43/75

SUPREME COURT OF VICTORIA

IVERMEE v TALEVSKI

Fullagar J

25 August 1975

CRIMINAL LAW – ABANDONING AND CRUELTY TO ANIMAL – MEANING OF "ABANDON" AND "CRUELTY" – CHARGES DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *PROTECTION OF ANIMALS ACT* 1966, S4(1)(a), (g).

The defendant was acquitted by a Magistrates' Court for the offences of "abandoning an animal of a species ordinarily kept in a state of confinement or for any domestic purposes", and "with doing an act towards an animal which involved cruelty." (*Protection of Animals Act* 1966 s4(1)(g) & s4(1)(a) respectively.) The facts were that the animal — a dog — immediately before it was thrown a couple of feet into a fence by the defendant was already suffering from very substantial injuries to lungs, abdominal wall and hind leg. Such injuries were severe enough in the opinion of a veterinary surgeon to warrant the dog being destroyed.

The defendant admitted driving in his car to the tip with the owner of the dog, taking the dog from the car by the scruff of the neck, throwing it against a fence "because the dog was sick" and then leaving it there. He did not admit knowledge of the dog's previous injuries. Upon order nisi to review—

HELD: Order absolute. Dismissal set aside. Remitted to the Magistrates' Court for hearing and determination in accordance with the law.

1. The dictionary meaning which the legislature here intended to convey was that the word "abandon" meant "to desert, to leave without help."

2. There was ample evidence before the magistrate that the defendant, having had the dog in his hands and thereby under his control, with the assent and approbation of the owner proceeded to desert it with the owner and leave it without help. Acceptance of the evidence would have sufficed to prove him to have been guilty of abandoning the dog within the meaning of s4(1)(g) of the *Protection of Animals Act* 1966 ('Act").

3. The Magistrate ought to have found that by taking the dog in his hands out of his car and then after leaving it in an injured condition against the fence and going off in his car, the defendant had abandoned the dog within the meaning of s4(1)(g) of the Act.

4. The Magistrate was wrong in law in holding that any degree of the control of the dog, over and above that which was shown by the uncontested facts, was a necessary ingredient of s4(1)(g) of the Act.

5. In relation to the charge involving cruelty, the Magistrate misdirected himself in law in holding or finding that there was no evidence that the dog had suffered actual pain as a result of the defendant's act in throwing the dog against the fence. It was so clear that the dog was, on uncontested evidence, very severely injured before the throwing, that it would be a quite unreasonable inference that the dog suffered no actual pain as a result of being thrown against the fence.

6. The infliction of pain upon the dog which must have been caused by its being thrown against the fence in its severely injured condition, constituted an infliction of pain that in the circumstances was unreasonable.

7. Accordingly, the order nisi was made absolute, and the matters remitted to the Magistrates' Court for hearing and determination according to law.

FULLAGAR J: ... The principal question is whether the accused man in these circumstances abandoned the dog. Mr Redlich, in the course of an interesting argument, said that a dog was a chattel, that before one can have possession of a chattel one must have some intention of excluding other people from its possession or from the chattel. He argued that the cases in relation to abandonment of chattels showed that before a chattel could be abandoned the person alleged to have abandoned it must have had some possession of that kind or character or else have owned

the chattel. He argued from this that the offence of abandoning a dog could not be committed unless the person alleged to have abandoned it either owned the dog or had a possession of it of that kind or character.

In my opinion, Mr Redlich is right insofar as he asserts that before the offence of abandoning a dog can be committed there must be shown in the alleged offence ownership, or some element of possession or control, of the dog. As at present advised, I should have thought that a mere passerby, observing the dog at the bottom of this fence in question, who kept on walking would not himself be guilty of an offence against s4(1)(g) of the Act.

However, I think that the argument of Mr Redlich puts somewhat too highly the required relationship between the person and the animal alleged to have been abandoned. In the present case, the accused man, who was not the owner of the dog, took it from the back of a car in which was sitting his friend who was the owner of the dog. In my opinion, the accused man at that time had sufficient possession of the dog to make him liable under s4(1)(g).

Mr Redlich said that an overwhelming inference must be drawn from the facts, that the owner of the dog assented to what was done with it by the accused man. I agree, and I draw attention to the statement by the accused to the police, indicating that the events were part of a joint venture, and I refer to the passage where he said to the police officer, "I don't know what happened to dog: we leave it." As a result of the throwing, the dog was lying at the base of the fence in such a state that it would be virtually impossible for it to move away to some place where it could be rescued, by reason of the injuries to which I have earlier referred.

