

12/12; [2012] WASC 113

SUPREME COURT OF WESTERN AUSTRALIA

HOLDING v PARKIN

Hall J

14, 30 March 2012

CRIMINAL LAW – ANIMAL CRUELTY – WHETHER SENTENCE OF IMPRISONMENT MANIFESTLY EXCESSIVE – IMPORTANCE OF THE PARTICULAR CIRCUMSTANCES: *ANIMAL WELFARE ACT 2002* (WA), s19(1).

As a result of a domestic dispute, H. went to a chicken pen at the rear of his property and took his partner's favourite chicken to a garden bed where he struck the chicken with an axe fatally injuring it. H. was subsequently charged with a number of offences including cruelty to an animal and was sentenced to seven months' imprisonment. Upon appeal—

HELD: Appeal allowed. Sentence quashed.

1. Section 6 of the *Sentencing Act 1995* (WA) requires that sentences be commensurate with the seriousness of the offence. This requires consideration of the circumstances of the commission of the offence. The relevant factors in assessing the circumstances of an offence of animal cruelty pursuant to s19 of the *Animal Welfare Act* are:

1. the nature of the harm inflicted on the animal (see definition of 'harm' in s5);
2. the length of time during which the animal suffered;
3. the amount of suffering caused, that is the extent of any injury or the degree of pain or the amount of distress;
4. the vulnerability of the animal, both in general and in relation to the particular offender;
5. whether the conduct that caused the harm was a single act or a course of conduct; and
6. whether the conduct was deliberate, intentional or planned, or was neglect of a duty to animals (one will not necessarily be more serious than another, it will depend upon the circumstances).

2. In any particular case it will also be necessary to take into account any mitigating factors, including those factors that are personal to the offender.

3. When all of the circumstances of the offence were considered, this was a case which was clearly distinguishable from those that have attracted immediate imprisonment. In any event, such a sentence could not properly be imposed unless all other available sentencing options were found to be inappropriate: s39 *Sentencing Act*.

4. The range of options available to the magistrate was reduced because s19 of the *Animal Welfare Act* provided for a minimum fine: s42(2a) *Sentencing Act*. However, his Honour still had options which, whilst recognising the seriousness of the offence, did not require that the appellant serve a term of immediate imprisonment. It was not open to the magistrate to come to the view that no other sentence but one of immediate imprisonment was appropriate. Other possible sentences were clearly open and entirely appropriate in this case.

HALL J:

Introduction

1. On 14 March 2012 I gave brief oral reasons for decision in this matter and stated that I would publish more detailed reasons at a later date.

2. On 8 December 2011 the appellant was sentenced in the Kalgoorlie Magistrates Court to 7 months' imprisonment for an offence of cruelty to an animal contrary to s19(1) of the *Animal Welfare Act 2002* (WA). He had previously pleaded guilty to that charge.

3. The appellant sought leave to appeal against that sentence on the ground that it was manifestly excessive when considered in the light of the circumstances of the offending, his personal circumstances and the sentencing standards applicable to offences of this nature. For the reasons that follow I allowed the appeal.

Facts

4. The facts of the offence are that on 14 June 2011 the appellant was at home with his partner and child. There was an argument regarding some cannabis plants that the appellant was growing. The partner then went out to the rear yard and pulled out the plants and stomped on them.

5. The appellant, angered by what his partner had done, came out and grabbed her by the throat. He then pushed her away and raised his fists before grabbing her by the throat a second time. The assault on the partner was the subject of a separate charge which resulted in a 2 month sentence of imprisonment, ordered to be served concurrently. That sentence is not the subject of this appeal. The facts of the assault are only relevant to provide context for the animal cruelty offence.

6. The partner ran away, taking the child with her. She went to the police to make a complaint. The appellant then went to a chicken pen at the rear of the property. The pen contained a number of chickens belonging to the appellant and his partner. He selected one that he knew his partner was particularly fond of. He took the chicken to a garden bed, where he intended to kill it using an axe. He struck the chicken with the axe but did not decapitate it. This was said to be because the blow was not hard enough. The chicken was, however, fatally injured, very likely because its neck was broken. It flapped and thrashed for 10 to 20 seconds before the appellant left it.

