

Appeal against a Destruction Order made by the Magistrate's Court, in relation to a male Staffordshire bull terrier belonging to the Appellant.

[2022]GRC037

**ROYAL COURT
FULL COURT
ON APPEAL FROM THE MAGISTRATE'S COURT**

6th May 2022

CLINT WAYNE BLONDEL

- v -

THE LAW OFFICERS OF THE CROWN

Decision handed down: 6th May 2022

Judgment handed down: 13th June 2022

Before: Catherine Maureen Fooks, Judge of the Royal Court and Jurats:

**Stephen Murray Jones OBE,
Terry John Ferbrache, Jonathan Grenfell Hooley,
Steven John Morris, Joanne Marie Wyatt, David John Robilliard, Heather Reed,
Simon Ernest Bodkin and James Robert Toynton.**

**Advocate P F Cobb appeared for the Appellant
Crown Advocate R J Calderwood appeared for the Crown**

Legislation and Authorities considered:

The Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988
The Magistrate's Court (Guernsey) Law, 2008
The Summary Offences (Bailiwick of Guernsey) Law 1982 as amended
The Human Rights (Bailiwick of Guernsey) Law, 2000
Blackstone's Criminal Practice 2022 D26:52

JUDGE OF THE ROYAL COURT:

Introduction

1. This appeal arises from a destruction order ("the Order") made by the learned Judge of the Magistrate's Court, Judge McKerrell ("Judge McKerrell"), on the 18th March 2022, in relation to the male Staffordshire bull terrier known as 'Murphy' belonging to Mr Clint Blondel, the Appellant.
2. The Order was made following the conviction of the Appellant at trial for failing to restrain an animal pursuant to Section 2(c) of the Summary Offences (Bailiwick of Guernsey) Law 1982, as amended ("SOL").

3. The Appellant challenges the Order on the basis that it is wrong in principle and/or manifestly excessive. The Order was stayed by Judge McKerrell pending the outcome of any appeal. The Appellant was also fined the sum of £500 but there is no appeal against that penalty.

Materials and submissions

4. The Court has been provided with a sizable bundle of material including evidence from the trial especially that relating to previous incidents involving Murphy, the reports of three experts Ms Deborah Fry, Mrs Lorna Chadwick and the states vet, Mr David Chamberlain, photographs and transcripts of parts of the evidence, the verdict judgment, the sentencing hearing and the sentencing judgment of Judge McKerrell. The Court has considered all of this material carefully as well as the written and oral submissions of counsel.

Constitution of the Court

5. As will be considered below, Crown Advocate Calderwood submitted that the appeal raised only a point of law such that it should be constituted by Judge alone whereas Advocate Cobb submitted that her client's appeal was based on a point of law (wrong in principle) and fact (manifestly excessive) such that Jurats were required to constitute the Court with the Judge. At a preliminary hearing Judge Fooks determined that the Court would sit with Jurats and hear all submissions and then she would decide whether the Jurats were required to make a decision.

The power of the Magistrate's Court to make the Order

6. Section 2(3) of SOL provides as follows:

“Upon conviction of a person of an offence under subsection (1)(a), (b) or (c), the Magistrate's Court may, if satisfied that the animal in relation to which the offence was committed is dangerous, and in addition to any other penalty it may impose, make an order for the animal to be –

- (a) kept under control by the owner or keeper, or*
- (b) destroyed under the supervision of the Chief Officer of Police.”*

Law Applicable to the Appeal

7. The Order is appealable by virtue of Section 2(4) of SOL which provides that *“an order under subsection (3)(b) shall be treated as part of the sentence for the purposes of any enactment conferring a right of appeal”*. It is common ground between counsel that the effect of Section 2(4) of SOL is that the appeal is to be treated as one under The Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988 (“the 1988 Law”). Under section 1 of that Law, the Appellant has a right of appeal against any sentence which is not limited by any of the restrictions in section 2. There are no applicable restrictions.
8. There are no prescribed Grounds of Appeal in the 1988 Law. This Court approaches appeals against sentence as the Court of Appeal approaches such appeals from the Royal Court, namely that it will not interfere with a sentence unless it is wrong in law i.e. beyond the Magistrate's Court's powers, wrong in principle or manifestly excessive.
9. It is common ground that the options for this Court in accordance with its powers under section 6 of the 1988 Law are:
 - (a) to allow the appeal and to substitute for the Order a control order
 - (b) to dismiss the appeal; or
 - (c) to remit the matter to the Magistrate's Court.

