APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 19
HCA/2018/14/XJ

Lord Justice General
Lord Drummond Young
Lord Turnbull

OPINION OF LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST SENTENCE FOLLOWING UPON A REFERENCE FROM THE SCOTTISH CRIMINAL CASES REVIEW COMMISSION

by

MOIRA HUNTER

Appellant

against

PROCURATOR FISCAL, KILMARNOCK

Respondent

Appellant: O'Rourke QC; Faculty Appeals Service
Respondent: Gillespie AD; the Crown Agent

2 April 2019

Introduction

[1] On 30 November 2017, at the Sheriff Court in Kilmarnock, the appellant pled guilty to an offence which libelled that:

> "On 9 December 2016 at Lifnock Avenue, Hurlford, you… were in charge of a dog, namely a Bull Mastiff whereby said dog was dangerously out of control… in respect that said dog did attack and bite a Labrador dog belonging to [LM] … whereby said

dog was injured, and thereafter did attack and repeatedly bite ... [LM] 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."

[2] On 9 January 2018 the sheriff: disqualified the appellant from owning or keeping a dog for a period of 5 years; imposed a compensation order of £166.38 in favour of LM; fined the appellant £300.00; and ordered the destruction of the dog.

Legislation

[3] Prior to the Dangerous Dogs Act 1991, the control of dogs was regulated partly by complaints made by the procurator fiscal to the sheriff under the Dogs Act 1871 and partly by the Dogs Act 1906. The 1906 Act and its successor (the Animals (Scotland) Act 1987), concerned itself primarily with civil liability for damage to livestock and how to deal with stray dogs. Section 2 of the 1871 Act allowed the sheriff to order that a dangerous dog be kept under "proper control" or be destroyed (see now sections 1 and 9 of the Control of Dogs (Scotland) Act 2010). There was a perception that this legislation was not particularly effective in dealing, in a United Kingdom context, with an increasing number of attacks by dogs, especially on children.

[4] The 1991 Act was enacted because of public concern about these attacks. This concern was particularly focused on specific types of dog, notably the Pit Bull Terrier and dogs bred for fighting generally. However, the Act also applied, and continues to apply, to other dogs which represent a "serious danger to the public" (see Preamble). Thus, it provides that:

"3. *Keeping dogs under proper control*

(1) If a dog is dangerously out of control ...

> (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, an aggravated offence…".

It is of note that the Act thus creates an "offence" and an "aggravated offence" applying to two different situations; the dog which is simply out of control and the dog which, when out of control, injures a person. The Act continued:

> "4. *Destruction and disqualification orders*
>
> (1) Where a person is convicted of an offence under section... 3(1) ... the court–
>
> (a) may order the destruction of any dog in respect of which the offence was committed and, ... shall do so in the case of ... an aggravated offence under section 3(1) ...; and
>
> (b) may order the offender to be disqualified, for such period as the court thinks fit, for having custody of a dog."

There was thus no discretion left to the decision-maker in the case of an aggravated offence.

[5] The mandatory destruction provisions were criticised in Parliament (Home Affairs Committee, First Report: *The Operation of the Dangerous Dogs Act 1991*, December 1996, paras 56 and 57) for not allowing a "defence" to an aggravated offence where there might have been "an acceptable reason for an attack and injury", such as the situation in which "there had been some provocation of the dog". A defence of "reasonable excuse" was recommended (*ibid* para 68) along with powers, which existed under the unrepealed 1871 Act, to specify measures of control, if a dog was not to be destroyed. This was coupled with a recommendation (para 75) that a limited discretion should be introduced for aggravated offences, albeit that "the balance should remain tilted towards strictness rather than leniency". The suggestion was that a dog should still be destroyed unless there were "exceptional circumstances" and the public "would not be at risk" if a destruction order was not made.

[6] The Government accepted the recommendations on discretion and control (Reply dated 26 February 1997, recommendations 15.1 and 18) although the wording ultimately selected did not exactly reflect this. At that time, there was an extant private member's Bill in Parliament which sought to provide, in a new sub-section 4(1), options in the case of a section 3(1) "offence" *viz.*: destruction, owner disqualification and a control order. The Government accepted that the balance should remain tilted towards strictness and advised a provision whereby that the court "shall" order the destruction of the dog in the absence of exceptional circumstances and provided that the public would not be at risk if an order were not made.