In my opinion, it would be impermissible to look at other special statutes relating to abandonment of chattels and other things or persons in order to fix the meaning of the word "abandon" in s4(1) (g) of the *Protection of Animals Act*. No case has been cited to me giving the meaning of the word in a statute of this kind. In my opinion, the proper course in the circumstances is to construe the word in its context in accordance with ordinary English usage. The *Oxford Dictionary* gives a considerable number of meanings of the word "abandon", but I think that the dictionary meaning which the legislature here intended to convey is "to desert, to leave without help."

In my opinion, there was ample evidence before the magistrate that the accused man, having had the dog in his hands and thereby under his control, with the assent and approbation of the owner proceeded to desert it with the owner and leave it without help. In my opinion, acceptance of the evidence would suffice to prove him to have been guilty of abandoning the dog within the meaning of s4(1)(g).

It may well be that the application to the case of s18(a) of the Act, and the decision of the Full Court of the Supreme Court of Queensland, should be held in this case to have the effect that the owner himself abandoned the dog, by the acts of the accused who was his bailee of the dog with his assent for the purpose of abandoning it, and that the accused man, in doing the acts which he did, aided and abetted the commission of the offence by the owner and accordingly was himself guilty of the offence charged. The Queensland decision to which I refer is *Adams v Moneypenny* 9 QJPR 194; [1915] St RQd 195.

Mr Redlich contended that none of the grounds of the order nisi are apt to raise this way of putting the prosecution's case and, in view of various difficulties which I see in the matter and in view of the decision at which I have already arrived, I find it unnecessary to determine either the precise ambit of the grounds in the order nisi or the validity of the argument to which I have just adverted. Accordingly, I do not make any decision upon those matters.

I now turn to the second matter, which is Order to Review No. 7089. The offence charged in that case was that the accused man did do an act towards an animal, to wit a dog, which involved cruelty, contrary to s4(1)(a) of the *Protection of Animals Act.* In dealing with this matter, I need not restate the salient facts which I have already above stated.

The prosecution, in order to make out this offence, had to satisfy the magistrate beyond reasonable doubt that the act of throwing the dog against the fence involved cruelty. Cruelty is

defined by s3 of the Act and means "the infliction upon an animal of pain that in its kind or in its degree or its object or its circumstances is unreasonable." The English of this definition is by no means clear, but I think that the thing which must be in some way unreasonable is not just the pain and not just the infliction but the infliction of pain.

In my opinion, there was ample evidence (if accepted) to show that there was an unreasonable infliction of pain upon the animal by throwing it into the fence. The dog had the injuries which I have earlier indicated and it was thrown some two feet on to the wire mesh fence. I agree with the assertion or contention by Mr Redlich that the evidence was overwhelming that the dog was in the injured condition of which I have spoken before it was thrown into the fence. It seems to me that the prosecution established from the above evidence (if accepted) that it would be a wholly unreasonable inference that the dog suffered no pain.

When seen shortly after the throwing by the man at the tip, the dog was apparently conscious, because it was "cowering" as well as shivering. In my opinion, the ground of each order nisi are made out and each order nisi ought to be made absolute.

In the O/R. No. 7088 I am of the opinion that on the evidence the stipendiary magistrate ought to have found that by taking the dog in his hands out of his car and then after leaving it in an injured condition against the fence and going off in his car, the defendant had abandoned the dog within the meaning of s4(1)(g) of the Act.

I am further of the opinion that the stipendiary magistrate was wrong in law in holding that any degree of the control of the dog, over and above that which I have said is shown by the uncontested facts, was a necessary ingredient of s4(1)(g) of the Act.

In O/R. No. 7089 I am of opinion that the stipendiary magistrate misdirected himself in law in holding or finding that there was no evidence that the dog had suffered actual pain as a result of the defendant's act in throwing the dog against the fence. It was so clear that the dog was, on uncontested evidence, very severely injured before the throwing, that, in my opinion, it would be a quite unreasonable inference that the dog suffered no actual pain as a result of being thrown against the fence.

I am further of opinion that the infliction of pain upon the dog which must have been caused by its being thrown against the fence in its severely injured condition, constituted an infliction of pain that in the circumstances was unreasonable.