The Grounds of Appeal

10. The thrust of the appeal is that the Order was wrong in principle and/or manifestly excessive because a Control Order under Section 2(3)(a) (a “Control Order”) would be adequate protection of the public in the circumstances of the case.

Facts of the case/Approach of the Magistrate’s Court to sentence

11. There have been three incidents of note involving Murphy. In March 2020 Murphy escaped from the Appellant’s property in St Andrew and attacked Otis a miniature schnauzer. Murphy latched onto Otis’ neck and the witness evidence was that he would have ‘ragged’ him had Murphy not been pinned down by a passing male. Otis was critically injured but recovered. His owner was bitten by Murphy when trying to prise his jaws open. The Appellant struggled to get Murphy off Otis despite the assistance of at least two other grown men. Murphy only released Otis at the point where Murphy’s blood flow had been restricted almost to the point of his passing out. The owners were traumatised. This incident did not result in any Court proceedings.
12. In July 2020 Murphy had escaped from his home and had been mistakenly returned to a different property by a member of the public. There was a different Staffordshire bull terrier, Kai, at the address and Murphy and that dog fought. It was acknowledged that this incident was different from the other two as Murphy was accidentally taken into the home of the other dog but the witness evidence was that Murphy had bitten the neck of the other dog. The person who had taken Murphy to the address was bitten when trying to separate the dogs but it was not possible to attribute the bite to Murphy. Again, there were no Court proceedings resulting from this incident.
13. On the 13th April 2021 Murphy again escaped from the Appellant's property and attacked another dog, a beagle called Barney. Murphy latched onto Barney’s side and would not let go despite being struck and kicked. Only after some minutes and concerted efforts by Barney’s male owner and the Appellant was it possible to prise open Murphy’s jaws to release Barney. Barney suffered serious injuries to his chest and his pregnant owner was also physically injured and traumatised while trying to separate the dogs. The Appellant paid the veterinary bills incurred for Barney’s treatment. The Appellant pleaded ‘not guilty’ to failing to restrain Murphy on the basis that it was the Appellant’s friend who had accidentally left the door open which allowed Murphy to escape. The Appellant was found guilty of failing to restrain an animal and he does not challenge that verdict.
14. In addition to the three incidents, it was accepted that Murphy has strayed and had to be reclaimed from the GSPCA on 11 occasions, the first on 4th May 2014 and three in 2020 21st February, 7th May and 28th July, the last one being after the attack on Otis.
15. Murphy has never directly attacked a human but it was and is accepted by the Appellant that humans can be injured if they voluntarily involve themselves in the separation of Murphy from another animal.
16. Murphy has been in the care of the GSPCA since the incident in April 2021.
17. Following conviction, the prosecution indicated that it would be seeking a Destruction Order so the Appellant’s sentencing hearing was adjourned for sentencing for several months to enable the Appellant to instruct his own animal behaviour expert to assess Murphy. Ms Deborah Fry, a certified clinical animal behaviourist, with what the learned Judge described as an impressive career history, was instructed and filed her report dated the 1st February 2022. She gave live evidence at the sentencing hearing and presented to the Court video footage of

parts of her hour-long assessment of Murphy at the GSPCA to support her recommendation that there was no need to euthanise Murphy as the risk he posed could be managed by the measures the Appellant had taken to secure his home and when out with Murphy.