7. There was a dispute as to the alleged facts at this point. The appellant's counsel told the magistrate that the appellant was of the view that the chicken was dead despite the fact that it continued to move, that is to say that the movement was said to be the postmortem nervous movement known to occur in chickens. It was also submitted that the appellant had not left the chicken to die as he thought it was already dead. This was accepted by the prosecutor.

8. There was no evidence that the chicken was alive after being hit, nor was there any evidence that the chicken suffered a prolonged or unduly painful death. Indeed, on the appellant's own account of what occurred, which was the only available evidence, it must have died within a matter of seconds.

9. The appellant left the dead chicken in clear view, intending that his partner should find it. Police attended a short time later and the appellant was arrested and interviewed. He made admissions as to what had occurred, including the killing of the chicken. He said in that regard that he had killed it because he was angry at his partner's behaviour and because he knew the chicken meant a lot to her.

10. The personal circumstances of the appellant were set out in a pre-sentence report and a psychological report which were available to the magistrate. Those reports indicate that the appellant had no prior criminal record and that he had significant mental health issues. He was diagnosed as having an anxiety disorder with symptoms of post-traumatic stress linked to physical and psychological abuse that he suffered as a child. He had also been diagnosed four years prior to the offending with bipolar disorder. Those conditions had required him to take medication, but there had been inconsistent use of that medication. At the time of the offence he was in a period of adjustment with new medication and, it was submitted, during such a period his mental health state became worse before it improved. It was said that in such circumstances he had difficulties in coping.

11. It was also clear from the submissions made to the magistrate that the appellant had accepted responsibility for his actions. The reports stated that the appellant was a low risk of re-offending and had shown a willingness to engage in counselling. The submissions made to the magistrate were that the appellant was remorseful for his conduct, that he came from a stable relationship, that he had apologised to his partner and that she had accepted his apology.

12. The cannabis that was the cause of the dispute with the partner was said to be used by the appellant for self-medication in respect of his mental health issues. I should note in that regard that the transcript indicates that he received an infringement notice in respect of the growing of the cannabis.

13. The partner was in full-time work and was the primary breadwinner for the family. The appellant was the primary carer for their 17-month-old child. A custodial sentence would mean that the child would have to be placed into day care. There was no suggestion that the appellant had been anything other than a good and attentive carer for his son.

Magistrate's reasons

14. The magistrate stated that he regarded the *Animal Welfare Act* charge as being very serious. He referred to cases from other states which had attracted sentences of imprisonment. I will return to those cases shortly.

15. The police prosecutor did not submit that a sentence of imprisonment was the only appropriate penalty for this offence. Indeed, the prosecutor expressed surprise at the sentences that the magistrate had indicated had been imposed in other cases. He said he was not familiar with those cases and could not comment on them. The prosecutor stated, frankly, that he had been focussing more on the assault offence.

16. In his sentencing remarks the magistrate referred to the factual circumstances of the offending. He described the act of killing the chicken as being a 'malicious and very calculated act of revenge'.

17. The magistrate said that whilst there was no 'set tariff' for offences of this type, he considered that offences appeared to fall into two general categories. He said that the first of these categories was cruelty by omission; that is, cases where there had been a failure to provide proper care for an animal. He said that offences in this category were usually dealt with by fine. He said that the second category was offences involving intentional acts of cruelty. He referred to two cases in this category: *Maher v The Queen* [2011] VSCA 136 and *Bond v Royal Society for the Prevention of Cruelty to Animals (SA)* [2011] SASC 19. He noted that in those cases, animals had been killed in the context of domestic violence. Both of those cases had resulted in sentences of imprisonment.

18. The magistrate considered that the present case fell into the second category of offences. His Honour then said:

I appreciate that those cases are guides only and certainly not binding upon me in determining the appropriate penalty for this matter. They do illustrate the very serious regard that courts have for this kind of violence and cruelty towards animals in which the animal becomes what could be described as the innocent, powerless and unwitting victim of the offender's anger, malice and revenge towards another.