[7] This exchange resulted in the Dangerous Dogs (Amendment) Act 1997, which introduced a new sub-section to section 4 of the 1991 Act, as follows:

> "(1A) Nothing in subsection (1)(a) above shall require the court to order the destruction of a dog if the court is satisfied–
>
> (a) that the dog would not constitute a danger to public safety; ...".

The words "subject to subsection (1A) below" were added to section 4(1)(a). Henceforth, therefore, the court could decline to order destruction if it was satisfied that the dog would not constitute such a danger.

[8] The 1997 Act introduced, in a separate section, the concept of a contingent destruction order. It did so in a manner which echoed some of the existing terms of section 4, but without repealing those terms, as follows:

> "4A. *Contingent destruction orders*
>
> (1) Where –
>
> (a) a person is convicted of ... an aggravated offence under section 3(1) ...
>
> (b) the court does not order the destruction of the dog under section 4(1)(a)
>
> ...

> the court shall order that ... the dog shall be destroyed."

This section does not appear to make sense (see *infra*). It continues, specifically in relation to contingent destruction orders as follows:

> "(4) Where a person is convicted of an offence under section 3(1) above, the court may order that, unless the owner of the dog keeps it under proper control, the dog shall be destroyed.
>
> (5) An order under subsection (4) above–
>
> (a) may specify the measures to be taken for keeping the dog under proper control, whether by muzzling, keeping on a lead, excluding it from specified places or otherwise; ...".

This was the response to the earlier concerns about the absence of control measures, such as existed in the 1871 Act, where a dog was not to be destroyed. The Current Law Statutes annotator (Trevor Cooper, solicitor with Cooper & Co, "specialists in Doglaw") noted at the time that this section applied "if the Court exercises discretion".

[9] The Anti-social Behaviour, Crime and Policing Act 2014 (s 107) inserted a further sub-section into section 4 of the 1991 Act, as follows:

> "(1B) ... when deciding whether a dog would constitute a danger to public safety, the court –
>
> (a) must 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, and
>
> (b) may consider any other relevant circumstances."

The Explanatory Notes (para 248) observed that "if the court decides that the dog would pose a danger to public safety, this constitutes a reason for making an order for destruction as opposed to a contingent destruction order".

Facts

[10] At about 8.50 am on 9 December 2012, the complainer left her house to walk with her "little boy", as the sheriff put it, to nursery. Her 6 month old Labrador puppy was with her on a lead. The appellant's Bull Mastiff was in the appellant's garden. The appellant shouted "don't worry, she's friendly". This proved to be far from the case. The appellant's dog ran out of the garden, across the road and attacked the puppy, resulting in a £166.38 veterinary bill for the damage. The complainer lifted her dog up. The dog then attacked the complainer, by biting her on the left hip. The bite went through her clothing and broke the skin of her leg. The complainer shouted to the appellant, who ran over. The appellant's dog then bit the complainer on the right hip and then on the hand, causing 2 puncture wounds and a broken finger.

[11] In interpreting the legislation, the sheriff determined that she had to order the destruction of the dog unless she was satisfied that it did not constitute a danger to public safety. She was not so satisfied. A report had been prepared for the appellant by Elaine Henley, an animal behaviourist. It gave the sheriff "no confidence" that the dog would not attack another dog or a person again; given the nature of the dog and the appellant's irresponsibility. The appellant had continued to allow the dog off the lead whilst out of doors, contrary to a court order not to do so. She also had a previous conviction involving the same dog.

[12] According to Ms Henley, a Bull Mastiff is a large and powerful dog, traditionally trained as a guard dog. This one had delivered level 3 bites (on Dr Dunbar's bite scale) to the complainer and level 4 bites to the puppy; it being unusual for a dog with no previous history to deliver a level 4 bite. A level 3 bite is 1 to 4 punctures from a single bite, with no punctures deeper than half of the dog's canine teeth. Level 4 is the same, with at least one

deeper than half of the length. Dogs progress up a ladder of aggression if not punished. Level 4 biters are said to be "very dangerous". The dog was a product of forced mating, which was likely to result in physical and mental issues for any offspring. A behavioural problem with this particular breed was aggression towards other dogs. Careful training and socialisation with other dogs must occur from puppyhood. Since the dog was five years old, this period had long since passed. When Ms Henley had been out observing the dog, it had to be stopped from attacking another dog. Ms Henley concluded that the dog was inherently aggressive to other dogs, which it perceived to be threatening or challenging, especially on home turf. Although there was a possibility of the dog being brought under control, the prognosis was poor. It would at least require to be muzzled and kept on a lead for life.

