

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE
3

4 SCA 1/2018
5

6
7 DUKE PERRIGOFFE MERREN
8

9 v.
10

11 REGINA
12



13 **Appearances:**

Mr. Brett Basdeo of Walkers for the Appellant

14
15 Ms. Toyin Salako of the ODPP for the
16 Prosecution/Respondent
17

18 **Before:**

Justice Stephen Hellman (Actg.)

19
20 **Date of Hearing:**

22nd March 2018
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23
24 **HEADNOTE**

25 *Criminal Law - Appeal against order for destruction of dangerous dogs – Animals Law*
26 *(2015 Revision) sections 40(4); 41(1) – (3); 44 – whether order properly made — whether*
27 *court could impose requirements on person keeping dogs so that it could be satisfied that*
28 *they would not constitute a danger to public safety.*
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1 **EX TEMPORE JUDGMENT**

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3 **INTRODUCTION**

4 1. This is an appeal against an Amended Order dated 10th May 2017 for the destruction of
5 four dogs (“the four dogs”) owned by the Appellant, Duke Merren (“Mr Merren”) made by
6 Magistrate McFarlane (Actg.) (“the Destruction Order”).

7 2. The Destruction Order provided that following Mr. Merren’s conviction of two offences
8 contrary to s.40(4) of the Animals Law (2015 Revision) (“the Law”) on the 10th May 2017,
9 it was ordered that in accordance with s.41(1) of the Law, Mr Merren hand over each of the
10 four (4) dogs owned by him – which were dangerously out of control and caused injuries to
11 Trevor Spinney and Janine Webber – to the Cayman Islands Department of Agriculture
12 (“the Department”) on or before 17th May 2017, for the immediate destruction of the dogs
13 by the Department.

14 3. The Destruction Order followed his conviction for *inter alia* two (2) aggravated offences of
15 being in charge of a dog which was dangerously out of control in a public place contrary to
16 s.40(4) of the Law.

17 4. The dogs were duly handed over to the Department. One of them has since died. The
18 learned Magistrate made a Further Order on 18th May 2017 staying the Destruction Order
19 pending the outcome of the appeal. Whether she was *functus* and therefore had no power
20 to make the Further Order is now academic.



1 5. By a Notice of Appeal dated 1st November 2017, Mr Merren complains: That the
2 Destruction Order was wrong in law or in excess of jurisdiction; and further or
3 alternatively that it was unreasonable, irrational, and/or disproportionate.

4 6. The appeal is brought pursuant to s.165(1) of the Criminal Procedure Code (2014
5 Revision) (“the CPC”). On appeal, the Court may draw inferences of fact from evidence
6 given before the Summary Court¹. It may reverse, vary or modify the decision of the
7 Summary Court, including passing some other sentence, whether more or less severe².

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EVIDENCE IN SUMMARY COURT

10 7. The learned Magistrate heard evidence from the complainants, Trevor Spinney and Janine
11 Webber, and from Mr Merren.

12 8. Mr Spinney gave evidence as follows³:

13 *Mr. Spinney confirmed that he had been living on Woodstock Road for 3 years,*
14 *and on the day in question, he was living there with his fiancée, Ms. Webber. They*
15 *owned a pit bull mix dog (mix rescue dog from Humane Society). Entrance to the*
16 *complainant’s property is gained through an electric gate. Once opened, the gate*
17 *closes automatically after a few seconds.*

¹ s.179 of the CPC

² S.181 of the CPC

³ Paragraphs 3 – 16 of the Magistrate’s document entitled “Summary of Evidence, Verdict and Sentence”



1 The Defendant, Mr. Merren, is known to Mr. Spinney (and Ms. Webber) – having
2 always lived “pretty much directly opposite” across the road from them. The
3 Defendant has four (4) dogs, and they are normally seen “roaming Woodstock
4 Road”.

5 On the day in question he [Mr. Spinney] and Ms. Webber decided to take their dog
6 for a walk at around 6:30 p.m. The walk is about 30 to 45 minutes long, so they
7 would have returned to their property sometime after 7 p.m.

8 When Mr. Spinney and Ms. Webber returned from walking their dog (the dog was
9 on a lead), Mr. Spinney observed that the Defendant’s 4 dogs were on the
10 [Woodstock] Road “as they normally were ... right in front of my property”. The
11 Defendant’s 4 dogs were not on a lead, and when Mr. Spinney observed the dogs,
12 they were not accompanied by the Defendant, Mr. Merren, or any other person.

