

JERSEY / JUDGMENT

Canavan v AG [2024] JRC 019 (23 January 2024)

[2024] JRC 019

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JUDGMENT

THE COMMISSIONER:

Introduction

1. On 6 October 2023, the Appellant pleaded guilty to two charges under Article 11A of the Dogs (Jersey) Law 1961 ("the Dogs Law") by which she accepted that her dog, a Staffordshire / Labrador cross-breed, ("Bruce") was dangerously out of control on two occasions, the first on 7 April 2023, and the second on 7 May 2023. The Appellant was fined £450 on each charge, a sentence against which she does not appeal, but the Assistant Magistrate ordered that the Appellant should keep Bruce under proper control and that the dog should be both kept on a lead and muzzled when in a public place. The Appellant wishes to appeal the order that the dog be muzzled on the grounds that it was manifestly excessive, wrong in principle and / or that the decision of the Assistant Magistrate was unreasonable but no appeal has been entered against the order that the dog be kept under proper control nor that it be kept on a lead when in a public place. The facts 2. On the first occasion, at about 9 a.m. when the owner of a border collie was walking past the home address of the Appellant, Bruce ran out of the property. The prosecution contended (this was later denied by the Appellant) that the Appellant stood outside the property and ran after Bruce shouting " Save your dog " as he attacked the border collie. The dogs were separated with the assistance of a member of the public and Bruce was dragged back to the Appellant's property showing signs of aggression. The border collie received two bite marks during the attack, one by the mouth, and one on the chin. Neither bite required veterinary assistance. The owner of the border collie received a minor injury as she had fallen over during the incident. According to the neighbours, this was not the first time that Bruce had attacked other dogs. The Appellant does not agree with that and we have seen no evidence one way or the other on the point. 3. The second occasion was on 7 May when, at approximately 9.15 p.m., another owner was walking her dog along the pavement from Grands Vaux when Bruce ran across the road and pinned the dog to the ground. The owner let go of the lead and her dog escaped and was caught by a member of the public. Bruce then returned into the Appellant's property by himself. The victim dog had received a scratch to the inside of the back leg, but was

otherwise unhurt. The prosecution accepted before the Assistant Magistrate that the Appellant had been extremely apologetic and remorseful and she wished to apologise to the owners of the dogs. It transpires that the Appellant's lodger had on both occasions left the front door open, allowing Bruce to escape, as a result of which he was able to attack the other dogs. According to the Appellant at the time, Bruce is not a fearsome or dangerous dog, and it was simply regrettable that he got out of the house on these particular days and reacted in the way that he did. It was pointed out to the Assistant Magistrate that the matter was quickly brought under control and there were no serious injuries. Furthermore, the Appellant had made some changes to her front door since the incidents and had had firm words with her lodger to take care not to leave the front door open; and there had been no further difficulties since May. 4. After a brief adjournment, the Assistant Magistrate passed sentence of the fine of £450 on each charge and he then added this: "Also, because I am not persuaded that the underlying propensity to attack other dogs have been eliminated, I am also imposing conditions under Article 11B(3) that Bruce shall be muzzled and on a lead at all times when in public. I appreciate that is not what you wanted to hear, but I have to have consideration for the wellbeing of those around. I did ask very specifically about how much time Bruce spends out on the lead and I hope that proportionately that is reasonable in the circumstances." 5. The conditions under Article 11B(3) continue indefinitely but the Assistant Magistrate made plain that he was not ruling out the possibility at a later stage of an application being brought back to Court to vary the orders he had made. The right of appeal 6. It is necessary to review the Dogs Law in more detail because Advocate Taylor's first contention was that, contrary to the submissions of Advocate Bell that this was an appeal against an ancillary order forming part of the sentence, this was not an appeal against sentence (the fine of £900) as is clear from the Notice of Appeal, but an appeal against the muzzling order made as part of the control order - an order in respect of which the Dogs Law provided no appeal. This point has not arisen previously, although appeals against an order for the destruction of a dog have been considered in *Evans v AG*