Leave to Appeal

[13] The appellant sought leave to appeal the destruction and the disqualification orders on the basis that the sheriff had failed to give sufficient weight to the dog's temperament and the scope for the dog to change. A behaviour modification plan, to run in conjunction with a Dog Control Notice (presumably under the Control of Dogs (Scotland) Act 2010) requiring the dog to be muzzled and kept on a lead, could be imposed.

[14] The decision of the Appeal Sheriff at first sift on 7 February 2018 was:

> "Unarguable; for all the reason expressed by the sheriff the disposals were justified. The appellant's own report records that the dog had administered bites intended to cause maximum injury (1.3), has acted aggressively towards other dogs before (3.3), and showed evidence of inherent aggression (3.4). The sheriff could not, on that material, be satisfied that the dog would not constitute a danger to the public. So far as the disqualification from owning dogs is concerned, as the sheriff records, the appellant's own report said that she was not a responsible dog owner (3.6.1) and on the material available, the sheriff was entitled to be sceptical of the appellant's ability to change."

[15] An application to the second sift was accompanied by an opinion from a solicitor advocate, which expanded on the grounds of appeal but raised a new point, which had not been included in the grounds and upon which the sheriff had not had an opportunity to comment. This was that the sheriff had failed to consider the "alternative" of a contingent destruction order under section 4A(4) of the 1991 Act, to which conditions could be attached. The decision of the Sheriff Appeal Court at second sift on 28 February 2018 was:

> "This was an aggravated offence under section 3(1). Section 4(1)(a) provides in an aggravated offence the dog shall be destroyed unless the dog does not constitute a danger to public safety. The sheriff explains why she was not satisfied that the dog was not a danger to public safety. We agree the report from Ms Henley does not provide a sufficient basis to evidence the dog does not constitute a danger to public safety. Indeed it may be read as to suggest the contrary. The opinion in support of the appeal at second sift, fails to recognise that section 4(A) (*sic* 4A) is only applicable if the court does not order destruction under 4(1)(a) and 4B is only applicable to destruction orders otherwise than on a conviction. The sheriff was justified in making the order. The appeal is unarguable."

The Scottish Criminal Cases Review Commission

[16] In July 2018 the SCCRC refused to refer the case to the High Court on the basis that, although it determined that the sheriff had failed to consider a contingent destruction order (cf *supra*), no viable alternative to accommodate the dog had been presented. The sheriff had little option but to take account of the appellant's fitness as owner. Furthermore, it was not in the interests of justice to refer the case, standing the lack of any real benefit to the appellant and the circumstances of the offence.

[17] This was followed by a further submission, accompanied by the opinion of counsel and a report from Olive's Fight Against BSL (breed specific legislation) setting out a plan for re-housing the dog. Olive is also a dog. On 30 November 2018, the SCCRC determined to refer the case on the issue of the destruction order on the basis that a miscarriage of justice

may have occurred and it was now in the interests of justice to refer the case. The SCCRC noted the conflict between the Sheriff Appeal Court's second sift decision and their reasoning in *Feldwick* v *PF Edinburgh* [2018] SAC (Crim) 5 at para [19], following *R* v *Flack* [2008] 2 Cr App R (S) 70 and *R* v *Davies* [2010] EWCA Crim 1923. All the circumstances had to be taken into account. *Adamson* v *PF, Kilmarnock* [2018] SAC (Crim) 4 was to the same effect, as was *Kelleher* v *DPP* [2012] EWHC 2978 (Admin). It was in the interests of justice to refer the case, given the upset which the dog's destruction would cause to the appellant.

