41/94

SUPREME COURT OF VICTORIA

STEVENS v O'CONNOR

O'Bryan J

11, 15 April 1994

ANIMALS – DOG – ON LEAD – COULD ONLY MOVE 3-4 INCHES – CHILD BITTEN BY DOG – "ATTACK" – MEANING OF – WHETHER DOG OWNER GUILTY OF OFFENCE: *DOG ACT* 1970, S22.

Section 22 of the *Dog Act* 1970 ('Act') provides so far as relevant:

> "(1) The owner of a dog which rushes at attacks worries or chases any person .... shall be guilty of an offence and liable in respect of any damage so caused by the dog."

O'C. was charged under s22(1) of the Act being the owner of a dog which attacked a child by biting it on the nose. The dog was on a short lead tied to a bin and could only move 3-4 inches. When the child was bending towards the dog's face it snapped once making contact with the child's face. At the hearing the Magistrate dismissed the charge on the ground that there was no attack within s22(1) of the Act. Upon appeal—

HELD: Appeal dismissed.
The ordinary meaning of "attack" is: "to set upon with force; begin hostilities; the initial offensive movement in a contest." Section 22 does not impose criminal liability in every case where a dog has bitten a person. Biting is made relevant after an offence under s22 is proved. In the present case it was open to the Magistrate to conclude that the dog's reaction without proof of movement was not an attack within s22 of the Act.

O'BRYAN J: [1] This is an appeal from the Magistrates' Court at Frankston. By summons the respondent was charged that on 28 February 1993 at Seaford she was the owner of a male heeler cross which attacked by biting Adele Chambers aged four years. The respondent pleaded not guilty to the charge in the Court below. At the conclusion of the evidence for the informant, the respondent gave evidence on oath. The learned Magistrate then dismissed the charge. In announcing the decision the learned Magistrate said:

1. He was not satisfied provocation occurred.

2. There was evidence that the respondent had tied up her dog.

3. The dog could only move two or three inches.

4. He was satisfied that the dog had bitten the girl but that the respondent had made every effort to ensure that the dog would not attack any person.

5. That even though he felt sympathy for the child and the parents, he was not satisfied that an "attack" had occurred.

The evidence was quite brief in the Court below. No issue arose that the respondent was the owner of the male heeler cross on 28 February 1993. Nor did any issue arise that the dog bit Adele Chambers on her nose in Austin Road, Seaford. At about 10.00 a.m. Mrs Chambers walked out of a milk bar in Austin Road accompanied by her children, Matthew aged five years and Adele aged four years. Mrs Chambers observed Matthew walk up to a dog which was tied to a rubbish **[2]** bin and heard him say: "Hello Doggy". Matthew's face was about two feet from the dog and he was shaking his head.

The dog was on a short lead attached to a bin. The respondent said the dog was secured to a bin by a choker chain and could only move three to four inches. This evidence was accepted by the Magistrate.

Mrs Chambers said that she took Matthew's shoulder and said: "No Matthew you musn't

go near dogs like that." She said that as she was attending to Matthew, she looked to see that Adele was bending towards the dog's face. She said Adele was at this stage smiling. She said the dog didn't growl or bark but snapped once, making contact with Adele's face. Mrs Chambers' evidence did not show that the dog moved its body in any way save that it "snapped once". After the incident Mrs Chambers said to the respondent: "It's alright, Matthew shouldn't have gone up to the dog."

The respondent was interviewed by the informant on 23 March and notes of the interview were read to the Court. In the interview the respondent told the informant that the dog was on a lead, was tied to a rubbish bin and would not have been able to move more than two to three inches. The respondent also said that after the incident, which she had not witnessed because she was inside the shop, Mrs Chambers said to her: "I am sorry it's not your fault they were teasing him."

When the informant closed the case for the prosecution the respondent gave evidence on oath. **[3]** The respondent said that she did not observe either child provoke the dog and had seen nothing until the girl was bitten. The respondent said that she was told the boy provoked.

Section 22 of the *Dog Act* 1970 relevantly provides:

> "(1) The owner of a dog which rushes at attacks worries or chases any person ... shall be guilty of an offence and liable in respect of any damage so caused by the dog.
>
> (2)(a) Not relevant.
> (b) it shall not be necessary to prove a previous mischievous propensity in the dog or the owner's knowledge of any such propensity or that the attacking worrying or chasing or any damage occasioned thereby was attributable to neglect on the part of the owner."

Four questions of law are raised by the appeal. It is only necessary to consider the first question which is in these terms: "Whether on any reasonable view of the evidence before him the finding by the learned Magistrate that there was no attack within the meaning of s22(1) of the *Dog Act* 1970 can be supported."

