

CITATION: *Police v McArthur* [2008] NTMC 011

PARTIES: ANDREW KEVYN LITTMAN

v

DARREN MCARTHUR

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Justices Act

FILE NO(s): 20630048

DELIVERED ON: 26 February 2008

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JUDGMENT OF: Jenny Blokland CM

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OFFENCES – SUMMARY OFFENCES – APPLICATION OF CRIMINAL
CODE

Criminal Code s 5, ss 209 and 210

Summary Offences Act s 54

Animal Welfare Act s 6

Hulley v Hill (1993) 69A Crim R at 52

REPRESENTATION:

Counsel:

Complainant: Ms McMaster

Defendant: Ms Keppert

Solicitors:

Complainant: ODPP

Defendant: NTLAC

Judgment category classification: B

Judgment ID number: [2008] NTMC 011

Number of paragraphs: 23

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20630048

[2008] NTMC 011

BETWEEN:

ANDREW KEVYN LITTMAN

Complainant

AND:

DARREN MCARTHUR

Defendant

REASONS FOR DECISION

(Delivered 26 February 2007)

JENNY BLOKLAND CM:

Introduction

1. On 15 November 2006 an altercation occurred between three dogs. It commenced through and around the fence of a property owned by Mr Mark Vogt at 32 Hatt Street, Adelaide River. The three dogs involved were “Willy”, (effectively the alleged victim in this matter owned by Mr Vogt and resident at 32 Hatt Street) and “Chief” and “Demon” owned by the Defendant. During the course of the incident it is alleged that the Defendant, Mr Darren McArthur did not exercise reasonable care over Willy and did not prevent an act of cruelty on him. It is further alleged that he “stole” Willy, although as will be discussed below, I have come to the conclusion that the charge as laid cannot be made out.

Summary of the Evidence

2. The evidence possessed complexities beyond what would often be the

case in summary matters. During the course of the hearing I made rulings excluding certain conversations between the Defendant and police primarily because, although the most significant conversation was taped by police, a fault with the audio equipment meant there was no audible sound that could be played to the Court. The recollection of the officers concerned was acknowledged not be precise. Police also suspected the Defendant to be intoxicated although probably by substances other than alcohol. In those circumstances and for reasons given previously, those conversations have been excluded from my reasoning.

3. It is common ground that Willy is a pure bred pit bull terrier owned by Mr Vogt. It is not in dispute that Chief and Demon are owned by Mr McArthur. It is not in dispute that Chief is a mixed breed Bull Mastiff – Bull Arab – Sharpee cross who was eight months old at the time of the incident. Demon is a Wolf Hound – Bull Arab who was 12 months old at the relevant time. It is not in dispute that Mr Vogt and Mr McArthur knew each other and there was some background of hostile feeling between them. Mr Vogt spoke of shooting on Mr McArthur's block some time previously and being aware Mr McArthur had three mixed-breed dogs used for pig hunting. Mr McArthur spoke of an incident between himself and Mr Vogt that he believed led to him being banned from the Adelaide River pub – a ban he was notified of at about lunch time on 15 November 2006 – the date of the alleged offences. It was this notification and the background to it that Mr McArthur said led him to go around to Mr Vogt's residence at 32 Hatt Street. In the cross-examination of Mr McArthur the prosecution suggested this background of animosity was why Mr McArthur had allowed Willy to be mistreated and had stolen him. Mr McArthur went to Mr Vogt's place with Chief and Demon in his vehicle basically for company but he also thought he would give Chief and Demon a chance at chasing pigs if they saw some on the way.
4. Mr McArthur told the Court he had consumed around seven beers prior to

the incident. He would have been somewhat affected by alcohol but it is difficult to say to what extent. Police officers noted Mr McArthur looked intoxicated but they thought it was not alcohol related.