Such acts of violence against domesticated pets are invariably likely to occur behind closed doors and are relatively easy to conceal from authorities, although clearly your intention here was to make the death very visible to your partner. Such violence targets a victim that cannot seek help nor, if they happen to survive, communicate what has happened other than by the physical evidence of their injuries. For all these reasons such offences are by their nature, in my view, difficult to detect and prosecute. There needs to be a penalty, in my view, that makes it clear to you and more importantly, to the community, that such violence towards animals will not be tolerated.

Domesticated animals completely vulnerable to the petty whims and emotional fluctuations of those who are responsible for their care deserve the utmost protection of the law. The punishment that I impose in this case must properly reflect the seriousness of this offence. Denunciation is also an important factor in sentencing for an offence such as this, that is, a penalty that appropriately reflects the community's legitimate disgust and condemnation for this kind of behaviour. General deterrence demands a punishment that makes it clear to the community at large that this kind of behaviour will not be tolerated, the message being this: that if you kill an animal in your care out of anger and spite you can expect a severe penalty.

In carefully assessing all these matters, including as I have said, your plea of guilty, your remorse, the absence of a record, your relatively young age, your abusive background and positive prospects for rehabilitation, I'm nevertheless of the view that the very serious nature of this offending, particularly in respect to the animal welfare charge, the need for a penalty that properly reflects the very serious nature of that charge, the need for a penalty of general deterrence, that the only appropriate sentence is one of imprisonment.

Turning my mind again to all the matters considered in reaching that decision and for the same reasons in respect to seriousness and general deterrence primarily, I am not ultimately of the view that the sentence should be suspended (ts 16 - 17).

The ground of appeal – was the sentence manifestly excessive?

19. The relevant principles applying to an appeal against sentence are well known. They are conveniently summarised in *Wilson v The State of Western Australia* [2010] WASCA 82. That case related to an appeal to the Court of Appeal under pt 3 of the *Criminal Appeals Act 2004* (WA), but the principles are materially the same for appeals from magistrates under pt 2 of the Act.

20. A ground of appeal which alleges that a sentence is manifestly excessive asserts the existence of an implicit error: *Royer v The State of Western Australia* [2009] WASCA 139; (2009) 197 A Crim R 319 [126] (Buss JA); *Dinsdale v The Queen* [2000] HCA 54; (2000) 202 CLR 321 [6] (Gleeson CJ and Hayne J). A claim of manifest excess depends on establishing implied error in the type or length of sentence imposed. The implied error that must be established is that a sentence of the nature or length imposed could not have been reached in the exercise of proper sentencing discretion.

21. In order to determine if a sentence is manifestly excessive it is necessary to view it in light of the maximum penalty prescribed by law for the offence, the standard of sentencing customarily observed for that type of offence, the level of seriousness of the circumstances of the offending and the personal circumstances of the offender: *Chan* (1989) 38 A Crim R 337, 342 (Malcolm CJ); *McDougall v The State of Western Australia* [2009] WASCA 232 [12] [13] (McLure P).

22. Section 19(1) of the *Animal Welfare Act* provides that the penalty for an offence of being cruel to an animal is a fine of between \$2,000 and \$50,000 and/or imprisonment for a maximum of 5 years. Increased penalties exist where the offender is a body corporate: s 88. Somewhat unusually, given the size of the maximum penalties, the offence is not an indictable one: s 67 *Interpretation Act 1984* (WA). In some other states serious animal cruelty is an indictable offence.

23. The *Animal Welfare Act* was enacted in 2002 and came into operation on 4 April 2003. It replaced the *Prevention of Cruelty to Animals Act 1920* (WA). The *Animal Welfare Act* significantly increased the maximum penalty for cruelty offences. The maximum penalty under the repealed Act was \$5,000 or 12 months' imprisonment: s 4(1). This increase must be taken as being an indication that the legislature viewed offences of this type as being serious and that previous maximum penalties were inadequate.