Submissions

Appellant

[18] The arguments contained in the ground of appeal were, first, that the sheriff had erred in her consideration of whether the dog would constitute a danger to public safety. The test required her to consider the temperament of the dog, its past behaviour and whether the owner of the dog was a fit and proper person to do so. From her reference to the appellant's irresponsibility, the sheriff had placed substantial weight on the appellant's lack of fitness as an owner in determining that the dog did constitute a danger to the public. This was an error, given that she had imposed upon the appellant a disqualification order for a period of five years. The appellant was therefore no longer capable of owning the dog. Had the dog not been made the subject of the destruction order, it could not have been returned to the appellant's care and would have had to be re-housed. As such, the capabilities and fitness of the appellant were irrelevant.

[19] Section 4(1B)(a)(ii) was drafted on the basis that it was the fitness of the dog owner in the future that was relevant to whether the dog would constitute a danger to public safety. The sheriff should have enquired into alternative arrangements for the dog, superseding the

appellant's fitness accordingly, or, if no alternative arrangements existed, proceeded solely on a consideration of 4(1B)(a)(i) and (b). Had the sheriff disregarded the appellant's fitness, or looked at an alternative arrangement, the test for destruction of the dog would not have been satisfied. If the sheriff was correct in considering the owner's fitness, she erred in failing to consider the imposition of a contingent destruction order first. Notwithstanding the terms of section 4A(1)(b), *Feldwick* v *PF Edinburgh* (*supra*) had determined that it was necessary to take into account the possibility of a contingent destruction order (see also *Adamson* v *PF Kilmarnock* (*supra*) and *McPhee* v *PF Kilmarnock*, unreported, 26 June 2018, Sheriff Appeal Court.)

[20] It was accepted that the provisions (s 4A(4)) in relation to contingent destruction orders referred to offences rather than aggravated offences. Although it was also accepted that the prospect of a contingent destruction order had not been raised in the original grounds of appeal, the court was advised that the SCCRC had invited the sheriff to comment on the matter, but she had declined to do so. In all the circumstances, the court should quash the destruction order and substitute a contingent destruction order, requiring the dog to be kept on a lead and muzzled when out of doors, and made subject to a behavioural plan. The risk posed by the dog could be managed.

Crown

[21] The advocate depute did not contest the appellant's submissions on the proper construction of the 1991 Act as amended. If the meaning of sub-section 4(1A) was ambiguous, it should, as a penal statute, be construed in favour of the appellant. The advocate depute submitted that an "aggravated offence" was an "offence". If the sheriff had

been required to consider the prospect of a contingent destruction order, and had not done so, that was an error.

Additional Report

[22] A new report from Alexis Aitchison, a canine behavioural consultant, of Muttropolitan Management, was lodged following upon the appeal hearing. Ms Aitchison expressed the view that he had "yet to meet a dog that hasn't been turned around and flourished in a new environment". She sought to play down the seriousness of the bites to the Labrador puppy. She blamed its owner for mishandling the situation. She also downplayed the bites on the complainer, pointing out that the dog had not gone for her throat or attempted to disembowel her. All dogs were the product of forced mating. Physical and mental issues would arise, if the dog's mother had been stressed prior to the dog's birth. This dog had been socialised from a neonatal stage, and throughout her development, to children, other dogs and adults. There was no behavioural problem with this particular breed in the form of aggression towards other dogs. Dogs had to be considered as "individual personalities". The dog was not responsible for the faults of its owner. The dog lunging at another dog was not aggression but canine communication. Ms Aitchison disagreed with Ms Henley's view on the dog's inherent aggression. He concluded that:

> "the Bull Mastiff, a dog with her own individual right to life has been found in unfortunate circumstances that were the responsibilities of the owner to manage ... She is a well behaved dog who is responsive to commands. With a control order in place with muzzle and lead restrictions in public, a behavioural plan in place if needed and a new home and environment will see [the dog] be well managed (*sic*)".