13 As Mr. Spinney approached his gate, he observed that the Defendant’s 4 dogs were
14 “kind of scattered [across]” the road: “So I came up to my property and [pushed
15 the button on the fob] that opens the gate...one of the dogs approached us. I turned
16 and stomped my foot to shoo the dog away.” As the dog approached, “he [the dog]
17 was just coming up towards us; as he [the dog] started coming towards us ... the
18 other 3 dogs followed behind.” The dogs were not barking at this point.



1 *Mr. Spinney explained that the reason he stomped his foot was as a consequence of*
2 *“multiple incidents in the past where these 4 dogs have attacked my dog.” He*
3 *explained that he was trying to prevent a further incident because he considered*
4 *that the Defendant’s 4 dogs have a “pack mentality”, and he feared that the*
5 *situation could “quickly escalate into a violent situation.”*

6 *One of the Defendant’s 4 dogs whimpered as a result of Mr. Spinney stomping his*
7 *foot. He did not physically touch the whimpering dog or any of the Defendant’s*
8 *dogs. The one dog that was coming towards Mr. Spinney and his fiancée turned*
9 *away, and at this point their gate was opening, so they proceeded towards the*
10 *entrance of their property.*

11 *As Mr. Spinney and his fiancée were walking down their driveway whilst the gate*
12 *was closing, Mr. Spinney recalled that “Mr. Merren came out of his gate.” Mr.*
13 *Spinney presumed that the Defendant was making his way towards his property,*
14 *and also noticed that the Defendant’s 4 dogs were still on the street: “I heard Mr.*
15 *Merren before I saw him – he said “you kicked my (fucking) dog, you kicked my*
16 *(fucking) dog.”*

17 *In response to the Defendant saying this, Mr. Spinney recalled that he turned*
18 *towards the Defendant and said, “No, I did not kick your dog.” Mr. Spinney was*
19 *on his own property as he said this, and by this time his gate (which did not have*
20 *any damage to it) had closed. In response to this, Mr. Spinney recalled that he*
21 *observed the Defendant “kick in the gate, and came through the gate which his 4*
22 *dogs.”*

1 When asked whether this kick was what caused the damage to the gate which can
2 be seen in photographs 7 and 8, Mr. Spinney agreed that it was. As a result of the
3 Defendant kicking the gate (which caused it to open slightly), the Defendant was
4 then able to "force his way in" to Mr. Spinney's property. Once the Defendant was
5 on Mr. Spinney's property, he observed that the Defendant's 4 dogs were still
6 without leads, and Mr. Spinney further recalls that he was no longer holding his
7 dog's lead.

8 Mr. Spinney confirmed when asked by Ms. Salako that he did not give the
9 Defendant permission to enter his property. Once the Defendant made it into Mr.
10 Spinney's property, the Defendant's 4 dogs "immediately came racing through the
11 gate" towards Mr. Spinney, Ms. Webster and their dog. Mr. Spinney's dog was
12 immediately attacked by all the Defendant's 4 dogs. From this point, it was "utter
13 chaos" as Mr. Spinney and his fiancée screamed for the Defendant to get off their
14 property."

15 Mr. Spinney "reached down and tried to grab" his dog in order to get him into the
16 house and away from the Defendant's 4 dogs, following which he received two
17 bites from one (or more) of the Defendant's 4 dogs. "I was bit on my [right] hand.
18 I was also bit on my upper right thigh." Mr. Spinney recalled that Ms. Webber was
19 also trying to get the Defendant's 4 dogs away, although he accepts that he was
20 not able to see exactly what was happening with Ms. Webber as she was to hi
21 immediate right. Ms. Webber was also screaming at the Defendant to leave their
22 property.



1 Once it became evident that the Defendant's 4 dogs were attacking Mr. Spinney
2 and Ms. Webber, Mr. Spinney recalled that the Defendant did nothing "at first" to
3 stop his dogs, as the whole incident last (sic) a few minutes. "...eventually it must
4 have clicked in that he [the Defendant] was in the wrong [because the Defendant
5 then said to Mr. Spinney] ... maybe you didn't kick my dog and then he started to
6 gather his dogs and leave the property."

7 The injuries received by Mr. Spinney caused him to bleed at the scene of the
8 attack, and, although Mr. Spinney was not initially aware whether Ms. Webber
9 had been bitten, he later became aware that she was bitten by one (or more) of the
10 Defendant's 4 dogs, and was also bleeding from her injury. Mr. Spinney's dog was
11 also injured in the attack, receiving some "puncture" wounds. Mr. Spinney
12 attended the hospital for treatment, receiving 8 stitches and a tetanus shot in
13 respect of the injuries sustained. A complaint was made on the following day to the
14 police.

