



THE COURT OF APPEAL

[29/19]

Birmingham P.

Edwards J.

McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

JAMES KAVANAGH

APPELLANT

JUDGMENT of the Court delivered on the 10th day of April 2019 by Birmingham P.

1. James Kavanagh was sentenced on 22nd February 2019 to a term of three years imprisonment, having entered pleas of guilty to twenty counts of causing or permitting unnecessary suffering to or endangering the health and welfare of an animal contrary to s. 12 of the Animal Health & Welfare Act 2013, and ten counts of failing to protect animal welfare contrary to s. 11 of the Animal Health & Welfare Act 2013. The pleas were entered and accepted on a "full facts basis" in a situation where there were one-hundred and twenty-six counts contrary to the Animal Health & Welfare Act 2013 on the indictment. When imposing sentence, the Circuit Court Judge imposed a disqualification under s. 58 of the Animal Health & Welfare Act 2013, disqualifying James Kavanagh from any involvement with dogs or horses for life. In addition, the Judge ordered that Mr. Kavanagh pay a sum of €35,000 as a contribution towards the outlay incurred by the ISPCA in relation to the case which was measured at €59,149.

2. Mr. Kavanagh has now appealed against the severity of the sentence imposed and sought, and was granted, a priority hearing for his appeal. Unusually, much of the focus of attention in the context of an application for bail, or alternatively, a priority hearing, and indeed at the hearing itself, was on matters that occurred subsequent to the imposition of sentence. The prosecution had its origin in a search, under warrant, of premises at Raheenleigh, Myshall, County Carlow, the business premises of the appellant: James Kavanagh, carried out on 14th April 2015 by members of An Garda Síochána and officers of the ISPCA. The premises were licensed as a dog breeding centre. However, the main activity carried on there was in the nature of a dog rescue centre which involved dogs being brought onto the premises, kept there for a period, and then dispatched to different locations, in particular, locations in England.

3. It should be explained that the appellant's wife: Mrs. Jenny Kavanagh, who was a co-accused who received a suspended sentence, was licenced under the Dog Breeders Establishment Act 2010 to operate a dog breeding establishment, having been licenced for that purpose by Carlow County Council. The licence permitted Mr. Kavanagh to keep a maximum of ninety bitches over six months old. However, the nature of his business evolved somewhat, in that he discovered that it was financially more rewarding to take in and transport dogs. Indeed, it appears that in 2014, he had applied to Carlow County Council for a rescue licence, but this was refused. Nonetheless, he continued to take in dogs, both from individual owners and from dog breeding establishments, and then transported these to dog rescue centres in England. These centres paid a fee of the order of €40 to €50 per dog and also covered the cost of travel expenses and a travel passport for each dog.

4. The sentence hearing heard from Garda Catriona Denny, the investigating Garda, and also from Mr. Conor Dowling of the ISPCA. The scene encountered by the Gardaí and the ISPCA party was a truly shocking one. Later in the course of his sentencing remarks, the Circuit Court Judge would describe it as "like something biblical". The premises were in a truly appalling condition. In total, three hundred and forty dogs and eleven horses had to be removed from the premises over a number of days. In addition, twenty dogs and four horses were euthanised because of their condition.

5. In the course of the sentence hearing, a booklet of photographs was produced and the Garda and ISPCA witnesses gave their evidence by reference to these photographs. In addition, the Court viewed a video. At this stage, perhaps the best account is to be found in the probation report.

6. This report records the fact that during the search of the premises, Gardaí and ISPCA personnel discovered atrocious levels of animal neglect and cruelty. The removal of the animals took place over a period of eleven days. The worst of these cases were removed immediately. However, some animals were less fortunate and had to be euthanised on site for humane reasons. A number of dead dogs were discovered, some of which had apparently been killed and partially eaten by other dogs. The premises were strewn with skeletal remains, dead sheep, and rotting horse carcasses. Gardaí witnessed dogs eating dog and horse carcasses as it appeared that this was their only source of food. A total of four horse carcasses were found in separate dog enclosures.

7. According to information contained in the Book of Evidence, the horses did not show any signs of being shot or given lethal injections (as this would have poisoned the dogs), and it was stated that the horses had died shortly before or after being fed to the dogs. All of the animals had health problems. Almost all of the animals were distressed, in pain and discomfort, and suffered from multiple afflictions and diseases. Many of the dogs had parasitic infestations, skin diseases and eye and ear infections. Many of the

animals were also severely emaciated, starving, dehydrated, soaked in urine, and caked in excrement. Burnt out fires were discovered on the premises revealing the remains of dogs, horses and sheep. Some small breed dogs were discovered crowded together in inadequate sized cages with no freedom to move, no access to food or water and no shade from the sun.

