor redness and her skin was not broken. The incident ended when a male from the home of the appellant retrieved Sasha and took her inside. JT's dog was left with minor bite injuries. Medication was required and, although his skin was broken, no stitches were necessary.

[4] As Sasha injured JT, the offence to which the appellant pleaded guilty was an aggravated one under s.3(1) of the Dangerous Dogs Act 1991 (hereinafter referred to as "the 1991 Act").

[5] Before the summary sheriff it was accepted that the appellant had previously been served with a dog control notice, as narrated in the charge. A copy of that notice, issued by Midlothian Council under and in terms of s.1(1) of the Control of Dogs (Scotland) Act 2010 (hereinafter referred to as "the 2010 Act"), was before the summary sheriff.

[6] In terms of s.1(1) of the 2010 Act if it comes to the attention of an authorised officer that a dog has, on at least one occasion, been out of control, the officer may serve on the proper person a written notice (known as a "*dog control notice*") requiring the person to bring and keep the dog under control. The "proper person" is defined by s.1(5) of the 2010 as,

broadly, the owner of the dog or the parent of the owner of the dog where the owner is under 16.

[7] The dog control notice narrates that at around 11.15 am on 1 November 2016 Sasha escaped from the appellant's insecure garden. She bit a Greyhound to the right leg causing a puncture wound/laceration. The Greyhound's owner tried to separate the dogs and was bitten to the left hand, causing lacerations approximately 2cm long. The appellant then tried to separate the dogs and sustained minor cuts in doing so.

[8] The dog control notice required the appellant to take certain steps to the satisfaction of the local authority, for the purposes of bringing and keeping Sasha under control. Those steps were keeping Sasha on a lead in a public place at all times; ensuring that a muzzle or a halter was worn at all times when Sasha was in any public place; and requiring Sasha to attend training classes to address all behavioural problems she had with other dogs and people. In addition, the appellant was required to ensure that her property was secure so that Sasha could not escape.

[9] There is no connection between the legislative schemes under the 1991 Act and the 2010 Act. Failure to comply with a dog control notice is an offence by virtue of s. 5(1) of the 2010 Act. In this instance, the Crown elected to prosecute under the 1991 Act.

[10] On the date of sentencing, the summary sheriff was advised that in November 2016 the appellant had been diagnosed with cancer and required to undergo treatment. She was physically weakened by this and, accordingly, had been unable to attend the training courses required of her in terms of the dog control notice. The appellant had complied with the remaining requirements of the notice.

[11] The summary sheriff had before him a report by a veterinary surgeon of significant experience. In the veterinary surgeon's opinion, Sasha was considered to be an extremely

powerful and energetic dog lacking some training. The veterinary surgeon concluded that only someone with significant experience of dogs could handle Sasha and train her. Whilst the appellant had been the owner of Sasha for only two years at the date of sentencing, she had owned dogs for over 20 years at that point in time.

[12] Following the plea of guilty, the case subsequently called on a number of occasions, primarily for the purpose of obtaining a suitable report on the temperament of Sasha.

Ultimately, it called on 25 October 2017 at which time the summary sheriff ordered the destruction of Sasha in terms of s.4(1)(a) of the 1991 Act.

[13] The appellant contends that the order for destruction was not justified having regard to the personal circumstances of the appellant in determining whether she was a fit and proper person to be in charge of a dog; and that other, more appropriate, courses had been open to the sheriff, namely, the imposition of a contingent destruction order in terms of s.4A of the 1991 Act.

[14] As originally enacted, s.4 of the 1991 Act provided that the court shall order the destruction of any dog in respect of which the offence which was committed was an aggravated offence under s.3(1).

[15] Destruction orders were mandatory for aggravated offences until the enactment of the Dangerous Dogs (Amendment) Act 1997, which introduced subsection (1A) to s.4. Section 4(1A)(a) of the 1991 Act provides that the court is not required to order the destruction of a dog if the court is satisfied that the dog would not constitute a danger to public safety.

[16] The Dangerous Dogs (Amendment) Act 1997 also introduced s.4A to the 1991 Act. That provides for the making of contingent destruction orders. Section 4A(4) of the 1991 Act provides that, where a person is convicted of an offence under s.3(1), the court may order

that, unless the owner of the dog keeps it under proper control, the dog shall be destroyed.