Decision

Offence or Aggravated Offence

[23] The first question is whether a contingent destruction order is available on a conviction for an aggravated offence under section 3(1) of the Dangerous Dogs Act 1991. The 1991 Act distinguishes an offence from an aggravated offence (s 3(1)) and applies different penalties to each (s 4(1)(a)). An offence attracts a discretionary destruction order. An aggravated offence, but for the later amendment (s 4(1A)), requires one. Where a section of the Act applies to an aggravated offence, it specifically says so. It does, for example, in sub-section 4A(1)(a), but this particular sub-section does not seem to make sense. It reads as if court must make a destruction order if it has not already done so under section 4(1)(a); ie if it has decided that the dog would not constitute a danger to public safety.

[24] A solution to this anomaly was proffered in *Kelleher* v *DPP* [2012] EWHC 2978 (Admin) (Collins J at para 8) whereby the reference to an aggravated offence should simply be ignored. That may be correct, but it still points to a Parliamentary intention to use "offence" and "aggravated offence" as separate concepts. If that were so, then a contingent destruction order under section 4A(4) would only be available when an offence, but not an aggravated offence, had been committed. This is contrary to *Kelleher* (Collins J at para 11) and can be seen as making little sense where a decision not to order destruction has been made (under s 4(1A)) because the dog is deemed not to be a danger to the public. It would seem prudent, in that situation, to have contingent destruction orders available. The reference to "an aggravated offence" in section 4(1)(a) would be inoperable if the phrase "an offence" earlier in section 4(1) was not inclusive of both non-aggravated and aggravated offences. The court should therefore proceed on the basis that "offence" in sub-section 4A(4) includes "aggravated offence".

England and Wales

[25] The next question is whether, in determining whether a dog "would not constitute a danger to public safety" (s 4(1A)), the court requires to consider the effectiveness of a contingent destruction order, including muzzling, keeping on a lead and excluding it from specified places (s 4A(5)(a)). In *R* v *Flack* [2008] 2 Cr App R (S) 70, the Court of Appeal in England and Wales (Silber J at para 11) stated that:

> "(3) The Court should ordinarily consider, before ordering immediate destruction, whether to exercise the power under s. 4(a)(4) of the 1991 Act to order that, unless the owner of the dog keeps it under proper control, the dog shall be destroyed ('a suspended order of destruction' (*sic*).
>
> (4) A suspended order of destruction may specify the measures to be taken by the owner for keeping the dog under control ...
>
> (5) A court should not order destruction if satisfied that the imposition of such a condition would mean the dog would not constitute a danger to public safety.
>
> (6) 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 ...".

There is no record of any argument about this or indeed the presence of a contradictor. The court set aside an order for the destruction of a Rottweiler/German Shepherd dog which had escaped from its enclosure, as a result of third party involvement, and bitten the leg of a woman who had been walking with her husband and three grandchildren in a public park. The wound was described as severe. Nevertheless, an animal behaviour consultant had described the dog, and an associated dog, as "two of the most passive and friendly dogs which [she] had ... encountered". An order for muzzling, being kept on a lead in public and a special collar was substituted.

[26] A similar result followed in *R* v *Davies* [2010] EWCA Crim 1923, in which the Court of Appeal again said that the court of first instance had to consider the making of a

contingent destruction order before ordering destruction. The destruction order was quashed notwithstanding that defence counsel had accepted that the dog, which was an Alsatian being walked on the street without a lead, was a danger to public safety. No submission about a contingent destruction order had been made. An order for muzzling and being kept on a lead was substituted.

[27] Interestingly, the English Sentencing Council's *Dangerous Dog Offences Definitive Guideline* (revised 1 July 2016) reads as follows:

> "The court *shall* make a destruction order unless the court is satisfied that the dog would not constitute a danger to public safety.
>
> In reaching a decision, the court should consider the relevant circumstances which *must* include:
>
> the temperament of the dog and its past behaviour;
>
> 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;
>
> and *may* include:
>
> other relevant circumstances.
>
> If the court is satisfied that the dog would not constitute a danger to public safety ... it *may* make a contingent destruction order requiring the dog be kept under proper control ..." (emphasis added).