24. The change in the law and to the maximum penalties for cruelty offences in 2003 is such that cases from this State prior to that time are of little assistance in regard to sentencing standards. An example of such a case is *Daniele v Weissenberger* [2002] WASCA 289. On the hearing of this appeal the parties referred me to a number of cases, including the two referred to by the magistrate. All of those cases were from other jurisdictions and in respect of different legislation with varying maximum penalties. That also limits the usefulness of those cases. I will, however, review them.

25. Before turning to the cases it is important to state the possible relevance of other cases. Consistency in sentencing is a desirable objective: *Hili v The Queen* [2010] HCA 45; (2010) 242 CLR 520. However, consistency assumes that cases are truly comparable. In respect of many offences the circumstances in which they can be committed will vary so widely that it will be impossible to make useful comparisons or discern a meaningful range. In any event, even where a range can be established the fact that a sentence is outside that range is only indicative, not conclusive of error. There is always the possibility of an offence which calls for a sentence outside the usual range. Furthermore, the fact that a sentence is within a range does not conclusively prove that there is no error of discretion. This is because the particular circumstances in which an offence was committed will always be an important factor.

26. In *Maher* the offender was convicted of a number of serious offences. These included two offences of stalking, intentionally damaging premises by fire with intent to endanger life, possession of an item with the purpose of using it to damage premises in a way that would likely to endanger life, trespassing with intent to damage property, trespass with intent to commit an assault, being armed with offensive weapons and four charges of breaching an intervention order. There was also a charge of aggravated cruelty to an animal. With respect to the cruelty charge the offender was initially sentenced to 18 months' imprisonment to be served cumulatively on other terms. Following an appeal this sentence was reduced to 12 months' imprisonment of which 3

months was to be cumulative. The offences were all part of a concerted course of stalking of the ex-partner. After being charged with some of the offences and being released on bail, the offender killed his ex-partner's cat by strangling it with a telephone lead. This offence was committed after the offender had broken into the victim's home and damaged her personal property. The killing of the cat occurred as part of a course of conduct against the partner which terrorised her and involved threatening acts and statements over an extended period.

27. In *Bond* the offender was convicted of cruelty following a trial. The offender was sentenced to 5 months' imprisonment, which was confirmed on appeal. The cruelty involved the killing of a girlfriend's dog following an argument. The manner in which the dog had been killed was particularly serious. The offender was a butcher and had used a knife from his employment to kill the dog. A postmortem examination of the dog revealed a number of superficial wounds to the head and a longitudinal cut which extended from the jaw through to the shoulder joint. There was an indication of slow bleeding and, in the view of the pathologist, the dog would have taken some time to die. There was evidence that it was highly likely that the dog would have been in pain as a result of the injuries and that loss of blood and difficulty in breathing would have resulted in distress. The offender in that case had a criminal history including two offences of assault occasioning bodily harm.

28. In *R v Kelly* [2006] QCA 467 the offender was convicted of wilfully and unlawfully killing a dog following a four-day trial. He was sentenced to 4 months' imprisonment suspended after 1 month and was also fined \$5,000. On appeal the fine was reduced to \$1,000. The offence in that case involved the violent killing of a neighbour's pet dog by kicking the dog and hitting it with a baseball bat. There was evidence at the trial that the dog had been heard yelping. Following the attack the offender was seen to emerge from the dog owner's yard and approach a neighbour and her husband, remarking that he had done something that those neighbours should have done 'ages ago'. After killing the dog the offender had thrown its body over a fence into another neighbour's yard and had later put the body into a wheelie bin. The offender was 51 at the time of the offences and had a significant criminal history which included offences of abduction, unlawful detention and threats.

29. In *Moore v Lewis* [2008] QDC 105 the offender was convicted of one count of animal cruelty following a plea of guilty. The facts were that the offender had kicked a kitten whilst walking in a park. The evidence was that the kitten had been kicked at least twice and that the animal had staggered off. When located a short time later the kitten was found to be dead. A post-mortem examination revealed that the kitten had a ruptured liver in two places and ruptured vessels to the right kidney. These injuries were consistent with a severe blow to the abdomen. The offender said that he had initially been patting the kitten but had then tried to shoo it away. For reasons that he could not explain, he then became angry and kicked the animal. The offender was 17 years old at the time of the offence and had a minor criminal history. On appeal a sentence of 1 month's imprisonment with an 18 month probation order was set aside and an 18 month probation order alone was substituted. No conviction was recorded.

