EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT TAURANGA

CRI-2016-070-000881
[2016] NZDC 10137

TAURANGA CITY COUNCIL
Informant

v

NICHOLAS NATHAN EPIHA
Appellant

Hearing: 1 June 2016

Appearances: C Tuck for the Appellant
J Howell for the Respondent

Judgment: 1 June 2016

ORAL JUDGMENT OF JUDGE P G MABEY QC

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[1] This is an appeal by Nicholas Epiha, from the decision of a Community Magistrate sitting in Tauranga to convict him of an offence under s 57 Dog Control Act 1996 in that he was the owner of a Labrador Retriever Shar Pei Cross dog named Coasty, which attacked a person in contravention of that Act.

[2] Consequent upon the conviction, the Community Magistrate ordered the destruction of the dog as she found that there were no exceptional circumstances relating to the offence that would justify non-destruction. In reaching that conclusion she was applying s 57(3).

[3] The notice of general appeal signed by Mr Epiha and dated 28 February 2016 expressly challenged the order that the dog be destroyed. Mr Tuck's written submissions expanded the grounds of appeal to include a challenge to the conviction.

The inclusion of that separate ground is out of time for the purposes of the Criminal Procedure Act 2011, but Mr Howell who appears today for the informant takes no issue with that.

[4] Mr Tuck makes an oral application to extend time and, as there is no opposition, that is granted. So the appeal now is advanced on the basis of a challenge to the conviction and also a challenge to the destruction order.

[5] Mr Tuck made submissions briefly in support of the challenge to the conviction. The basis of that challenge was that this is not a public welfare regulatory offence, which has available the defence of total absence of fault. Mr Tuck says that notwithstanding High Court authority to that effect, in particular Heath J in *King v South Waikato District Council* [2012] NZHC 2264, this is in fact an offence which requires the prosecution to prove mens rea beyond reasonable doubt.

[6] That aspect of the appeal was short lived. I made clear to Mr Tuck that I consider that this is very much a public welfare regulatory offence of the type that was developed subsequent to *Civil Aviation Department v McKenzie* and also *Miller v Ministry of Transport* [1986] NZLR 660. In addition, I am bound by High Court authority and in particular, Heath J in *King v South Waikato District Council* and subsequent High Court decisions which apply his reasoning.

[7] Having got to that point, Mr Tuck did not pursue the challenge to conviction any further and moved directly to the original ground of appeal, which was the challenge to the destruction order. In doing so, he addressed his written submissions which commence at paragraph 49.

[8] The essence of Mr Tuck's challenge to the destruction order made by the Community Magistrate on 19 February 2016 is that she was wrong to conclude there were no exceptional circumstances for the purposes of s 57(3). That can really be the only basis of the challenge, for, if on the evidence the Community Magistrate was justified in concluding there were no exceptional circumstances then the appeal must fail.

[9] Mr Tuck's emphasis in his submissions in support of this aspect of the appeal was to point to aspects of the offence which he says amount to exceptional circumstances. In other words, although the Community Magistrate had herself addressed those particular issues, she was wrong to conclude they were not exceptional.

[10] Mr Tuck emphasised the following matters in support of his argument that there were exceptional circumstances at the offence, they are:

(a) History of past aggression. The dog, the subject of this prosecution, has not in the past attacked a person. The evidence relating to any past history was limited to the dog jumping a fence and attacking another dog.

(b) Mr Tuck referred to the character of the dog, saying that it had been properly socialised. It is used to going for walks, it is generally good around people and has in the past had no difficulty with people coming and going. I have to indicate at this point that there was evidence which was not disputed that Mr Epiha's sister, who was the owner of the dog as well as Mr Epiha as ownership is defined in the Act, said that the dog can be difficult around people. She said that the dog was vigorous with visitors to her home and that he growls when people come to the door but as long as they are there, he is okay. That was a matter of significance to the Community Magistrate.