18. At that hearing the Court also heard evidence from Mr David Chamberlain the States vet and Mrs Lorna Chadwick from the GSPCA, who was considered to be an expert by Judge McKerrell based on her relevant experience at Battersea Dogs and Cats Home and at the GSPCA where she had gained direct knowledge of Murphy. Both witnesses recommended that Murphy be euthanised on the basis that he is dangerous and that no steps could be taken which would eliminate or reduce the risk to an acceptable level.
19. All the witnesses addressed the Court on the works carried out by the Appellant to his property after the attack on Barney including fencing and other security arrangements which, he asserted at the sentencing hearing, should ensure that Murphy would not escape in the future.
20. Judge McKerrell adopted Mrs Chadwick's description of Murphy as "something of an escape artist". He referred to the three incidents above and to the 12 (which should be 11) occasions upon which Murphy had come to the attention of the GSPCA either as a stray or via the police.
21. At paragraph 8 of his judgment, Judge McKerrell set out the criteria of which he had to be satisfied before making a destruction order namely that Murphy is dangerous and that the alternative and less severe order (a Control Order) that he be kept under control by the owner or keeper would not be sufficient to alleviate that danger.
22. In reaching his decision he took account of a number of factors:
 - (a) the wider risk to the public and to other animals if no order was made;
 - (b) the undoubtedly significant financial cost the Appellant has incurred while the matter is resolved and the steps he has taken in an effort to make his property secure;
 - (c) Murphy's temperament;
 - (d) Murphy's past behaviour;
 - (e) The video evidence of Murphy at the GSPCA site when he showed a lack of aggression;
 - (f) whether the Appellant is a fit and proper person to be in charge of Murphy in which regard he considered pertinent any relevant previous convictions cautions (there being no relevant) or agreed previous incidents;
 - (g) the nature and suitability of the premises that the dog is to be kept at if allowed to live; and
 - (h) the steps that have been taken by the Appellant since conviction.
23. Judge McKerrell determined to the criminal standard of proof namely that he was sure that Murphy is dangerous and no challenge is made to that ruling. Judge McKerrell took the view that he should also apply that criminal burden and standard to the determination of whether a destruction order should be made or whether measures short of destruction could provide adequate protection against that danger.
24. In considering the risk posed by Murphy, Judge McKerrell considered carefully the evidence of the experts. He referred specifically to Ms Fry's evidence where she conceded that Murphy is a danger to unfamiliar dogs. It was his view that on the evidence before him Murphy in the wrong context, could and almost certainly would, attack again as previously. He was out of control when he attacked Barney and similarly at least when he encountered Otis.

25. Having determined that Murphy is dangerous, Judge McKerrell went on to consider whether measures short of destruction would be enough to negate the danger or reduce it to a proportionate and acceptable level. Judge McKerrell alluded to Murphy's previous escapes and behaviour including his escape despite the erection of fencing and signs. Judge McKerrell noted as a very strong point in the Appellant's favour that he had carried out work following recommendations by Ms Fry. Nonetheless, Judge McKerrell concluded that Murphy is both determined and resourceful, highly protective of his home and, when a dog strays into or near it, there is a risk that he will attack as he attacked Barney and Otis. Judge McKerrell concluded that no amount of security could eliminate the possibility of human error enabling Murphy to escape from the property or whilst on a lead whether muzzled or not. Judge McKerrell concluded that were Murphy to escape, he poses a danger.
26. Having considered all matters carefully, Judge McKerrell concluded that the only way in which he could be satisfied that there would not be a fourth incident would be to order Murphy's destruction.