30. In *Towers-Hammon v Burnett* [2007] QDC 282 the offender pleaded guilty on the day set down for his trial to one count of animal cruelty. The offence involved killing four cats with an iron bar in the presence of the owner. Only one charge was preferred although four animals were killed. A witness who saw the first cat killed said that the animal was struck between seven and ten times to the body and head, and that it was then dropped to the ground where the offender continued to strike it. He then walked away and returned to hit the cat several more times. The other three cats were killed in a similar manner. The bodies of the animals were disposed of in a charity clothing bin, though it is not clear who did this. One of the animals, a kitten, was still alive when found. It cried when touched and was found to have significant injuries which required it to be euthanized. All of the other cats were dead when found. They had severe injuries including possible broken necks, head trauma and bleeding from the throat and it was said that one was 'virtually decapitated'. Initially a fine of \$1,800 was imposed in the Magistrates Court. On appeal the fine was set aside and the offender was sentenced to 3 months' imprisonment.

31. In *Hudson v Miskell* [2011] QDC 44 the offender was sentenced to 2 months' imprisonment to be released after 2 weeks in respect of one count of animal cruelty. The offender pleaded guilty to the charge. The facts were that the offender had set a trap for a neighbour's cat after becoming

annoyed that it had been coming onto his property. The trap involved placing food near a scratching post and when the cat attempted to eat the food it was caught by a noose and hung. The offender had also set up a camera to record the cat's death. He later showed footage of what had occurred to work colleagues. In allowing a prosecution appeal against the sentence the appeal judge stated that this was 'a blatant and appalling example of cruelty to an animal'. The original sentence was found to be manifestly inadequate and was set aside. A sentence of 3 months' imprisonment was substituted, however it was held to be manifestly excessive for the offender to serve any of that time and he was granted immediate parole.

32. In *R v Romano* [2008] QCA 140 the offender pleaded guilty to one count of stealing stock, one count of breaking and entering premises and one count of injuring an animal. On each count he was sentenced to 12 months' imprisonment. The facts were that the offender and four others had been at a party in a semi-rural area and decided to drive to a nearby property where a pet goat was tethered. The goat was found, led back to the vehicle and placed in the boot of the car. The car was then driven to a local church that was then under construction but only one week from completion. The offenders gained entry to the church and led the goat to a raised dais at the end of the room where its throat was cut. The offender later told police that he was sitting near the door watching the goat lying bleeding to death when he took a knife and cut off its head to 'put it out of its misery'. A female co-offender was sentenced to 2 years' probation with a requirement to make compensation to the owners of the goat and to the church. On appeal the offender's initial sentence was set aside and a term of 6 months was imposed in respect of each offence. This was said to be because notwithstanding that the offence was described as 'horrible'; the sentence was excessive having regard to other cases and it did not adequately reflect the offender's plea of guilty and his show of remorse.

33. In *Joyce v Visser* [2001] TASSC 116 the offender was convicted following a hearing of 8 counts of animal cruelty. The charges related to four dogs that the offender was responsible for caring for. The dogs had been chained up and left for an extended period without food and (except for one) without water. They were found by police in a dilapidated stable, surrounded by their own excrement and in extremely poor condition. One of the dogs was dead. The offender had told the police that the dogs belonged to him, that he had run out of dog food, that he had no money to buy more and that he had been feeding them on scraps from the house from time to time. A veterinary pathologist said that the likely cause of death of the dead dog was starvation and that its condition indicated a slow demise over a period of weeks. Similar evidence was given in relation to the three surviving dogs. A total effective sentence of 3 months' imprisonment was set aside on appeal as being manifestly excessive. In doing so, Crawford J noted that whilst this was a serious case of cruelty, it did not involve deliberate or extreme violence. His Honour said that a sentence of imprisonment to be immediately served was open but that 3 months was too long. His Honour also noted that the offender had no prior record and that he was 'a plainly unsophisticated and uneducated man'.

