



SHERIFF APPEAL COURT

**[2016] SAC (Crim) 29
SAC/2016/000425/AP**

Sheriff Principal Abercrombie QC
Sheriff Arthurson QC

OPINION OF THE COURT

delivered by SHERIFF ARTHURSON QC

in

APPEAL AGAINST SENTENCE

by

ANNE-MARIE LUCKHURST

Appellant

against

THE PROCURATOR FISCAL, FORFAR

Respondent

Appellant: Mackenzie; Faculty Services Limited

Respondent: Hughes AD; Crown Agent

21 September 2016

[1] On 9 June 2016 Mr Philip Pudney tendered a plea of guilty to a single charge complaint alleging a contravention of section 3(1) of the Dangerous Dogs Act 1991. The charge alleged that the dog in question, a St Bernard dog named Douglas, was dangerously out of control and bit another dog causing its death. The libel also alleged that Douglas bit a Ms Connor on the body to her injury, but we note that the sheriff's report of the narration of the circumstances

provided by the Crown does not refer to this latter component of the libel. The sheriff imposed a financial disposal in respect of Mr Pudney and ordered the destruction of Douglas in terms of section 4(1)(a) of the 1991 Act. In his report the sheriff records that it has subsequently transpired that Mr Pudney was not the true owner and instead was the person in charge of Douglas at the time of the incident referred to in the charge.

[2] The appeal before this court is advanced today on behalf of the true owner, Ms Luckhurst, of the charity Saving Saints Rescue UK, and is directed to the destruction order only. An appeal against destruction is one advanced competently under the specific provisions of section 4(2) of the 1991 Act and is not an appeal against sentence in terms of the Criminal Procedure (Scotland) Act 1995. We are accordingly of the view that the conventional sifting process should not have been applied in this case. The terms of section 4(2) of the 1991 Act quite clearly permit an appeal to this court at the instance of the true owner (the appellant today) against a section 4(1)(a) destruction order in respect of a dog owned by a person other than the offender (here, Mr Pudney): section 4(9) of the 1991 Act.

[3] We have considered the grounds of appeal, opinion of counsel tendered in supported thereof, and the oral submissions of Ms McKenzie, Advocate, to us this morning. As a starting point in this exercise we turn to the sheriff's account in his report of factors which he considered important in pronouncing the destruction order. It is important to be clear that this was not, on the sheriff's account of the Crown narrative, an aggravated offence under section 3(1), in that on the facts stated there was no injury to any person. The sheriff has rightly recognised this by undertaking his determination on the matter as a discretion-based exercise rather than a peremptory one: section 4(1)(a). We now consider in turn the factors which the sheriff expressly took into account in paragraph 5 of his report. The lack of opposition to the order by Mr Pudney is an irrelevant factor. The role and conduct of Mr Pudney, on the sheriff's account,

appear to be the central issues which weighed with him as he reached his decision. We have considerable concerns about Mr Pudney's conduct on the date of the incident. As a St Bernards' fosterer he should have known that Douglas was not to have an electric collar, given his previous history of appalling physical abuse. He also should have known that Douglas required to be kept on a lead, in particular while Mr Pudney had with him a multitude of other dogs on the West Links. Mr Pudney obtempered neither of these crucial requirements at the time of the incident. These omissions were those of Mr Pudney and certainly not the fault of the dog. In the event, perhaps unsurprisingly, Mr Pudney was unable to maintain control of the dog.

[4] In so far as the sheriff has determined that the dog constituted a danger to public safety, he has correctly considered the past behaviour of the dog (no previous incidents). He had however no report of any form available to him in respect of the dog's temperament. This was an essential factor which was simply not present during the exercise undertaken by the sheriff. He has further not expressly taken into account that on the Crown narrative there was no injury to any person. The sheriff did not have available to him the information that this court has in respect of the requirements relevant to the dog, which could have allowed him to make a fuller and more accurate assessment as to whether Mr Pudney was a fit and proper person to be in charge of Douglas at the time, being of course another essential consideration in the determination exercise as to whether the dog constituted a public danger: see section 4(1B) of the 1991 Act.

[5] The sheriff in this case has made the order on the basis therefore of factors which are irrelevant (lack of opposition), partial (the past behaviour of the dog has been considered, but not its temperament) or approached on the basis of incorrect information (whether the person in charge at the time was a fit and proper person). He has in addition not taken into account the

lack of injury to any person in the Crown narrative. He has further not considered or addressed the suitability or otherwise of a contingent destruction order or any alternative orders short of destruction which would allow public safety issues to be addressed. In these circumstances we have no difficulty in finding that the sheriff has erred in fact and law in the exercise of his discretion. In identifying these matters, we express our concern that the relevant material required under the statutory regime applicable was not put before the sheriff in specific terms by the Crown on 9 June 2016. We also appreciate that significant new material has been placed before this court which was simply not available to the sheriff.

[6] In terms of disposal, we allow the appeal and recall the section 4(1)(a) destruction order. We leave it to the good sense of the charity to enforce their own rules on good practice in such circumstances as these, bearing in mind the obvious horror and distress which must have been experienced by the owner of the dog which was attacked.