8. During the course of the sentencing hearing, reference was made to the statement of Mr. Kieran Considine, the veterinary services provider to Carlow County Council, which noted that the facilities were grossly substandard, that the dogs showed signs of contagion, pathological conditions and cannibalistic tendencies. Mr. Considine also raised concerns about the immediate serious risks to public health due to the feeding of carcasses to the dogs and the accumulation of waste matter within close proximity of a water treatment plant and the River Burren. He stated that keeping animals in such conditions caused risks to humans by the spread of infection and contagious diseases. It was also noted that such conditions attracted higher levels of vermin, for example, rats, potentially increasing the risk of humans contracting Weil's Disease.

9. In terms of the business that was being carried out at the premises, it is of significance that in 2012, the Minister of Agriculture, Food and the Marine announced the introduction of Pet Passports which were to come into operation on 28th December 2014. These regulations required dogs and cats to be microchipped and vaccinated for rabies at least twenty-one days prior to travel. Mr. Kavanagh, in his interactions with the Probation Service, explained that his premises became the "dumping ground" for dog breeders involved in export who were not prepared to or were not in a financial position to cover the cost of the pet transport scheme. It appears, though, that Mr. Kavanagh actively sought out dog breeders and others and offered to take dogs with a view to having them rehomed.

10. In terms of the appellant's background and personal circumstances, he was born on 21st November 1970, is a married man, the father of five children, the eldest being a second year apprentice electrician and the youngest child, aged twelve, in 6th class in primary school and came from a farming background. He had a number of previous convictions. These included a number of matters dealt with in the District Court in Muine Bheag on 9th February 2004. On that occasion, he was convicted of attempted false pretences and producing incorrect documentation in connection with tax and obtaining funds from the Department of Agriculture, Food and Rural Development by false pretences. It appears that the background to these charges is that in the course of a Department of Agriculture investigation, it was discovered that Mr. Kavanagh was making false claims to the Department for grant assistance in respect of animals that he did not have. In addition, on 29th November 2006, he was convicted in Carlow District Court of the offence of drunk driving. The sentencing court heard that he and other members of his family had been subjected to vitriolic abuse. The sentencing court also heard that his wife, who at the time was a co-accused, had significant health difficulties including suffering from a heart condition.

The Judge's Approach to Sentencing

11. The Judge commenced his sentencing remarks by referring to the vilification of Mr. Kavanagh and his wife on social media, referring to keyboard warriors and to the fact that there had been nasty bullying behaviour. He then turned to what he described as the substantive matter before the Court. He referred to the fact that the headline sentence which the Court can impose was five years' imprisonment and/or a fine of up to €250,000. The reference to headline sentence is perhaps misleading, in that what the Judge was in fact referring to was the maximum sentence permitted by statute. The Judge then went on to refer to the obligation on the Court to deal with everything in proportion and commented that the circumstances of the accused before him were unique to him and to him alone. The Judge said he was entitled to take into account certain mitigating factors, not least the entry of a guilty plea, and in that regard, he accepted a submission that had been made to him that had a trial been contested, it would probably have taken not less than three weeks. He then commented:

"[t]his is an extraordinary case and certainly it is an extraordinary case in my experience. It is extraordinary to find someone of farming stock, a farmer by any other definition, guilty of such an appalling crime as is best illustrated by reference to the video film which we sat through this morning, and the pictures which paint a complete story as far as this Court is concerned. However, I do accept that you acknowledge that you did wrong, I also, but I do notice that you didn't offer the Court any suggestion of remorse, but you did acknowledge that you did wrong. It also seems to me that it has to be the case that having received a licence, a very short time previously, that matters did run away on you, but it doesn't take away from the gravity of the offence of which you stand convicted.

Words fail me to describe what those pictures depict in relation to the conditions that those unfortunate animals found themselves in, both in terms of their, if you like, living accommodation, and it appears to this Court that the only comprehensible conclusion that I can reach is that, yes, you did become, or your premises did become, a dumping ground for others. And, sadly, for the poor unfortunate animals concerned and, sadly, for you and your family and everyone associated with you, you didn't know how to, or we know you certainly didn't, seek help until it was too late, and by the time the Guards arrived and the authorities arrived, the scene was like something biblical, what they were presented with. And anyone who has seen those pictures will, undoubtedly, see them again and again in their mind's eye, and they are just hard to comprehend. But, as I say, I don't believe that you were born into this world an evil man. As a farmer, I don't believe that you intentionally visited such horrors on those defenceless animals, big and small. However, as I say, you have acknowledged the gravity of your offence. I acknowledge that you have pleaded guilty, I have read your Probation and Welfare Report and I have noted that you are motivated to a large, to some significant degree, by profit and trying to generate profit and probably, to use the vernacular, you are trying to make a living and that's not wrong when it's done - - when you go about it the right way.