5. Mr McArthur said he parked his vehicle on the same side as Mr Vogt's block. Mr William Roberts (a neighbour of Mr Vogt), gave evidence that at about 10.00 o'clock he heard Willy barking "a lot" and this was unusual. He went outside with his torch (which initially wasn't switched on). He thought Willy was tied up in the far corner of the yard. He later realised he was chained to the fence. Next a car parked on the opposite side of the road. He thought he heard someone try to open the gate and say something like "come on". He said Willy started "really going off" and he turned his torch on and saw a person outside the fence who looked like he was trying to undo Willy off of the chain. He asked the person what he was doing and he replied something like "You want to F with me, I'll kill your dog". He thought the person was trying to pull Willy up through the fence. The fence has been described in various ways but is basically a mesh fence (Mr Roberts said about 800cms) with two lines of barbed wire at the top. Mr Vogt said the fence was five feet high. Mr Roberts recalled the man had yelled out that the dog had his arm, possibly had yelled out "bit my arm". He said it was pitch black.
6. Mr James Darby who resides at 32 Hatt Street woke up to dogs fighting. He said Willy had been chained to the fence that evening. He said he could see dogs fighting but didn't have a torch. He saw one dog in the yard fighting Willy. He said he heard someone yelling out and the dog latched onto his arm and the man was "bashing" Willy, trying to get him off. Mr Darby said he told the man to "F off" and "what are you doing?" He said the neighbour shone the torch and he saw Willy off the chain and pulled through the fence. Next the dogs had "gone all the way to the car and ended up in the car and drove away". He said he saw the man pull Willy through the fence between the barbed wire and the top of the mesh

part of the fence. He said there were two dogs and they were all fighting. He said when Willy latched onto his arm the man was hitting Willy, trying to get him to let go. Mr Darby said he told police he thought Mr Vogt was at the pub so he jumped in the back of the police car to go with police. On the way they saw a vehicle coming in the opposite direction. When it was pulled over he saw that it was Mr McArthur. He saw Willy in the back with the other dogs. He said Willy got out of the car, he had a few marks or cuts to the face and was breathing heavily from fighting with other dogs.

7. The Defendant said that when he called out at Mr Vogt's place there was no answer so he gave the gate a rattle. He walked down the fence line on the side of the house. He saw some one was there and thought it may be Mr Vogt. His own dogs came out of his vehicle and Demon ran up and down the fence. Chief stayed seated beside him. Willy came up in a guarded way. Chief started licking Willy, Willy growled and then grabbed Chief. Chief was cowering and Willy latched onto Chief through the fence, grabbing Chief by the throat and shaking him. Mr McArthur said he tried to pull Chief by the scruff of the neck but Willy wouldn't let go. He thought Chief had half a head through the fence. He saw that Willy was stuck to the fence with the chain and he unclipped the chain. Willy released Chief and Mr McArthur said as he was pulling Chief back Willy attached to his arm. At one point he reached through to grab Willy with his right hand and Chief with his left and tried to pull them apart but couldn't. He couldn't get Willy off of his arm so he pulled him through the fence – he then punched Willy on the back of the head because he wouldn't let go of his arm.
8. He opened the driver's side of the door and put Chief in the car; Demon ran back and went in the passenger side. Willy jumped in the car and fought with both Chief and Demon in the back of the car. Then Willy jumped into the passenger side and sat beside Mr McArthur. He said he

went to open the door and Willy growled at him so he didn't know what to do. He thought he would go to the pub to see if Mr Vogt was there so he could remove Willy from the car. When he arrived at the pub he looked around for Mr Vogt so that he would be able to free Willy from his vehicle but ended up driving back to Mr Vogt's house and was apprehended by police on the way. He described injuries to Chief that were stitched by a friend.

9. There are not significant differences between the evidence of the prosecution witnesses and the defendant. The prosecution witnesses were viewing only part of the incident and the viewing conditions were not ideal. I found them to be truthful witnesses. Similarly, I can find no reason to reject the Defendant's version, even given the evidence concerning the issues he had with Mr Vogt. The Defendant may have been looking for a confrontation with Mr Vogt but that does not easily translate into a clear motive for dog theft and mistreatment. After all, Mr McArthur told the Court at around this time he had four other dogs, but three had been eaten by crocs since then. Further, it is not disputed that the route taken by Mr McArthur from the pub back to Mr Vogt's residence was the expected route. The evidence of the extent of Willy's injuries from another incident merged with the injuries attributed to this incident. I accept that Willy had visible cuts to the face and jaw area and around his rectum and scrotum as noted by Mr Vogt, but I cannot accept beyond reasonable doubt that his veterinary treatments can be attributed to this incident.