[2021] JRC 026 , *Knapp v AG*

[2011] JRC 118 and *Melim v AG*

[2012] JRC 134 . However, those cases are in this respect unhelpful because the Dogs Law did and does provide for appeals against orders for the destruction of a dog. But there is no direct authority on the existence or otherwise of an appeal against orders of the type made in this case. 7. As first enacted, the Dogs Law made provision under Article 11 as follows: "(1) Where it is shown to the satisfaction of the police court, on a representation made by any person, that a dog is dangerous or is not kept under proper control, the Court may make an order relating either - That the dog shall be kept under proper control; or That the dog shall be destroyed; provided that no order shall be made under this paragraph unless the owner of the dog has been given an opportunity of being heard. (2) Where on a representation made under paragraph (1) of this Article the police court makes an order directing that the dog shall be destroyed, the owner of the dog may, within the period of

seven days from the date of the order, appeal against the order to the Royal Court, and, until the expiration of that period, or until the determination of the appeal, as the case may require, the order shall have effect as if it were an order directing that the dog shall be kept under proper control. (4) On any appeal under paragraph (2) of this Article, the Royal Court may either dismiss the appeal or rescind the order made by the police court and, if thought fit, substitute therefor an order directing that the dog shall be kept under proper control..... (5) The decision of the Royal Court on any appeal under this Article shall be final and without further appeal. (7) Part 1 of the Civil Proceedings (Jersey) Law 1956 (which relates to costs in civil proceedings) shall extend to the hearing of proceedings under the foregoing provisions of this Article and the provisions of the said Part 1 shall have effect accordingly but as if references therein to the Petty Debts Court were references to the police court. (8) For the avoidance of doubt, it is hereby declared that Part IV of the Police Court (Miscellaneous Provisions) (Jersey) Law 1949, as amended, [the "1949 Law"] (which relates to appeals against convictions by the police court and sentences passed on such convictions), shall not apply in relation to any order made by the police court under paragraph (1) of this Article." 8. Various amendments to the Dogs Law have been passed by the States but the material amendment is the fourth amendment adopted in 2016 (the "2016 Amendment") which introduced substantive changes to Article 11, as well as new Articles 11A, 11B, 11C and 11D. That legislation also made provision for increased sanctions for breach of the law. 9. Before turning to the detail of the 2016 Amendment, we note that under the Dogs Law as first enacted, an owner of a dog did not face criminal charges unless he or she: (i) kept a dog without a licence; (ii) permitted a dog to be on the highway or in any public place without a collar with its name and address of owner inscribed on the collar; (iii) owned a dog which worried livestock on any agricultural land; (iv) failed to comply with the terms of any order made under Article 11 that the dog be kept under proper control. 10. It can be seen that, as first enacted, unless the Police Court (or Magistrate's Court as it came to be called) had made an order that the dog be kept under proper control, an owner who failed to do so committed no offence. Furthermore, an order for the keeping of a dog under proper control or for the destruction of the dog, could be made notwithstanding that no criminal offence had at that stage been committed. All that was necessary was that the Court had to be satisfied that the dog was dangerous or was not kept under proper control. The rights of appeal under Article 11 have to be seen in that context

- there might be neither a criminal charge nor a conviction or sentence, and yet orders could be made for keeping the dog under control or for its destruction against which appeals could be brought, as it were in a civil context, despite the fact that it was the Police Court making those orders. That is why the appeal provisions in the 1949 Law were disapplied and why provision was included for Part I of the Civil Proceedings (Jersey) Law 1956 to apply. The jurisdiction conferred on the Police Court was a mixed criminal and civil jurisdiction under this legislation. 11. Under Article 11A of the Dogs Law as introduced by the 2016 Amendment, a new offence was created where a dog was found to be dangerously out of