15 When asked about prior incidents concerning the Defendant's 4 dogs, Mr. Spinney
16 stated that his pit bull mix dog was on one previous occasion attacked by the
17 Defendant's 4 dogs, and another dog he owned previously was also on one
18 occasion attacked by the Defendant's 4 dogs. However, no complaint was made to
19 the police regarding these earlier incidents. Mr. Spinney added: "The purpose of
20 installing the gate following the earlier attacks was to keep [the Defendant's] dogs
21 off my property and to try to hinder any further instances of these attacks."



1 9. Ms Webber corroborated Mr Spinney's evidence.

2 10. Mr Merren gave evidence as follows⁴:

3 *The Defendant's (sic) says on the day in question, he was inside his property by his*
4 *gate working, and he could from this location see Woodstock Road and what was*
5 *happening, and believed that he saw Mr. Spinney kick one of his dogs: "[Mr.*
6 *Spinney] hit the dog; I reacted."* [Mr. Spinney did not accept that he had a stick
7 *with him on the day in question, nor did he accept that he hit (with a stick or*
8 *otherwise) or kicked one of the Defendant's dogs as the Defendant suggested.] *The*
9 *Defendant accepts rushing over to Mr. Spinney's property and opening Mr.*
10 *Spinney and Ms. Webber's gate in order to confront him about kicking one of his*
11 *dogs, following which the dogs started fighting. The Defendant says that in the*
12 *course of the dogs fighting, he too was bitten by Mr. Spinney's pit bull dog.**

13 *Ultimately the Defendant accepted that the attack took place, but denied*
14 *acknowledging (to Mr. Spinney and Ms. Webber) that they did not kick one of his*
15 *dogs as he originally believed.*

16 *The Defendant also seemed to take issue with what can be described as a less than*
17 *"neighbourly" relationship with the complainants, recalling previous incidents*
18 *which had occurred between them as neighbours (which may or may not have had*
19 *a nexus with allegations by the Defendant of racism), and also stating that their*
20 *dog had bitten him also.*

⁴ Paragraphs 29 + 31-32 of the Magistrate's document entitled "Summary of Evidence, Verdict and Sentence."



1 *THE MAGISTRATE'S FINDINGS*

2 11. The findings of fact by the learned Magistrate, material to the present appeal, were as
3 follows⁵:

4 *"I accepted the evidence of both Mr. Spinney and Ms. Webber, who gave their*
5 *evidence clearly and did not waver when challenged by the Defendant.*

6 *Further, I have no doubt in my mind that the 4 dogs, which the Defendant accepts*
7 *owning, failed on the day in question to be under any or any proper control by the*
8 *Defendant, and failing to be under any control on the day in question, one or more*
9 *of the Defendant's 4 dogs injured both Mr. Spinney and Ms. Webber in separate*
10 *attacks.*

11 *The Defendant's case seemed little more than a complaint (which to my mind, had*
12 *little basis) about neighbours with whom he did not have a particularly amicable*
13 *relationship, and who he managed to convince himself had kicked one of his dogs.*
14 *Even if that [were] the case, (although I do not believe that it was), his reaction*
15 *was entirely and wholly disproportionate, resulting in one of the most serious*
16 *cases of failing to keep a dog under proper control I have seen in some time. Not*
17 *only did the Defendant decide to confront the complainants on a mistake basis, but*
18 *[he] took the matter several steps further by kicking open (and damaging) their*
19 *gate, trespassing on to their property and aggressively confronting them, thereby*
20 *leading to his dogs engaging in an attack on the complainants and their dog.*

⁵ Paragraphs 36 (from the last sentence) – 40 of the Magistrate's document entitled "Summary of Evidence, Verdict and Sentence"



1 *I cannot imagine a more frightening instance of a dog attack, entirely unprovoked.*
2 *Even in the privacy (and presumed safety) of the complainant's property, the*
3 *complainants were attacked on a wholly mistaken basis by an angry next door*
4 *neighbour.*

5 *Thus, having been satisfied so that I am sure, I made the following findings of fact:*

6 *a. The Defendant is and was at all material times the owner of the 4*
7 *dogs referred to in the evidence of Mr. Spinney and Ms. Webber*
8 *(The "4 dogs".)*

9 *b. On 17 March 2016 the 4 dogs, whilst being on Woodstock Road,*
10 *were not under any proper control;*

11 *c. The Defendant at no time on 17 March 2016 had any lawful*
12 *business nor was permitted to be on the property of Mr. Spinney;*

