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Court of Appeal: Dangerous Dogs and Destruction Orders--Barking Up the Right Tree

R v Davies [2010] EWCA Crim 1923

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The appellant had been convicted at Harrow Crown Court of an offence under s. 3(1) of the Dangerous Dogs Act 1991 in that he was in charge of a dog dangerously out of control in a public place. He was given a community sentence which included an element of education, but this appeal concerned the court making an immediate destruction order in respect of his Alsatian dog. The court had found that one of his two dogs, namely his Alsatian, had bitten a human causing injury, which was the first limb of the appeal. Secondly, even if that limb was not made out, the recorder was wrong to make a destruction order and should at most have made a suspended destruction order. The appellant had been walking his two dogs, the Alsatian and a Labrador, but neither was on a lead or otherwise under control. The evidence was that they had run towards his neighbour who was walking her dog on a lead and at least one of them attacked her dog. In an attempt to defend her dog, the neighbour was bitten on the finger causing a deep wound which left her with a permanent disability. Although it was unclear from the witnesses which dog had caused the injury, the recorder found as a fact that it was the Alsatian that was responsible and she made an immediate destruction order.

Held, allowing the appeal, the recorder was wrong to make an order for immediate destruction due to a failure to consider s. 4A of the Dangerous Dogs Act 1991 and the decision in *R v Flack* [2008] EWCA Crim 204, [2008] 2 Cr App Rep (S) 395. This would have allowed her to consider the imposition of a contingent destruction order which could have attached conditions to ensure public safety. Accordingly, such an order was substituted and provided that the dog should be kept under proper control, and must at all times be kept on a lead and muzzled when in public places.

Commentary

The appellant had argued that as it was uncertain which of the three dogs involved had actually bitten the victim, it was wrong to find that it was the Alsatian. However, under s. 3(1) and s. 10(3) of the 1991 Act, the owner is guilty of an offence if a dog is dangerously out of control in a public place and shall be regarded as being so 'on any occasion on which there are grounds for reasonable apprehension that it will injure any person, whether or not it actually does so ...'. This becomes an aggravated offence if injury is actually caused. The jury had rejected the submission that it was the neighbour's own dog that caused the wound, which only left the Alsatian and the Labrador. The recorder had considered that both the appellant's dogs fell within the definition in s. 4(1) 'presumably on the basis of some form of joint attack' (at [10]), but limited herself to finding the culprit to be the Alsatian. The appellant had given evidence that the victim was bitten by her own dog, his dogs were merely 'playing' and that the Labrador was not involved at all. The Court of

Appeal (at [12]) were not persuaded by his novel argument that as the jury had rejected his claim that neither of his dogs had caused the bite, it was not open to the judge to rely on any of his evidence, or the alternative submission that if any of the victim's evidence was accepted it should all have been in which case two dogs were involved. This is because the 'credibility of a witness ... is not indivisible, or a seamless garment'.

Clearly, under s. 4(1) of the 1991 Act once convicted of an offence under s. 3, the court 'may order the destruction of any dog in respect of which the offence was committed' and the subsection provides that 'subject to sub-section (1A) ... the court *shall do so* in the case of ... an aggravated offence' (emphasis added). However, s. 4(1A) states:

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;

Section 4A further provides:

> (4) Where a person is convicted of an offence under section 3(1) or (3) 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;

It was noted by Mackay J in the Court of Appeal that the recorder was not initially referred to these latter provisions, but when she was later reminded of s. 4(1A) she seemed to think the only consideration was whether the dog posed a threat to public safety and she stated that it clearly did. Defence counsel accepted that and made no further submissions. Moreover, she was not referred to the decision of the Court of Appeal in *Flack* where Silber J provided guidance as to when contingent or mandatory destruction orders should be made (*R v Flack* [2008] EWCA Crim 204 at [11]) with which the court agreed in the present case. What is clear is that only a dog which inflicts injury is potentially liable to a mandatory destruction order, but before making any order, either mandatory or discretionary, the court must consider both ss 4(1A)(a) and 4A(4) and (5). If concluding that the dog does not pose a danger to public safety, the court does not have to make a mandatory order. The burden of proving that no danger is constituted, to the civil standard, falls on the party making the assertion.

However, even where a destruction order, either mandatory or discretionary, is otherwise appropriate, there is a further obligation to consider a contingent destruction order under s. 4A. In construing this provision, Silber J in *Flack* stated:

> (iii) The court should ordinarily consider, before ordering immediate destruction, whether to exercise the power under section 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 ...
>
> (iv) A suspended order for destruction under that provision may specify the measures to be taken by the owner for keeping the dog under control whether by muzzling, keeping it on a lead, or excluding it from a specified place or otherwise ...

(v) A court should not order destruction if satisfied that the imposition of such a condition would mean that the dog did not constitute a danger to public safety.

(vi) 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. (*R v Flack* [2008] EWCA Crim 204 at [11])

In light of this omission the immediate destruction order could not stand. As to the possibility of the incident being viewed as a joint attack, it was not appropriate on the facts of the instant case given that (1) a particular dog was found to have caused the injury, and (2) as there was evidence that both the appellant's dogs were involved in the attack the offence was committed whichever of the dogs delivered the bite. It was noted (at [11]) that the 'prosecution did not need to rely on any analogy with joint enterprise between human beings', leaving open the question whether 'if two dogs together attack a human victim but only one causes injury, both dogs "injure" that person, or only one does', for another day. Although a potential issue for the future, it could be a matter of asking if Fido knew or thought that Rover was going to attack!