control. In those circumstances, the owner and, if different, the person in charge of the dog at the material time, would be guilty of an offence. That clearly was a criminal charge and indeed it was for two breaches of that Article that the Appellant was charged and fined in the present case. 12. Article 11B of the Dogs Law, introduced by the 2016 Amendment, takes some of the former provisions of Article 11 and re-enacts them with some differences. By Article 11B(3), the Magistrate's Court, when satisfied that a dog is dangerously out of control or is otherwise not kept under proper control (whether so satisfied as a result of a representation brought, or as a result of criminal proceedings), can make an order that the dog be kept under proper control under Article 11B(3)(a) or that the dog be destroyed under Article 11B(3)(b). That order can be made whether or not a person is charged or convicted, and whether or not the dog is shown to have injured or killed or caused other harm to any person or domestic animal. Importantly, by Article 11B(5), the Court may specify particular measures to be taken for keeping the dog under proper control, whether by muzzling, keeping on a lead, excluding it from a specified place, or otherwise. In the case of a male dog, the Court may order under Article 11B(6) that it be neutered if that would facilitate controlling it. It is apparent that the mixed civil and criminal jurisdiction conferred on the Magistrate's Court by this legislation continued - while Article 11A confers a criminal jurisdiction, as do other parts of the legislation, Article 11B clearly confers a civil jurisdiction because the powers available to the court can be exercised whether there is a conviction or not. In our judgment, the nature of those powers cannot change depending upon whether there is or is not a conviction. 13. The right of appeal is conferred by Article 11B(7) and is in these terms: "(7) Where the Magistrate's Court makes an order under paragraph (3)(b) or (6) the owner of the dog or the person claiming responsibility for it may, within the period of 7 days from the date of the order, appeal against the order to the Royal Court, and, until the expiration of that period, or until the determination of the appeal, as the case may require, the order shall have effect as if it were an order directing that the dog shall remain in detention." 14. It can be seen that the right of appeal which is conferred by this Article concerns an order made by the Magistrate's Court for the destruction of the dog or an order that it be neutered. That is understandable because both such orders could have an impact on a person's right to property (the dog) and would therefore carry with them the obligation to consider Article 1 of Protocol 1 to the European Convention on Human Rights (the "Convention") before any such order was made. 15. The Magistrate's Court may also make an order under Article 11B(8) disqualifying a person from owning or keeping a dog, and there is an express right of appeal conferred by paragraph (9) against any such order. 16. It is noteworthy however that while there is an express right of appeal against most of the civil jurisdiction orders that can be made, there is no right of appeal contained in the statute in respect of an order that the dog be kept under proper control, nor is any right of appeal conferred in respect of an order specifying measures to be taken under paragraph (5) of the same Article. 17. It is in these circumstances that it is said that there is no right of appeal. 18. Article 11D of the Dogs Law sets out the procedure on appeals. It is, where material, in these terms: "(1) Where - (a) a person has been convicted of an offence under Article 9 or 11A(1) and an order has been made under Article 11B(3), 11B(6) or 11B(8) in