13 *d. One or more of the 4 dogs, having entered on to the property of*
14 *Mr. Spinney where they were not permitted to be, injured by biting*
15 *both Mr. Spinney and Ms. Webber during a sustained attack;*

16 *e. One or more of the 4 dogs, having entered on the property of Mr.*
17 *Spinney where they were not permitted to be, attacked and injured*
18 *Mr. Spinney and Ms. Webber's dog;*

19 *f. The Defendant kicked the entrance gate belonging to Mr. Spinney,*
20 *which caused damage to the gate; and*



1 g. On two occasions prior to 17th March 2016, one or more of the
2 Defendant's 4 dogs attacked a dog previously owned by Mr.
3 Spinney and Ms. Webber, as well as their dog, which was attacked
4 and injured on 17th March 2016.

5 The Defendant was therefore convicted of two aggravated offences of failing to
6 keep his 4 dogs under proper control, pursuant to s.40(4) of the Animals Law
7 (2015 Revision) (the "Animals Law"), criminal damage and criminal trespass."

8 12. I take the reference to a "sustained attack" to be a condensed summary of the accounts
9 given by Mr Spinney and Ms Webber. The learned Magistrate was not finding that they
10 were the initial targets of the attack, which would have been contrary to the evidence.

11 13. The learned Magistrate accepted the accounts of the incident given by Mr Spinney and Mr
12 Webber and rejected Mr Merren's account, as she was entitled to do. Her findings of fact
13 are unimpeachable.

14 14. The Defendant, Mr Merren, who is 47 years old, was sentenced to two (2) months (60
15 days) custody, suspended for two years, on both charges of being in charge of a dog which
16 was dangerously out of control; 3 months' (90 days) custody, suspended for two years, on
17 the charge of criminal trespass; and 50 hours service in the Community Payback
18 Programme on the charge of damage to property. He was also ordered to pay \$250.00
19 compensation to Mr Spinney for the damage caused to his gate, payable within 6 months,
20 failing which he would have to serve 2 weeks custody.



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THE RELEVANT LAW

15. Mr Merren was convicted of an aggravated offence under s.44 of the Animals Law, which provides:

“If the owner or, if different, the person for the time being in charge of a dog, allows it to enter a place which is not a public place but where it is not permitted to be and while it is there it injures any person or there are grounds for reasonable apprehension that it will do so, he commits an offence, or, if the dog injures any person, an aggravated offence under this section.”

16. Mr Merren was sentenced under s.41 of the Animals Law. This provides in material part:

“(1) Where

(a) a person has been convicted of an offence against section 40; or

(b) it is made to appear to a summary court that a dog has been dangerously out of control on more than one occasion or is likely to spread disease to any person or animal,

then the court may order either-

(i) that the dog be handed over to the Department of Agriculture for the immediate destruction of the dog by the Department; or

(ii) that the person who is keeping the dog observe such requirements in relation to the future keeping of the dog as the court thinks fit to specify in the order.

(2) A person who fails to comply with a requirement imposed upon him by an order made under subsection (1) (b) (ii) commits an offence.

(3) If a court which has convicted a person of an offence against subsection (2) is not satisfied that the dog can or will be properly controlled in the future, the court may, in addition to punishing that person for the offence, order the destruction of the dog.”

17. The phrase “a dog dangerously out of control”, which occurs in s.41(1)(ii), is defined in section 44 of the Animals Law:



1 *“A dog shall be regarded as being dangerously out of control on any occasion on*
2 *which there are grounds for reasonable apprehension that it will injure any person*
3 *or another domestic animal, whether or not it does so...”*
4

5 18. The learned Magistrate could properly have made the Destruction Order under s.41(1)(a),
6 based on the two offences of which she had just convicted Mr Merren, or alternatively
7 under s.41(1)(b), on the basis that the dogs had been dangerously out of control on more
8 than one occasion.

9 19. Instead, she made the Destruction Order under s.41(1)(3). It was not open to her to do this
10 as Mr Merren had not been convicted of an offence under s.41(1)(2). I sympathise with the
11 learned Magistrate, who was wrestling with quite a technical sentencing provision.
12 Nonetheless, the result of her error is that I am bound to quash the Destruction Order and
13 consider afresh whether to make one.



CASE LAW

20. As far as I am aware, there are no Cayman cases on point. I was not referred to any. However I was referred to several cases from England and Wales. One in particular I find helpful. This is *R v Flack*⁶. It was a case under the Dangerous Dogs Act 1991 (“the 1991 Act”). The provisions in this statute regarding the destruction of dangerous dogs are different from the provisions in the Animals Law, so observations about the English legislation are not necessarily applicable in Cayman.