Application of Facts to the Offences Charged on Complaint

10. At the commencement of the hearing the Defendant faced three counts including count 2: "owning a dog that attacked another" contrary to s75A (2)(a) *Summary Offences Act*. At the conclusion of the prosecution case I found no case to answer on that count, primarily because although there

was evidence of fighting, there was no evidence that Chief attacked Willy.

11. A case to answer was found on count 1, namely “being a person who was in care, control or supervision of an animal, namely, a Pure Breed Pit Bull Terrier, you did not exercise reasonable care, control or supervision of an animal and did not prevent the commission of an act of cruelty on it”, contrary to s 6(2)(a) *Animal Welfare Act*. Section 6 *Animal Welfare Act* provides as follows:

6. Neglect, cruelty etc.

- (1) A person must not neglect or commit an act of cruelty on an animal.
 - (2) A person in charge of an animal must –
 - (a) exercise reasonable care, control or supervision of the animal to maintain the animal's welfare and prevent the neglect of the animal or the commission of an act of cruelty on it;
 - (b) if it is necessary for the animal's welfare – obtain veterinary treatment for it; and
 - (c) if the animal is suffering – take reasonable action to alleviate the suffering.
 - (3) In this section, “an act of cruelty” includes the following:
 - (a) an act that causes an animal unnecessary suffering;
 - (b) an act that causes an animal suffering and is unreasonable in the circumstances;
 - (c) treatment that is inhumane in the circumstances.
12. The particulars the prosecution rely on in proof of this charge include the following:
- that the Defendant grabbed the dog and dragged him through the mesh and barbed wire fence,

- that the Defendant was punching the dog,
- that the Defendant encouraged his dogs to attack the dog.

13. It is clear that this third particular is not made out. There is no evidence that Chief and Demon were encouraged to attack Willy. In relation to the charge as a whole, I have severe doubts that the Defendant can properly be considered a “person in charge” of Willy at the relevant time. “Person in charge” in the *Animal Welfare Act* includes “an owner of the animal” and “a person who has the animal in his or her possession”. Here the “possession” at the relevant time was so brief and it was Willy who latched onto the Defendant. I have significant difficulty concluding there was possession at the time of the alleged cruelty. However, if I am wrong on that point, s 6(3) requires that to find the Defendant guilty, I would have to be satisfied beyond reasonable doubt that in all the circumstances the suffering caused was unreasonable. There might be a range of responses open to a person in the Defendant’s position. It is not a question of whether I would take the same action. The Defendant’s evidence has not been negated and is broadly accepted.
14. If the Defendant was trying to separate the dogs and trying to get Willy off of himself, and in doing so caused temporary suffering, in my view, that is not unreasonable in all of the circumstances. The Defendant did have Willy, a pit bull terrier, attached to his arm. I accept this is similar to a test of reasonableness in self defence. There is an element of proportionality that is relevant. Bearing these matters in mind I cannot find the charge proven beyond reasonable doubt. In my view self defence under the Criminal Code (NT) could not be negated either.
15. Count 3 on complaint reads “did steal a domestic animal, namely a Pure Breed Pit Bull Terrier” contrary to s 54 *Summary Offences Act*. Section 54 *Summary Offences Act* provides:

“Any person who steals any dog, or any bird or animal ordinarily

kept in a state of confinement and not being the subject of larceny, shall be liable to a penalty not exceeding 200 dollars, in addition to the value of the dog, bird, or animal stolen”.