respect of the same incident; and (b) the person appeals against the conviction or sentence and any such order, the Royal Court may at any stage order that the appeals be heard and determined together and may give such directions for that purpose as it thinks fit. ... (3) On any appeal under Article 11B(7), 11B(9), 11B(10) or 11C(4) the Royal Court may - (a) confirm, reverse or vary the decision of the Magistrate's Court; (b) remit the matter with its opinion on the matter to the Magistrate's Court; or (c) make such other order in the matter as it thinks just, and may by such order exercise any power which the Magistrate's Court might have exercised, and any order so made shall have the like effect and may be enforced in like manner as if it had been made by the Magistrate's Court." The reference in sub paragraph (1) (a) is to Article 11B(3) and not to (3)(b) only. There seems to be an assumption that the Court is conferred power to give directions for the purposes of hearing an appeal against an order under 11B(3)(a) as well as (3)(b). Under Article 11D(2) it can direct that witnesses should be heard. But interestingly, under Article 11D(3) the power in the Court to confirm, reverse or vary the decision made by the Magistrate's Court or remit the matter to the Magistrate's Court or indeed make any other order in the matter as it thinks just, and exercise any power which the Magistrate's Court might have exercised only seems to apply to some appeals and not those under Article 11B(3). 19. It is apparent that Article 11D(1) contemplates that a person may appeal against either the conviction or the sentence or an order made under Article 11B(3), which would include both an order for the destruction of the dog and an order that it be kept under proper control. On the face of it, although Article 11(B) does not confer a right of appeal in respect of an order under 11B(3)(a), Article 11D does seem to envisage a procedure for handling an appeal in the present circumstances but no provision for the court's powers on hearing the appeal. We are driven to the conclusion that the legislature may wish to give further thought to this legislation but in the meantime, we must make of it what we can. 20. In our judgment, the Appellant does have a right of appeal notwithstanding the rather circuitous provisions in the Dogs Law. Article 33 of the Criminal Procedure (Jersey) Law 2018 (the "2018 Law") provides as follows: "(1) A defendant convicted by the Magistrate's Court may appeal to the Royal Court in the circumstances set out in paragraph (2).

- (2) If the defendant - (a) pleaded guilty or admitted the facts, he or she may appeal against the sentence or order ; (b) pleaded not guilty, he or she may appeal against the conviction, sentence or order ; or (c) pleaded not guilty and was sent to the Royal Court for sentencing under Article 27, he or she may appeal against the conviction." (emphasis added) 21. Once again, there is a distinction between an appeal against the sentence and an appeal against the order made by the Magistrate's Court. Here there was a conviction because the Appellant pleaded guilty; there was a sentence which is not appealed; but there has been an order which the Appellant seeks to appeal. In our view, she is entitled to do so pursuant to this Article. 22. We recognise that reliance upon the 2018 Law seems inconsistent with our previous comments that the jurisdiction under the Dogs Law is both criminal and civil. However, although the provisions in the Dogs Law as first enacted which excluded the effect of the 1949 Law were brought forward by the 2016 Amendment, the 1949 Law was repealed

by the 2018 Law so that the provision so brought forward is in effect spent. It seems to us that we must assume that the legislature considered the 2018 Law would take precedence, were there to be any inconsistency with the Dogs Law because the 2018 Law is the later piece of legislation. As it provides for appeals against an order in criminal proceedings, this includes the orders made in this case. In our judgment, the fact that the legislation does contemplate appeals against this type of order where there have been criminal proceedings suggests that the same appeal ought to be possible if the civil jurisdiction alone had been exercised by the Magistrate, albeit that does not arise here. That may seem a curious outcome as a construction of the Dogs Law, but it is at least consistent with Article 11D which seems to contemplate that an appeal against an order under Article 11B(3), which includes a control order, is possible. The legislature may wish to consider amendments to the statute to put the matter beyond doubt. 23. We are not uncomfortable with this construction of the statute. In our judgment, it is clearly right and in the interests of justice that a person affected by a control order, with or without the ancillary orders made under Article 11B(5), should have the ability to appeal them. By Article 11B(11), a person who fails to comply with an order that the dog be kept under proper control, with measures as specified in paragraph (5) of that Article, commits an offence. In normal circumstances, the dog owner has freedom to decide whether the dog should be kept on a leash or muzzled when out in public. The owner does not commit an offence by choosing not to keep it on a leash or not to have the dog muzzled, unless of course the dog is dangerously out of control and an offence is committed under Article 11A(1). The consequence that mere failure to comply with the leash / muzzling order amounts to an offence carrying a possible sentence of imprisonment of up to twelve months or a fine at level 3 is such that, in our judgment, it is entirely appropriate that a right of appeal should be found to exist. That right is consistent with Article 33 of the 2018 Law (in its use of the words " or order ") in a criminal case and is implied by Article 11D of the Dogs Law. Furthermore, in theory - perhaps actually in this case - a caring dog owner may well find that the effect of a muzzling order might be so damaging to the dog that it would be kinder to put it down. If there is an appeal against an order that the dog be destroyed, as there is, there should also be an appeal against an order that has the same practical effect albeit not on the face of the order. 24. Accordingly, we decide for these reasons that the dog owner has a right of appeal against the making of a control order or ancillary orders pursuant to a control order. In so doing, we emphasise that this is not an appeal against sentence. It follows that we must consider the test to be applied on such an appeal. The test on appeal 25. As we have discussed, appeals against orders under Article 11B (3), (5), (6) and (8) of the Dogs Law are to be treated as civil appeals. It follows that the Court does not approach them by asking whether the order made was wrong in principle or manifestly excessive as one would with an appeal against sentence. The owner's right under Article 1 of Protocol 1 of the Convention, and indeed perhaps under Article 8 of the Convention, is such that the doctrine of proportionality is brought into the equation. As the Court must itself act in a Convention compliant way, it must judge for itself whether the order made is or is not a proportionate interference with the owner's rights. In doing so, the Court is entitled to have regard to the conclusions of the Magistrate, just as on