The contingent destruction order may specify the measures to be taken for keeping the dog under proper control (see s. 4A(5) of the 1991 Act).

[17] Section 107(3) of the Anti-social Behaviour, Crime & Policing Act 2014 inserted s.4(1B) to the 1991 Act. That requires the court, when deciding whether a dog would constitute a danger to public safety, to consider (i) the temperament of the dog and its past behaviour; and (ii) whether the owner of the dog, or the person for the time being in charge of it, is a fit and proper person to be in charge of the dog. In terms of s.4(1B)(b) the court may also consider any other relevant circumstances.

[18] In *R v Flack* [2008] 2 Cr.App.R.(S) 70, Silber J. outlined the relevant principles that then applied in England where the owner of a dog had been convicted under the provisions of s.3(1) of the 1991 Act. These principles were considered and developed in *R v Davies* [2010] EWCA Crim 1923. In light of these authorities and insofar as the Scottish provisions of the 1991 Act are concerned, the principles which apply in Scotland can be summarised as follows.

[19] The court is empowered under s.4(1)(a) of the 1991 Act to order the destruction of the dog in respect of which the offence was committed. Where the offence is aggravated, destruction is mandatory except where s.4(1A)(a) applies, or where a contingent destruction order is made.

[20] Nothing in that provision requires the court to order destruction if the court is satisfied that the dog would not constitute a danger to public safety (see s.4(1A)(a) of the 1991 Act).

[21] The court must consider, before ordering immediate destruction, whether to exercise the power under s.4A(4) of the 1991 Act to make a contingent destruction order that, unless

the owner of the dog keeps it under proper control, the dog shall be destroyed (see *R v Davies* at para 14).

[22] A contingent destruction order may be made, in an aggravated case, as a statutory derogation from the otherwise mandatory requirement for destruction of s.4(1)(a). The making of a contingent destruction order does not require the court to be satisfied that the dog would not constitute a danger to public safety.

[23] A contingent destruction order may specify the measures to be taken by the owner for keeping the dog under control whether by muzzling, keeping it on a lead, or excluding it from a specified place or otherwise; and may require a male dog to be neutered - see s.4A(5) of the 1991 Act.

[24] A court should not order destruction if satisfied that compliance with conditions under a contingent destruction order would mean that the dog would not constitute a danger to public safety.

[25] In deciding what order to make, the court must consider all the relevant circumstances which include the dog's history of aggressive behaviour and the owner's history of controlling the dog concerned in order to determine what order should be made.

[26] In the present case, the summary sheriff, having carefully considered the material before him, was not persuaded that Sasha did not constitute a danger to the public. Having done so, he formed the view that the possibility of making a contingent destruction order under s.4A of the 1991 Act did not arise. To that extent, he erred.

[27] The making of a contingent destruction order does not require the court to be satisfied that the dog would not constitute a danger to public safety. It is ordinarily inherent in the making of either form of destruction order envisaged by the 1991 Act that the dog in question does constitute a danger to public safety. The difference is that in the case of a

contingent destruction order the court is satisfied that the circumstances of the case are such that the dog owner should be afforded a “last chance”, in the certain knowledge that a failure to take that chance will result in destruction of the dog in question.

[28] If such an order had been considered, the interplay of the difficult personal circumstances of the appellant and her compliance with the terms of the dog control notice, save to the extent set out at paragraph [10] above might properly have been considered. The appellant’s failure was as a direct consequence of her personal circumstances. But for that failure, it is conceivable that the offence would not have been committed. As noted in *R v Flack*, another relevant factor is that the appellant is a lady of good character. Moreover, in this case, the measures available under the terms of a contingent destruction order are such as to significantly militate against the possibility of a repetition of the previous incidents involving Sasha.

[29] Having regard to the appellant’s personal circumstances, we are satisfied that that the appropriate course of action in this case is to allow the appeal, quash the order for destruction and impose a contingent destruction order in terms of s.4A(4) of the 1991 Act. That order will provide that, unless the appellant keeps Sasha under proper control, Sasha will be destroyed. The order will be subject to the following conditions: (1) Sasha shall be muzzled in public places at all times; and (2) Sasha must be kept on a lead at all times when in public.