The present section 22, which imposes criminal liability for an attack by a dog, replaced a similarly worded section in Act No. 6848 of 1961 – (s26(1)). The words "rushes at, attacks, worries or chases" have appeared in the *Dog Act* since 1958. (See Act No. 6236, s26). Speaking of s26 of the *Dog Act* 1958, Adam J observed in *Trethowan v Capron* [1961] VicRp 73; [1961] VR 460 at 463:

> "I consider, bound by authority to treat the section as creating a new liability on grounds unknown to the common law."

[4] Section 22 should be contrasted with s19 of the *Dog and Goat Act* 1898 (NSW) which was considered by the High Court in *Simpson v Bannerman* [1932] HCA 43; (1932) 47 CLR 378; 38 ALR 374. Section 19 provides:

> "The owner of every dog shall be liable in damages for injury done to any person, property, or animal by his dog, and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity ..."

This section imposed liability in absolute and unqualified terms and did not require proof that the dog rushed at, attacked, worried or chased a person or animal. In the joint judgment of Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ their Honours said: (at CLR p383):

> "The opening words of this provision express a liability without condition or qualification."

The same cannot be said about s22. Firstly, an element of an offence against s22 is that a dog rushed at, attacked, worried or chased a person or an animal. Secondly, an offence against s22 does not require proof that a dog bit a person or an animal. Thirdly, in *Trethowan's* case Adam J held that "the liability imposed in such absolute terms by s26 should be read subject to certain qualifications and that such qualifications exclude liability to trespassers where the circumstances are such that no liability would attach at common law" (at 465).

Now, of course, the children in the present case were not trespassers. The purpose of contrasting s22 with s19 in the New South Wales Act and in referring to *Trethowan's* case is to show that s22 does not impose criminal liability in every case where a dog has bitten a **[5]** person. Criminal liability is not imposed *per se* should a dog bite a person. Should the legislature wish to impose a stricter form of liability than presently exists s19 would provide a model. The four verbs in s22 connote movement by a dog as an element of the offence. Did the dog owned by Mrs O'Connor have sufficient liberty to enable it to attack the child? Mrs O'Connor's defence in the Court below was that the dog did not attack the child because it was restrained to such an extent that it could move no more than two or three inches.

The learned Magistrate had to determine whether the evidence proved beyond reasonable doubt that the dog "attacked" the child. It was not sufficient for the prosecution to prove that the dog bit the child because s22, unlike s19 of the New South Wales Act, does not create an offence whenever a dog bites a person. In my opinion, the learned Magistrate was entitled to find, as he did, that he was not satisfied that an attack had occurred. The informant carried the onus of proving beyond reasonable doubt that the dog attacked the child. *The Macquarie Dictionary* defines attack: to set upon with force; begin hostilities; the initial offensive movement in a contest.

The learned Magistrate found, and no challenge was made to his finding, that the dog was tied up and could only move two or three inches. Mrs Chambers saw her daughter bending towards the dog's face. "The dog didn't growl or bark, but snapped once making contact with Adele's face." **[6]** That the child's face must have come within two or three inches of the dog's mouth when the dog "snapped once" cannot be gainsaid. The reaction of the dog, in these circumstances, and without proof of movement is not an "attack" in the ordinary meaning of the word "attack", in my opinion.

For an offence to occur a dog must rush at, attack, worry or chase a person. Biting is not an element of an offence created by s22(1). It is only after an offence under s22(1) is proved that biting is made relevant. By ss(3)(b) the Court may order the owner of a dog convicted of an offence under s22 to keep it muzzled to prevent it causing injury by biting. The circumstances that a dog has bitten a person in the course of rushing at, attacking, worrying or chasing any person is relevant to penalty.

In my opinion, the learned Magistrate was entitled not to be satisfied beyond reasonable doubt that the dog attacked the child in the circumstances described earlier. The dog was secured on a choker chain and could move only three to four inches. Mrs Chambers did not observe the dog to move at all. Section 22 is a penal provision and must be construed strictly. At common law, liability in a dog bite action required proof of mischievous propensity known to the owner or actionable negligence on the part of the owner. The offence created by s22 is not concerned with civil law liability and proof of mischievous propensity known to the owner is not required.

The authorities relied upon by Mr Barton are of limited assistance in the present case. On the facts **[7]** presented in the Magistrates' Court I conclude that the learned Magistrate was entitled to dismiss the summons. It is unnecessary to consider grounds (b), (c) and (d) of the appeal. The order of the Court is, appeal dismissed.

APPEARANCES: For the appellant Stevens: Mr P Barton, counsel. Malleson Stephen Jaques, solicitors. No appearance for the respondent O'Connor.