(c) Mr Tuck then referred to past dealings with the City Council, which are really limited to barking and the aggression with the other dog. Those matters are, in themselves, not serious and I think Mr Tuck's point is to demonstrate that the dog does not have a bad history with the Council when it comes to its treatment of people, but of course he had already made that point when saying that there was no history of past aggression towards people.

(d) He points to Mr Epiha's response when the nurse, who was the victim in this case, was bitten. Mr Epiha went to her immediate assistance.

(e) He then refers to reasonable steps. The submission appears to be that it was reasonable to have the dog tied in the way it was because it had never bitten people before, but that point had already been made.

(f) He refers to owner's knowledge. Saying that Mr Epiha's purpose in tying the dog was consistent with responsible dog ownership and really was addressed at the dog's propensity to roam, which is another matter that the Council had cause to consider, but this is not a case about a roaming dog, it is a case about a dog attack.

(g) He refers to the dog's behaviour prior to the attack and that there was nothing preceding it that would have given the victim any particular warning but that, I would have thought, was a submission that was of no assistance to Mr Tuck. The reality of this attack was that the nurse approached the dog and as she passed and she was bitten from behind.

(h) There was a reference to victim behaviour that Mr Tuck quite properly did not pursue that point.

(i) His last point, and I think Mr Tuck considered it to be his strongest point, was that the attack was on private property and that the dog was tethered.

[11] Mr Howell, for the informant, provided written submissions which responded to the conviction point which for reasons I have said, was not pursued and Mr Howell then moved to address the destruction issue.

[12] The point made by Mr Howell is that the Community Magistrate considered all of the factors of the offence, including those set out by Heath J in a decision from the High Court in New Plymouth where he gave a non-exhaustive list of matters which could be relevant to determining of special circumstances of an offence exist.

[13] Mr Howell, in short, says there is nothing exceptional about this. It is a dog attack and there needs to be much more if destruction is to be avoided. Section 57(3) of the Act provides that:

> 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.

[14] Heath J, in *Halladay v New Plymouth District Council* High Court New Plymouth, 24 June 2005 considered that section and said at paragraph 21 the term exceptional means unique or special or substantially unusual, although the circumstances need not be extreme.

[15] The magistrate in this case considered that there was nothing exceptional. She traversed the facts which were by and large undisputed and concluded that there were no exceptional circumstances. She noted that there was no provocation by the victim and that Ms Epiha felt confident that her brother was able to control the dog. The magistrate said that the tethering was inadequate to allow the nurse to pass without incident on a scheduled and expected visit; the nurse having been there on many occasions before. What the Community Magistrate is saying is that the only exceptional thing about this offence was that the attack occurred.

[16] I need to determine whether the Community Magistrate was wrong. I need to be satisfied that if the appeal is to be granted there are exceptional circumstances and that the Community Magistrate's finding to the contrary cannot be sustained.

[17] I cannot conclude the Community Magistrate was wrong. What occurred here was a scheduled visit by a nurse to a property she had been to before. The occupier, Mr Epiha, knew she was coming. Mr Epiha and his sister were aware that

the dog could be difficult with people who came to the property but if they were present it was all right.

[18] In this case, the dog was tethered on a lead which was too long to keep it contained safely from the nurse who passed by down the side of the house coming close to the dog. Mr Epiha was not with the dog. If he had been with the dog, things may have been different. If the lead was shorter, things may have been different.

[19] It is true that it is on a private property, but she was an invitee, expressly there for a particular purpose, going to a part of the property where it must have been known she would pass the dog. It is correct the dog has no previous history attacking humans. It has shown propensity in the past to attack another dog, but at the end of the day, what occurred here was that a visitor to a property who was invited there was bitten by a dog on the property. That occurs. There is nothing exceptional about that.

[20] The fact that the dog has no history of biting humans really counts for little. The dog bit the nurse, there is nothing in the circumstances of this offence that are exceptional and for that reason I consider that the Community Magistrate reached the right conclusion and I certainly cannot say that she reached the wrong conclusion.

[21] The appeal must be and is dismissed.

P G Mabey QC
District Court Judge