21. For instance, under the 1991 Act, instead of making an order for the immediate destruction of the dog, the Court can make a suspended order of destruction, so that it shall be destroyed only if the owner fails to keep it under proper control. The court can specify the measures which the owner must take in order to keep the dog under control, just as it can under s.41(1)(ii) of the Animals Law. I have no power to make an order for the suspended destruction of the dogs, but if I did, such an order would have much to recommend it.

22. The Court in *Flack* went on to consider questions of policy which in my judgment, and as a matter of justice and common sense, are applicable in Cayman. Silber J, giving the judgment of the Court, stated at para 11:

“(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 in order to determine what order should be made.”*

⁶ [2008] EWCA Crim 204



1 *ANALYSIS AND DECISION*

2 23. In my judgment the Court should ask itself the practical question whether any measure
3 short of an order for the destruction of the dogs would be sufficient to safeguard the public.

4 24. The history is not promising. Mr Merren, through the account of the incident given to his
5 probation officer and subsequently advanced in his counsel's written submissions, although
6 sensibly not pursued at trial, continued to adhere to the version of events which the learned
7 Magistrate rejected and to apportion at least some of the blame to Mr Spinney. Mr
8 Spinney and Ms Webber are blameless. The fault is entirely Mr Merren's.

9 25. Historically, Mr Merren has allowed his dogs to roam free. They have attacked dogs
10 belonging to Mr Spinney and Ms Webber on at least two prior occasions. It was not until
11 more than one year after the incident took place, and once the Destruction Order was made,
12 that Mr Merren took any steps to address the situation.

13 26. But he did take steps. A Case Status Report prepared by the Department of Community
14 Rehabilitation (DCR) for a hearing in the Summary Court on 4th October 2017 notes:

15 *"At Mr Merren's last appearance before this Honourable Court, he agreed to have*
16 *an enclosure installed around his yard in order to prevent his animals from*
17 *leaving his yard. The Department of Community Rehabilitation visited Mr*
18 *Merren's Red Bay property to verify the progress on the property. The entire*
19 *property has been appropriately fenced off, and he has also provided evidence that*
20 *he can secure the dogs when he leaves the property, preventing them from*
21 *escaping.*



1 *Mr Merren completed the project on his own, taking great care to comply with the*
2 *Courts (sic), while at the same time remaining true to his creative nature. He was*
3 *praised extensively on the hard work put into the enclosure. He also provided*
4 *detail on how he will enhance space to create privacy.”*

5 27. In the circumstances, I am satisfied that there are practical measures short of an order for
6 the destruction of the dogs which would be sufficient to safeguard the public. I therefore
7 make an Order:

8 (i) Quashing the Destruction Order;

9 (ii) That the surviving dogs are returned to Mr Merren; and

10 (iii) That Mr Merren observe the following requirements as to the future
11 keeping of the dogs:

12 a. Mr Merren must ensure that his yard remains secure and enclosed
13 so that they are unable to escape;

14 b. whenever he leaves his property without the dogs, he must ensure
15 that they are tethered or otherwise secured; and

16 c. the dogs must not leave his property unless they are muzzled, on a
17 lead, and accompanied by Mr Merren and/or another adult at a
18 ratio of two dogs to one adult, i.e. so that one adult is holding the
19 lead of no more than two dogs.



1 28. The prosecution expressed concern as to how an order imposing such requirements could
2 be monitored. There is regrettably no formal mechanism to do so. However the
3 neighbours can complain to the police if they see the dogs running loose.

4 29. I direct that the prosecution provide Mr Spinney and Ms Webber with a copy of this
5 judgment so that they can make a complaint if the order is breached. Mr Merren can be
6 prosecuted for any breach. A successful prosecution would almost undoubtedly result in
7 an order for the destruction of the dogs.

8 30. I took the unusual step of speaking with Mr Merren in court directly. I am satisfied that he
9 understands his responsibilities under the order and the probable consequences should he
10 fail to comply with them.

11 31. I make no order as to costs.

12 32. I am grateful to both counsel – Mr Brett Basdeo for Mr Merren and Ms Toyin Salako for
13 the prosecution – for their assistance, and commend Mr Basdeo for representing Mr
14 Merren *pro bono*.

15 **Dated this the 22nd March 2018**

16

17 *S. G. Hellman*

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19 **Justice Stephen Hellman**
20 **Acting Judge of the Grand Court**

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