Submissions on the Applicable legal principles and test on appeal

27. Crown Advocate Calderwood filed interesting written submissions as to the correct standard of proof to be applied to the determination as to whether a dog is dangerous. He did so on the basis that the Appellant would be challenging the determination that Murphy is dangerous. As Advocate Cobb confirmed, after the filing of submissions, that there was no challenge to the determination, there is no need to consider the issue of the correct standard of proof to be applied to that determination and it remains open to the Magistrate' Court and Royal Court in the future to revisit that issue, if desired.
28. Crown Advocate Calderwood also submitted, in his written submissions that the standard of proof to be applied by Judge McKerrell to his decision as to the appropriate order should be the civil standard but he did not pursue that point at the hearing as he submitted that it would make no difference to the questions to be posed to the Jurats. Similarly, there is no need therefore to determine this point and that point is open for future Courts to consider.
29. This appeal is proceeding on the basis that Judge McKerrell applied the criminal burden and standard to the determination and sentencing considerations and no challenge is made to his choice of burden or standard of proof.
30. Both counsel submitted that the appeal ground of wrong in principle was open to the Appellant though Crown Advocate Calderwood naturally did not accept that any error of principle had been made by Judge McKerrell. In their submissions they agreed that Judge McKerrell had applied the correct test namely:
 - (a) was Murphy "dangerous" and, if so,
 - (b) were there measures short of a Destruction Order (i.e. a Control Order) which would eliminate or reduce the risk of danger to an acceptable level or adequately mitigate the risk. The expression "to an acceptable level" or "adequately mitigated" are used interchangeably by counsel and, to an extent by Judge McKerrell.
31. It was also common ground that a destruction order should only be made if it were proportionate.
32. Both counsel agreed that, if the Court considered that Judge McKerrell had been wrong in determining that only a Destruction Order would eliminate or reduce the risk that Murphy poses to the public to an acceptable level or be adequately mitigated, that would amount to an error of principle.

33. Judge Fooks questioned counsel on their assertion that the appeal could be founded on the ground of wrong in principle as she questioned what sentencing principle was said to have been offended.
34. Advocate Cobb said that Judge McKerrell imposed the wrong form of Order as the lesser penalty of a control order would suffice.
35. In support of his submission that the “wrong form of order” is a wrong in principle argument, Crown Advocate Calderwood quoted paragraph D26.52 of *Blackstone’s*:

“If a sentence is not of the appropriate form (e.g., because an offender was not eligible for the custodial sentence imposed), the more appropriate description is that the sentence is ‘wrong in principle’. Equally, an inappropriate combination of sentences can be most appropriately described as ‘wrong in principle’ (Socratous (1984) 6 Cr App R (S) 33, in which the imposition of a short custodial term combined with a probation order was held to be wrong in principle).”

36. In his written submissions, Crown Advocate Calderwood also sought to rely upon principles drawn from the English and Jersey case law. Judge Fooks considered those authorities and made the following decisions:
 - (a) the English case law is of very limited assistance as the statutory framework is quite different;
 - (b) the Jersey case law is, at first blush, of more assistance as the Dogs Jersey Law 1961 appears more similar to the Guernsey legislation but appeals from Orders made in Jersey are civil appeals as distinct from the position in Guernsey where they are criminal appeals. Further the Jersey cases cited all involved the admission of further evidence and rehearing which is not how this Appeal is proceeding;
 - (c) in Guernsey SOL itself prescribes that the appeal is a criminal appeal and therefore whatever standard of proof is applied to the decisions to be made by the lower Court, the appeal falls to be determined on the basis of the usual grounds;
 - (d) Judge McKerrell used the criminal standard of proof which is to the Appellant's advantage as the criminal standard represents a higher hurdle for the prosecution to surmount when applying for a Destruction Order. This Court will approach the appeal applying the usual appeal tests of manifestly excessive or wrong in principle (if applicable).
37. Crown Advocate Calderwood filed a separate submission to the effect that the only ground of appeal open to the Appellant was that the decision is wrong in principle. He submitted that the issue is one of sufficiency of evidence and therefore a question of law for the Judge alone. The Appellant relies on the ground of wrong in principle as an alternative to manifestly excessive.
38. In oral submissions, Crown Advocate Calderwood refocussed on the question this Court should ask itself, whatever the ground of appeal and indeed, he submitted, whether the appeal was civil or criminal. His question was - was it open to Judge McKerrell based on the evidence to conclude that the Order was proportionate because only a destruction Order would reduce the danger to an acceptable level?