The Sheriff Appeal Court

[28] The second sift decision of the Sheriff Appeal Court (Sheriff Principal Murray and Sheriff Ross), which was dated 28 February 2018, stated that the point raised in the solicitor advocate's opinion (without reference to *R* v *Flack* (*supra*) or *R* v *Davies* (*supra*)) about the contingent destruction order failed to recognise that section 4A only applied when the court did not order destruction under section 4(1)(a), because it was satisfied that the dog would not constitute a danger to public safety. This did not accord with an earlier decision of the SAC in *Luckhurst* v *Procurator Fiscal, Forfar* 2017 SLT (Sh Ct) 7 (at para [5]) (Sheriff Principal

Abercrombie and Sheriff Arthurson) (a non-aggravated case) concerning the relevance of a contingent destruction order. On 16 March 2018, in *Feldwick* v *Procurator Fiscal, Edinburgh* 2018 SLT (Sh Ct) 173 and *Adamson* v *Procurator Fiscal, Kilmarnock* [2018] SAC (Crim) 4, the SAC (Sheriff Principal Turnbull and Sheriff Ross) followed *R* v *Flack* (*supra*) and *R* v *Davies* (*supra*) in holding that the court must consider whether to make a contingent destruction order before ordering "immediate destruction" (para [21]). The court reasoned that the court should not order destruction if it was satisfied that compliance with conditions under a contingent destruction order would mean that the dog would not constitute a danger to public safety (para [24]). The extent to which this was debated is unclear.

Conclusion

[29] Sub-section 3(1) of the 1991 Act, as originally enacted, was, at least in retrospect, a draconian provision which mandated the destruction of a dog which was found to be dangerously out of control and had injured a person. It was a provision designed to encourage the proper control of the dogs, even if they were not in the specified dangerous breeds categories. The introduction, by the Dangerous Dogs Amendment Act 1997, of sub-section 4(1A) mitigated the effects of the provision by providing that destruction need not be ordered if the "dog would not constitute a danger to public safety". Thus sub-section 4(1) was immediately qualified by sub-section 4(1A), which follows it sequentially and which is in turn explained by sub-section 4(1B), as introduced by the Anti Social Behaviour, Crime and Policing Act 2014, regarding what may be taken into account is determining whether the dog would not constitute such a danger. This is, as appears from the structure of the section, a complete code for determining whether the dog is to be the subject of an order for

destruction. Sub-section 4(1) is expressly subject only to sub-section 4(1A) (and by implication 4(1B)).

[30] The provision in relation to a contingent destruction order is in a different section (not sub-section) of the Act (section 4A). Despite the anomalous sub-section 4A(1) (*supra*), it can only apply in a situation in which a decision not to destroy the dog under section 4(1)(a) has already been made. The purpose of the section was, and is, to allow the court the flexibility, which it had been, and continued to be, permitted under the Dogs Act 1871, to make a control order where destruction was not ordered. It was not to "tilt the balance" further towards leniency than had already been done with the introduction of sub-section 4(1A). Indeed, if the prospect of a contingent destruction order were a consideration in determining whether a dog did constitute a danger to public safety, it is doubtful whether a destruction order could ever be made, given the ability effectively to chain a dog to its kennel or to prohibit its appearance in public.

[31] That this is the correct interpretation is strengthened by the amendment with the introduction of sub-section 4(1B), which, in determining public safety, requires the court only to consider the temperament of the dog, its past behaviour and whether its owner (or the person in charge of it at the time (see s 3(1)) was a fit and proper person. The court may consider other relevant circumstances. Perhaps it would be bound to do so if the circumstances were indeed relevant, but the alternative, of lesser court ordered controls, is not such a circumstance. The focus is on the dog and its owner (or minder) and not what the court could do to reduce the public risk which it requires to assess.

[32] The terms of section 4 (including sub-sections (1), (1A) and (1B)) constitute a complete code which exists for the purposes of public safety, and not just in relation to the individual dog which is found to be out of control. They were conceived as a means of

deterrent, designed to prevent injuries to members of the public. It follows from all of this reasoning that the approach of the sheriff, and the Sheriff Appeal Court at second sift, was correct and the appeal must be refused.