most civil appeals from the Judicial Greffier the Court is entitled to have regard to the Greffier's views, but is not bound by them. The question for the Court is whether, on the balance of probabilities, the order made by the court below was proportionate. If the Court does not think it is, then it is able to intervene. However, in carrying out that exercise, the Court should bear in mind where appropriate that it has not had the opportunity which usually the court below has had of hearing the evidence. 26. Where, as here, the court below did not receive oral evidence, other than from the presenting Centenier, the advantage just referred to does not arise to the same degree. Equally, where the court below has had more evidence than has been made available to this Court, that too is a factor which should be taken into account when assessing the appeal. 27. The balance of probability test is the one which has been applied by this court in the three appeals under the Dogs Law which we have mentioned earlier - Knapp , Melim and Evans . We refer to [39] of Knapp , approved in [26] of Evans , and [23] of Melim . The merits of the appeal 28. Advocate Bell made a number of submissions on instructions about the adverse effect of the muzzling order on Bruce since it was made. We have no way of knowing whether these submissions are factually correct, and accordingly, although the consequences of the order as he described it do not seem surprising, we have no evidential basis for deciding the question. We have accordingly given that part of his address little weight. 29. The heart of the appeal on the merits is however a short point. The incidents giving rise to the charges occurred as a result of Bruce escaping from the Appellant's property when he was supposed to be kept inside. There is no evidence that there has been a problem with him when he is outside the property in the charge of the Appellant or anyone else. The muzzling order might be an effective order to protect the public or other animals if it applied when Bruce escaped; but that would be to require the animal to wear the muzzle at all times because the nature of an escape is that it is unintended as far as the Appellant is concerned, and of course that is not what was actually ordered. The order therefore bears no reasonable connection to the problem and is no answer to it. It imposes a penalty on the animal - and the Appellant - for no legitimate reason. The Appellant would be at risk of a criminal offence not because she had failed to muzzle him but because he had escaped. Furthermore, if Bruce is outside the property on a lead, it seems likely that not only will he be able to have adequate exercise and thus be a happier dog, but also that the Appellant or other person in charge of him will be able to control him sufficiently that attacks on other animals can be avoided. 30. In the circumstances, we are of the view that the muzzling order cannot be justified and we allow the appeal. The remaining parts of the Assistant Magistrate's order remain in force and the Appellant must keep Bruce under proper control and he should be kept on a lead when in a public place. The latter order does mean that the Appellant takes the risk if Bruce should escape in the future; and if he were to do so and/or cause injury to a person or animal, one can well see that an order for his destruction might be inevitable. Authorities Dogs (Jersey) Law 1961. Evans v AG

[2021] JRC 026 . Knapp v AG

[2011] JRC 118 . Melim v AG

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