34. This summary of cases is not exhaustive. It refers only to those cases which have been referred to by the parties on this appeal (apart from the last case). There are other cases involving appeals against conviction but which also include information in regard to sentences imposed for offences of this type. Those decisions include *Stefani v Ostle* [2010] WASC 350 and *Anderson v Moore* [2007] WASC 135. However, as neither of those cases involve any detailed consideration of sentencing for offences of this nature, it is unnecessary for me to refer to them.

35. It is impossible to derive a definite range of sentences from these cases. The factual circumstances varied significantly. It could not be said that imprisonment was the usual sentence for offences of this type. A number of the cases did involve sentences of imprisonment, but they were offences which were clearly more serious than the present matter.

36. The respondent argued that some assistance could be derived from the cases by noting the different maximum penalties and the percentage which each sentence of imprisonment was of that maximum. It was argued that the sentences of imprisonment ranged between 10% and 50% of the relevant maximum penalties and that the sentence here was 11⅓% of the maximum penalty and, thus, fell within that range.

37. I cannot accept this argument; it is reductive in nature. It removes from the equation those

cases where sentences other than imprisonment were imposed. It assumes that all of the cases are comparable notwithstanding their markedly differing circumstances. Furthermore, it seeks to extract a range of sentences from cases from different jurisdictions. The law across the differing jurisdictions is not uniform. Among other things, the maximum penalties vary markedly. The cases are relatively few in number and they only include those which have been appealed. They do not necessarily provide a representative sample.

38. In any event, as I stated earlier, the fact that a sentence is within a range does not necessarily mean that it is appropriate having regard to the particular factual circumstances.

39. The magistrate expressed the view that there were two general categories of offences; deliberate cruelty and failure to provide proper care. He took the view that the first category was more serious and was deserving of a greater penalty. With respect to his Honour, this attempt at categorisation overly simplifies the factors which are relevant to sentencing. The *Animal Welfare Act* makes no such distinction. It is possible to think of conduct of a kind which, whilst deliberate, involves little suffering to the animal concerned. Conversely, it is possible to think of cases of neglect which would involve very significant suffering and which may be deserving of a prison sentence. The fact is that whilst the intentions of the offender may be a relevant consideration, it is not the only one, nor will it always be the most important indicator of the seriousness of the offence. The danger of categorisation is that it diverts attention away from the significance of the particular circumstances of the offence and the offender.

40. The magistrate considered that this case was comparable to that of *Maher and Bond* because each of those cases involved animals killed out of malice in the course of a domestic dispute. He appears to have concluded that because sentences of imprisonment were imposed in those cases then it was appropriate to do so here. The danger of determining an appropriate sentence by analogy is that it focuses on the similarities and ignores the differences. By stressing the domestic violence context the magistrate effectively relegated other important factors. The obvious differences between this case and *Maher and Bond* in terms of the manner in which the animals had been killed and their likely degree of suffering were obscured. Again, whilst the context of domestic violence was a relevant factor it was not the only one, nor was it necessarily the most important.

41. Section 6 of the *Sentencing Act* 1995 (WA) requires that sentences be commensurate with the seriousness of the offence. This requires consideration of the circumstances of the commission of the offence. In my view, the relevant factors in assessing the circumstances of an offence of animal cruelty pursuant to s19 of the *Animal Welfare Act* are:

1. the nature of the harm inflicted on the animal (see definition of 'harm' in s5);
2. the length of time during which the animal suffered;
4. the amount of suffering caused, that is the extent of any injury or the degree of pain or the amount of distress;
5. the vulnerability of the animal, both in general and in relation to the particular offender;
6. whether the conduct that caused the harm was a single act or a course of conduct; and
7. whether the conduct was deliberate, intentional or planned, or was neglect of a duty to animals (one will not necessarily be more serious than another, it will depend upon the circumstances).

42. Of course in any particular case it will also be necessary to take into account any mitigating factors, including those factors that are personal to the offender.