[33] Even if the sheriff had been bound to take into account the prospect of a contingent destruction order of the limited nature suggested, and this court thereby required to re-assess the matter, the same result would follow. On the material before the sheriff, this was a large dog which had run out of a garden and across a public road with the obvious design of attacking a Labrador puppy which was, in contrast to it, under proper control. When the complainer attempted to prevent further injury by lifting the puppy, she was attacked and bitten three times. The experience must have been extremely alarming, as well as painful, especially when the complainer was with a young child. The material before the sheriff from Ms Henley was that this dog, as a level 4 biter, was "very dangerous". The prospect of teaching it, at the age of five, new tricks was extremely limited. It even had to be prevented from attacking another dog in her presence. It was inherently aggressive to other dogs. In these circumstances, despite Ms Aitchison's attempt to demonstrate that the dog had turned over a new leaf in new surroundings, the material in Ms Henley's report was that which was before the sheriff and there is no ground of appeal which would meet the "fresh evidence" test in section 106(3)(a) of the Criminal Procedure (Scotland) Act 1995. An almost inevitable conclusion from the material about the behaviour of the dog and its owner, both at the time of the incident and prior to it, was that this dog was indeed a dangerous dog which posed a danger to public safety, even if certain measures, if abided by, might reduce that risk.

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2 April 2019

Introduction

[34] I agree with your Lordship in the chair that this appeal should be refused, for essentially similar reasons. The legislative provisions that govern the case are not easy to follow, however, and for that reason I have set out my own reasoning on the legislation and on the ultimate issue that confronts the court.

[35] A major issue in this case is the relationship between section 4 of the Dangerous Dogs Act 1991, in particular subsections (1), (1A) and (1B), on one hand and section 4A, in particular subsections (1), (4) and (5), on the other. Section 4(1) applies "Where a person is convicted of an offence under section… 3(1)". If that condition is satisfied, paragraph (a) of the subsection provides that the court "shall" order the destruction of any dog in respect of which the offence was committed if it is an aggravated offence under section 3(1), as in the present case. I think that it is clear that the word "shall" is mandatory; this is the normal meaning, and it is used in contrast to the word "may" for offences that are not aggravated.

[36] This is, however, subject to section 4(1A), which provides that nothing in subsection (1)(a) requires the court to order the destruction of a dog if the court is satisfied "that the dog would not constitute a danger to public safety". For orders for destruction, that is clearly the critical test. Subsection (1B) then sets out the criteria that are to be applied in deciding whether a dog would constitute a danger to public safety. The two that must be considered are "(i) the temperament of the dog and its past behaviour, and (ii) whether the owner of the dog… is a fit and proper person to be in charge of the dog". Thus the identity and character of the owner are treated as material factors in determining whether a dog is a danger to the public, in all cases. This might be relevant in various ways. For example, the dog's behaviour might have been the result of poor control by the owner, or the dog might be one that can be kept under control if it is kept muzzled or on a lead when it is out in public, in which case consistent use of the muzzle or lead by the owner is clearly essential. The present appellant's history as a dog owner clearly gave serious cause for concern; she even resisted suggestions that her dog might be kept muzzled or on a lead when outside. The sheriff seems to have taken this factor into account in ordering destruction of the dog, as appears from the last two pages of her report.

[37] Section 4A is a distinct provision, added six years after the Dangerous Dogs Act was originally enacted. It seems clear that this section is designed to operate in conjunction with sections 3 and 4 of the Act. Section 4A is a poor example of statutory drafting, although the problems appear to emanate from policy that has been incoherently thought through as well as drafting in the narrow sense. Subsection (1) looks as if it is intended to set out the conditions for application of the section, but so far as aggravated offences under section 3(1) are concerned the subsection does not make sense, since its operative part (the provision after paragraphs (a), (b) and (c)), relates only to a prohibition imposed under section 1(3) of the Act, which has no bearing on aggravated offences under section 3(1). This is the point made in cases such as *Kelleher* v *DPP*, [2012] EWHC 2978 (Admin). The result of the poor drafting of section 4A(1) must, I think, be that it is incapable of applying to aggravated offences under section 3(1); I cannot see any sensible way of bringing such offences within the terms of the subsection.

[38] Nevertheless, subsections (4) and (5) of section 4A are capable of applying to convictions under section 3(1). Subsection (4) refers to "an offence", rather than "an aggravated offence", but as an aggravated offence is a species of offence I think that logically the expression "an offence" must cover both types of offence. It is true that the expression "aggravated offence" is used in other provisions of the Act, including subsection (1) of section 4A, but that is simply to distinguish an aggravated offence where that is appropriate. I note that in section 4(1) the condition for a destruction order is that a person should be convicted of "an offence" under section 3(1), and it is clear from what follows that that expression covers both aggravated offences and ordinary offences under that section. That accords with the general principle that the general includes the special, and it also seems to

accord with the decision of the Sheriff Appeal Court in *Feldwick* v *Procurator Fiscal, Edinburgh*, [2018] SAC (Crim) 5.