Appellant’s submissions on the merits of the Appeal

39. The Appellant submitted that sentence was manifestly excessive because Judge McKerrell was wrong to conclude that Murphy needed to be destroyed; such an Order was disproportionate; that Judge McKerrell erred in finding that a Control Order would not have mitigated the risk to

the public; that he did not take into account adequately or at all the significant changes made to the Appellant's property, at significant personal financial cost, to ensure that Murphy cannot escape; the Appellant had not previously appeared in Court for failing to restrain Murphy nor had he ever been made subject to a control order before; and that were there to be any breach of a control order the Appellant could be prosecuted for that and fined and punished, potentially with a custodial sentence for any further offence e.g. failure to restrain.

40. The Appellant also submitted that the sentence was wrong in principle because Judge McKerrell erred in finding that there were not any measures short of destruction that would have adequately protected against the danger when in fact a Control Order would have been adequate protection; that Judge McKerrell failed to pay sufficient account to the substantial changes made to the property to protect against any possible escape from Murphy and the fact that there would have to be several system failures in order for him to escape including electronic and human error whilst escape was not impossible, it was very very unlikely; that it was not a certainty that were Murphy to escape, he would attack another dog; the issue is with random (not all) unfamiliar dogs; the straying was not an issue and that Judge McKerrell had failed to attach sufficient weight to the evidence and particularly the report of the defence expert Ms Fry whose evidence should have been preferred. The Appellant submitted that Ms Fry was the only expert who had examined Murphy in detail and at length.

Crown Advocate Calderwood's Submissions on the Merits of the Appeal

Oral Submissions

41. In response to the Appellant's submissions on the facts Crown Advocate Calderwood highlighted the following as relevant:
- (a) that the Appellant has a poor record of keeping Murphy under control despite alarming incidents – the escape on 7th May 2020 post-dated the attack on Otis;
 - (b) that Murphy has a propensity to escape when given the opportunity;
 - (c) that Murphy presents a real and serious risk to other pets and any owners intervening in an attack on such pets;
 - (d) that the measures implemented by the Appellant could not be trusted.
42. Crown Advocate Calderwood asserted that such risks cannot be adequately managed by control measures such as increased home security or muzzles because this would require the Court to make a number of assumptions including that Murphy will always be owned by the Appellant and in the same place and that there will not be any human error leading to his escape either by the Appellant or by anyone else who has the care of Murphy temporarily. He set out certain passages from the evidence of Mrs Chadwick and Mr Chamberlain. The recommendation for a Destruction Order is based on Murphy's propensity to attack without warning causing serious biting injuries requiring medical or veterinary care and that the risk of such attack cannot be eliminated. Murphy can escape in a split second. Specifically he quoted the words of the States' vet: *"We have a choice between guaranteeing the public safety or putting the safety of the public in the charge of the jailer who is unfortunately the owner so there is always going to be a possibility and if you want us to guarantee to protect public safety then there is only one way forward."* Crown Advocate Calderwood went on to refer to the concession made by Ms Fry that there could be no 100% guarantee of avoiding a further incident. He also referred to the incredibly strong bite of Murphy's breed and the problem of getting him to release once he has latched onto another animal. It was Crown Advocate Calderwood's closing submission that Judge McKerrell was entitled to conclude that he could not afford to trust in the safeguards being proposed by the Appellant and that only a Destruction Order would adequately mitigate the risk.

43. Crown Advocate Calderwood referred the Court to the Appellant's comment at interview that Murphy would want to kill an unfamiliar dog.
44. Crown Advocate Calderwood responded specifically to the point that the Appellant could be prosecuted for further breaches that this would not spare the other dog or humans potentially injured in any future incident. No custodial sentence or further opportunity for a Destruction Order would arise unless there was another serious incident.