In the circumstances, I do not believe that you can escape a custodial sentence and I am of the view that you should pay at least some of the costs involved and incurred in connection with this investigation. As I say, I acknowledge that you have saved the prosecution a huge amount by your early plea and by participating with the authorities subsequent to that. It is a tough lesson, but I have to impose a sentence on you in this case and the sentence that I am going to impose is one of three years. In relation to the costs of the investigation, counsel has asked for the costs of the prosecution and I am not going to accede to that application, but I am going to make an order in relation to the ISPCA's costs, and in acknowledging your early plea, I am going to measure them down marginally from the €59,000 which was referred to in evidence and I am going to measure them at €35,000."

The Judge then confirmed that he was not proposing to suspend any part of the sentence.

12. While acknowledging that what occurred at Mr. Kavanagh's premises was obviously very serious indeed, counsel on behalf of the appellant, both in the trial court and again before this Court, has made the point that what occurred was neglect, perhaps neglect on

a grand scale, but nonetheless, neglect as distinct from cruel and intentional infliction of suffering. He also makes the point that the premises had been inspected by Carlow County Council in October 2014, and that therefore, the shocking state of affairs revealed by the inspection on 14th April must be seen as having been time-limited.

13. This was a case of exceptional seriousness. A measure of just how serious it is, is to be found in the evidence of Conor Dowling, Chief Inspector with the ISPCA. Dealing with the situation of one of the horses that was euthanised, he commented that in his opinion, that animal had suffered unnecessarily from severe malnutrition and poor husbandry in one of the worst cases of cruelty he had had the displeasure of attending over the last ten years. At another stage in his evidence, he commented that he had been twenty years in his job and never before or since had he come across anything like it. In terms of dog welfare, specifically, the scale and severity of what he witnessed was way above anything else that he dealt with.

14. In assessing the severity of the offending and seeking to identify an appropriate sentence, it is necessary to bear in mind that this was not a case, as sometimes occurs, of an individual in charge of an animal or animals, failing to care for the animal properly because of old age, frailty or by reason of some other inadequacy. This was a case of commercial activity on a very large scale and it is an inescapable conclusion that failing to care for the animals formed part of the business model.

15. Time and time again, this Court has made the point that before it can intervene, something of the nature of an error in principle must be identified. In the Court's view, in selecting the sentence that he did, the Circuit Court Judge was imposing a sentence that was within the available range. His task was not an easy one because, thankfully, there have been few, if any, comparable cases to come before the Court. Nonetheless, we have not been persuaded that he selected from outside the available range. On the contrary, we feel that the sentence chosen by him fell well within the range of appropriate sentences for offending of such seriousness.

16. It is in those circumstances that we feel that we must dismiss the appeal.

17. There is just one further matter on which we would wish to comment. Unusually, we have been asked to hear this case within a matter of weeks of the Circuit Court hearing. The application for bail post-sentence, or in the alternative, for a priority listing of the appeal, and it was on the latter basis that it was approached by this Court, placed particular emphasis on events that have occurred since the imposition of sentence. This has seen the Kavanagh family lose their teenage son in a road traffic fatality, as well as a very disturbing incident involving another son and the almost impossible pressure to cope that this has placed on Mrs. Kavanagh. This situation has been compounded by the shocking, indeed one can say, disgusting, response there has been on social media to the tragedy that has befallen the Kavanagh family. In addition, there is the fact that because of the notoriety that this case has achieved, Mr. Kavanagh has been subject to a number of serious threats to his safety and wellbeing from other prisoners which has impacted on the regime under which he serves his sentence.

18. The Court does not wish to appear to be hard-hearted or indifferent, but it is the case that the long-established jurisprudence of the Court, including a decision of the Supreme Court, which is of course binding on us, puts beyond doubt that the role of this Court is confined to reviewing the correctness or otherwise of the sentence that was imposed at first instance, and that this Court has regard to matters that have emerged post-imposition of sentence, only if the stage is reached where the Court is engaged in resentencing. The developments post-sentence in this case are very unusual, perhaps even to the point of being unique, and they are of course matters which the Executive is perfectly free to consider, and indeed, which the Executive may very well wish to consider.