16. As with much of the *Summary Offences Act*, (previously the *Police and Police Offences Ordinance*), this is obviously an ancient section, referring as it does to “larceny”. Larceny received its content from the common law. The penalty was prescribed from time to time in the Criminal Law Consolidation Act (SA) and Ordinance. The *Criminal Code Act* 1983 (NT) s 3 repealed the Criminal Law Consolidation Act and Ordinance. “Larceny” does not exist in the criminal law in the Northern Territory, it has been replaced with the more modern Theft Act version of the *Crime of stealing* pursuant to s 210 *Criminal Code Act* as defined in s 209 *Criminal Code*. I raised with counsel whether section 54 *Summary Offences Act* could still be considered an offence known to law on and from the enactment of the *Criminal Code*. Both counsel submitted that s 54 *Summary Offences Act* could stand, by reading the *Criminal Code* definition of “stealing”, and applying it to the *Summary Offences Act* and ignoring (as I must) the element “and not being the subject of larceny”. It was submitted that s 5 *Criminal Code* governed the situation and that the definition of “stealing” for the purpose of the Summary Offences Act was that contained in the *Criminal Code*. Section 5 *Criminal Code* provides as follows:

Section 5 Establishment of Code

“On and from the commencement of the respective Parts of the Code, those Parts shall be the law of the Territory in respect of the various matters therein dealt with”.

17. This section received extensive analysis by Mildren J in *Hulley v Hill* (1993) 69A Crim R at 52 dealing with whether the *Criminal Code* NT had abolished the common law right of arrest. His Honour noted (at 60) that the Code abolished the distinction between felonies and misdemeanours and that s3(1) divided all offences into crimes, simple offences and

regulatory offences. Mildren J also referred to the many changes the *Criminal Code* NT had brought, including larceny that he noted had been “substantially changed”. The factors he took into account in coming to the conclusion that the common law right of arrest no longer existed are as follows (at 61):

“In my view, history of the common law right of arrest, the declining importance of the distinction between felonies and misdemeanours before 1984, the abolition of felonies and misdemeanours by the Code, the extreme difficulty and assimilation of the common law right into the new laws and the likely absurdities which would flow therefrom, the abolition of pre-existing statutory powers of a citizen to arrest without warrant and the lack of any new provisions except those relating to arrest for a breach of the peace, all lead to the conclusion that the common law right of a citizen to arrest in relation to felonies was repealed by the *Criminal Code Act* on 1 January 1984”.

18. I am aware that His Honour was dealing with a common law principle, and that case may readily be distinguished from a statute which of course would ordinarily be applied. Section 54 *Summary Offences Act* appears to have created a less serious form of stealing than larceny. The fact that it appears in the *Summary Offences Act* is self evident of that. It might also have been a statutory device to remove any uncertainty on whether animals could be the subject of a larceny charge.
19. The difficulty with proceeding on the basis suggested (of interpreting “stealing” in s 54 as an adoption of the *Criminal Code* definition) is that the offence of stealing is defined as a “crime” in the *Criminal Code* and can only proceed on information. It is impossible to know the content of “stealing” in the sense of s 54 *Summary Offences Act*. It is a simple offence laid on complaint and there is no indication it would adopt the *Criminal Code* definition. The Code offence of stealing is classified a crime.
20. I have come to a tentative conclusion that on and from the introduction of

the *Criminal Code* stealing is to be charged under the Code unless specific further statutory provision is made.

21. Clearly the Defendant could have been charged with stealing Willy pursuant to s 210 *Criminal Code*. The application of Section 5 *Criminal Code* in my view makes it clear that on and from the time of the commencement of the Code, “stealing” would be classified a crime and could only be charged as such. To that extent, s 54 *Summary Offences Act* should be regarded as impliedly repealed by the *Criminal Code*. Not to do so would mean that a different form of stealing could exist which would run counter to s 5 *Criminal Code*.
22. In any event, if I am wrong on that matter even using the *Criminal Code* definition of stealing, I have real doubts on whether there was an “appropriation” in circumstances when Willy jumped into the Defendant’s car or when Willy was pulled through the fence when locked onto the Defendant and being separated from Chief. I have real doubts that the intention of the Defendant was to deprive the owner of Willy and have doubts that the Defendant intended to treat Willy as his own.
23. For these reasons the charges will be dismissed.

Dated this 26th day of February 2007.

ny Blokland

Jen
CHIEF MAGISTRATE