Decision on wrong in principle Ground of Appeal

45. In order to succeed on a submission of wrong in principle the Appellant must convince Judge Fooks that Judge McKerrell passed a sentence which offends a specific sentencing principle [e.g. totality, wrong combination].
46. It is the decision of Judge Fooks that there is no principle of sentencing engaged in the process whereby Judge McKerrell had to choose between a Destruction Order, Control Order or no order. SOL gave Judge McKerrell the power to make a Destruction Order or a Control Order (or neither). Whilst the scope of the orders open to Judge McKerrell is more limited than those open to a sentencing Magistrate or Court when faced, for example, with an offender in a theft or drugs case, it is still the case that he had a range of options from which he had to determine the appropriate one in all the circumstances. An appeal against such an exercise fall squarely within the grounds of manifestly excessive. Inherent in this decision of Judge Fooks is the rejection of Crown Advocate Calderwood's submission that the only ground of appeal open to the Appellant is that of wrong in principle.
47. Judge Fooks ruled therefore that the only ground of appeal applicable was that of the Order being manifestly excessive which requires the Court to be constituted with Jurats and she went on to direct the Jurats accordingly.
48. If Judge Fooks is wrong and the decision of Judge McKerrell is open to challenge on the basis that it was wrong in principle, Judge Fooks rejects that ground of appeal; the decision of Judge McKerrell was not wrong in principle.
49. It is the case, of course, that any order made by the Court must be proportionate, particularly when it concerns the destruction of a person's property and therefore engages that person's rights under Article 1 of Protocol 1 of the European Convention on Human Rights given domestic effect by the Human Rights (Bailiwick of Guernsey) Law, 2000. The issue of proportionality is one for the Jurats to consider as part of the determination as to whether or not the order was manifestly excessive and they were directed accordingly.

Consideration and decision on the ground of manifestly excessive

50. In order to succeed on a submission of the Order being manifestly excessive, the Appellant has to satisfy the Court (the Judge and Jurats) that the Order falls outside the appropriate range of orders and not just because it might be more severe than the Jurats themselves would have made. As Crown Advocate Calderwood submitted, it is not a case of the Jurats considering the evidence for themselves and deciding what order to make. Judge McKerrell had the benefit of the live evidence.
51. The Court kept in mind that the purpose of an Order is to protect the public and not to punish the Appellant so any Order must be proportionate and necessary.
52. In this case Judge McKerrell determined to the criminal standard, i.e. that he was sure that Murphy is dangerous, and that the Order is necessary and proportionate, the alternative of a

Control Order not being sufficient to eliminate or reduce the danger to an acceptable or proportionate level. He carried out an extremely thorough review of the evidence as to Murphy's nature and carefully set out the factors he identified as relevant to his decision. He specifically addressed the issue of proportionality.

53. Having considered carefully all the materials and relevant submissions, the Court concluded that the Order made was entirely appropriate in all the circumstances including:

- (a) Murphy's history of escaping, his drive and propensity to attack unfamiliar dogs when he could retreat, which was said to be in his nature;
- (b) the ferocity of the attacks, the strength of his bite and the extreme difficulty even of his owner to disengage Murphy's jaws once latched on;
- (c) the risk of injuries and trauma to other dogs;
- (d) the inevitability of humans intervening and being injured and traumatised, such that the potential consequences of escape are very serious;
- (e) the lack of control measures implemented by the Appellant, even after the incidents with Otis and Kai;
- (f) despite the recently improved security, the risk of escape through human/equipment error cannot be ruled out and is just too great to be eliminated or reduced to an acceptable level, there is no acceptable level of risk as the consequences are too severe; and
- (g) the only conclusion possible on any test was that only a Destruction Order would suffice.

54. Judge McKerrell's decision-making process and conclusion that the public can only be protected by the Order cannot be faulted and the Order cannot be said to be manifestly excessive. The Court was unanimous in its decision. The Court acknowledged that this decision will be difficult for the Appellant.

Conclusion

55. Accordingly, the Appeal is dismissed.

56. The Court is grateful to Counsel for their full and detailed submissions.

Catherine Fooks
Judge of the Royal Court

13th June, 2022