The circumstances of this offence

43. It is important to place this instance of offending in proper perspective.

44. The respondent's counsel on this appeal accepts that there was no evidence that the chicken did not die immediately on being struck or that it unnecessarily suffered as a result of any delay in death. Rather, it is said that the cruelty lies in the 'unnecessary' nature of the killing of the chicken. That is to say that it was killed in malice and not in the course of any animal husbandry or other lawful purpose.

45. This assumes that to kill an animal is to cause it harm, whether or not the killing is accompanied by any suffering. Such harm, the argument runs, can be unnecessary within the terms of s19 of the *Animal Welfare Act* if it is done for no reason other than to cause emotional

trauma to another person. In the present case it was not contested by the appellant that the killing was not 'unnecessary'. Accordingly, the respondent's submissions were not tested. Rather they were simply accepted for the purposes of this appeal against sentence. It is unnecessary for present purposes for me to make any determination in that regard. I do note that s85 of the *Animal Welfare Act* provides that the fact that a person killed an animal is not sufficient, on its own, to prove an offence of cruelty. However, assuming for the purposes of this appeal that the respondent's submissions are correct they are clearly relevant in assessing the seriousness of this particular offence.

46. The respondent's submissions were made to explain the basis for the conviction in circumstances where the prosecution had conceded that it did not maintain that the animal had suffered a slow or painful death. Unfortunately it was not readily apparent in the proceedings before the magistrate what, in light of that concession, the cruelty was said to consist of. The basis upon which the respondent has now submitted that the conviction was based must place it into a category which can clearly be distinguished from those cases involving either deliberate infliction of suffering or where a person is responsible for the unnecessary pain and suffering of an animal (whether deliberate or not).

47. The appellant killed the chicken out of malice and this made its death unnecessary. However, it is relevant to take into account that there was no allegation that the animal suffered before it died, and this is to be contrasted with most of the other cases that have been referred to. Nor was there any suggestion that suffering to the animal was intended. Indeed, it is clear that the appellant's intention was not to cause suffering to an animal but to hurt his partner. He sought to achieve this objective by killing the chicken, but not in a manner that was likely to, or did in fact, cause it to suffer any more than would a chicken killed for food or in the culling of a flock.

48. That is not to say that an intention to cause suffering is necessary. Whether such an intention exists, however, is relevant to penalty. Importantly in this case the applicant admitted the circumstances in which he killed the chicken and why he did it. He made these admissions voluntarily to the police on being arrested. The prosecution case relied on those admissions. Had he not made them, the charge would not have been capable of being proved.

49. The appellant pleaded guilty and expressed remorse for his actions. His immediate admissions to the police were entirely consistent with genuine remorse. The appellant, as I have mentioned, had no prior record and was assessed as being at low risk of reoffending. He had apologised to his partner and accepted that he had a need for counselling.

50. When all of the circumstances of the offence are considered this is a case which is clearly distinguishable from those that have attracted immediate imprisonment. In any event, such a sentence could not properly be imposed unless all other available sentencing options were found to be inappropriate: s39 *Sentencing Act*.

51. The range of options available to the magistrate was reduced because s19 of the *Animal Welfare Act* provides for a minimum fine: s42(2a) *Sentencing Act*. However, his Honour still had options which, whilst recognising the seriousness of the offence, did not require that the appellant serve a term of immediate imprisonment. In my view, it was not open to the magistrate to come to the view that no other sentence but one of immediate imprisonment was appropriate. Other possible sentences were clearly open and entirely appropriate in this case.

Conclusion

52. In the circumstances of this case, the sentence of imprisonment to be immediately served of 7 months was manifestly excessive.

53. The position now is that the appellant has served 4 months of the sentence that was imposed upon him and would soon be eligible for parole. It is important that I take that into account in imposing any new sentence. What I intend therefore to do is to grant leave, allow this appeal, set aside the sentence that the magistrate imposed, and in lieu thereof impose another sentence.

APPEARANCES: For the appellant Holding: Ms HA Stewart, counsel. Legal Aid (WA). For the respondent Parkin: Mr EM Heenan, counsel. State Solicitor for Western Australia.