[39] If that is so, subsections (4) and (5) of section 4A are potentially applicable. On that basis, in an appropriate case, the court should consider whether a contingent destruction order would be a sufficient remedy, and if so what measures should be specified under subsection (5). The power in subsection (4) to make a contingent destruction order is in my opinion available as an alternative to an outright destruction order; I cannot see any other basis on which the Act could operate. That would mean that, in considering the order to be made, the court would have to choose between an outright destruction order and a contingent destruction order. In the present case the sheriff made an order for the destruction of the dog, but it is that order that is open for reconsideration by the High Court, and I think that reconsideration must potentially encompass every order that would have been available to the sheriff when she made the order for destruction. Furthermore, I do not think that the power in subsection (4) is subject to the conditions set out in subsection (1) of section 4A, including the condition that the court does not order the destruction of the dog under section 4(1)(a). Those conditions relate to the form of order specified in subsection (1), but the condition for the application of the order permitted by subsection (4) is simply that a person should be convicted of an offence under section3(1).

[40] In the present case, the essential submission for the appellant is as follows. She has been prohibited from owning dogs, and consequently the ownership of the dog in question has been transferred to an animal charity that specializes in difficult dogs. In the sheriff's decision, an important factor was the applicant's serious inadequacy as a dog owner. Now that she is no longer the owner, however, the second of the relevant factors specified in section 4(1B) has changed completely; the new owner is likely to be a fit and proper person

to be in charge of the dog. It would also be possible to make use of subsection (5) of section 4A, by ordering that the dog should be kept muzzled and on a lead if it is taken into public places.

[41] In these circumstances, I think that the critical question for the court is whether an order in the foregoing terms should be made. In favour is the fact that ownership of the dog has now been transferred to a charity that can clearly be relied on to ensure that proper measures are taken to keep it under control. Against altering the destruction order are the circumstances set out in paragraph [33] of the opinion of your Lordship in the chair. It is accepted that the dog was dangerous, and it was certainly responsible for a very unpleasant attack. It also appears to be accepted that, as the dog is now five years old, the possibility of altering its character in fundamental respects is limited. The only factor in favour of a contingent destruction order is accordingly that the dog has a new, responsible, owner, who can be relied on to ensure that it is kept on a lead and muzzled when in public. I find this balancing exercise difficult. It is perhaps important not to be unduly swayed by sentimental considerations; the court must adopt a rigorously objective approach at all times. Ultimately, however, I have come to the conclusion that the dog's background outweighs the significance of the new owner, and on that basis I would agree that the destruction order imposed by the sheriff should stand.

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 19
HCA/2018/14/XJ

Lord Justice General
Lord Drummond Young
Lord Turnbull

OPINION OF LORD TURNBULL

in

NOTE OF APPEAL AGAINST SENTENCE FOLLOWING UPON A REFERENCE FROM THE SCOTTISH CRIMINAL CASES REVIEW COMMISSION

by

MOIRA HUNTER

Appellant

against

PROCURATOR FISCAL, KILMARNOCK

Respondent

Appellant: O'Rourke QC; Faculty Appeals Service
Respondent: Gillespie AD; the Crown Agent

2 April 2019

[42] I agree with the analysis of the statutory provisions undertaken by your lordship in the chair. In particular, I agree with the conclusion that where an offence under section 3(1) of the Dangerous Dogs Act 1991 has been established, the provisions of section 4(1), (1A) and (1B) of the Act provide a complete code for determining whether the dog concerned is to be the subject of an order for destruction. I agree that the provisions in section 4A of the

Act, which provide for a contingent destruction order, can only apply in a situation in which the decision not to destroy the dog under section 4(1) (a) has already been made. I therefore agree that the approach of the sheriff and the Sheriff Appeal Court at second sift was correct and that the appeal must be refused.