

IN THE SUPREME COURT OF NEW ZEALAND

SC 6/2018  
[2018] NZSC 25

BETWEEN                      ORLANDO SHEPHERD  
   Applicant  
  
AND                              AUCKLAND COUNCIL  
   Respondent

Court:                      William Young, Glazebrook and Ellen France JJ

Counsel:                      Applicant in person  
   R J A Marchant for Respondent

Judgment:                      27 March 2018

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**JUDGMENT OF THE COURT**

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- A      The application for an extension of time to appeal is allowed.**
- B      The application for leave to appeal is dismissed.**
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**REASONS**

**Introduction**

[1] Mr Shepherd was charged, under s 58 of the Dog Control Act 1996, with owning a dog that attacked his young son causing serious injury. He pleaded guilty but, prior to sentencing, sought to withdraw that plea. That application was dismissed.<sup>1</sup> He was later sentenced to 300 hours' community work and 12 months' supervision.<sup>2</sup>

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<sup>1</sup> *Auckland Council v Shepherd* [2016] NZDC 22570 (Judge Eivers).

<sup>2</sup> *Auckland Council v Shepherd* [2017] NZDC 4354 at [21] per Judge Eivers.

[2] Mr Shepherd's appeal against conviction was dismissed by the High Court.<sup>3</sup> Mr Shepherd seeks leave to appeal directly to this Court against the High Court decision. This is on the basis that his guilty plea was entered on, what he submits was, a mistaken assumption that the offence was a strict liability offence. Mr Shepherd seeks to argue that there is a mens rea element for the offence, requiring knowledge of the dog's propensity to attack. Mr Shepherd's application for leave to appeal is out of time.

[3] The Council opposes Mr Shepherd's application for an extension of time to appeal. It also submits that the proposed appeal does not give rise to an issue of general or public importance and that there is no risk of a miscarriage of justice because:

- (a) the law is settled that s 58 is a strict liability offence; and
- (b) in any event, Mr Shepherd would be guilty even if there was a mens rea element because he had recognised that there was a real possibility that his dog could attack someone. He had previously posted on Facebook about the dog's aggressiveness and had been warned by the previous owner not to leave the dog alone with children.

[4] Mr Shepherd had, within time, filed an application for leave to appeal to the Court of Appeal. He says that he abandoned that application and immediately filed the application for leave to appeal to this Court because the Court of Appeal had recently determined that s 58 is a strict liability offence.<sup>4</sup> The Court would therefore have declined leave and there would then have been no further right of appeal to this Court.

### **Our assessment**

[5] As pointed out by the Council, the decisions of the Court of Appeal referred to by Mr Shepherd relate to s 57 and not s 58 of the Dog Control Act.<sup>5</sup> This means that

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<sup>3</sup> *Shepherd v Auckland Council* [2017] NZHC 1660 (Downs J).

<sup>4</sup> Referring to *Walker v Nelson City Council* [2017] NZCA 526; and *Epiha v Tauranga City Council* [2017] NZCA 511, [2017] NZAR 1664.

<sup>5</sup> *Walker v Nelson City Council*, above n 4, at [10]; and *Epiha v Tauranga City Council*, above n 4, at [6].

it was not inevitable that the Court of Appeal would have dismissed Mr Shepherd's application for leave to appeal on the basis of the decisions to which Mr Shepherd referred.

[6] Despite this, Mr Shepherd's decision to withdraw his application to the Court of Appeal<sup>6</sup> in light of those decisions does provide a valid reason for the application to this Court being out of time.

[7] Those decisions of the Court of Appeal could, in other circumstances, have provided a valid reason for seeking leave to appeal directly to this Court, which has not considered the issue of strict liability under the Dog Control Act. However, Mr Shepherd did choose, after receiving legal advice, to plead guilty. Further, as the Council points out, on the agreed facts,<sup>7</sup> Mr Shepherd would have been convicted in any event, even if there is a mens rea element in s 58.<sup>8</sup> This means that there is no risk of a miscarriage of justice.

## **Result**

[8] In the circumstances the application for an extension of time to appeal is granted, but the application for leave to appeal is dismissed.

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<sup>6</sup> Which was within time.

<sup>7</sup> See at [3](b) above.

<sup>8</sup> We are not to be taken as making any comment on whether or not there is a mens rea element in s 58. Indeed, we accept there is force in the Council's submissions that it would add an unwarranted level of complexity to the section, that the High Court has consistently held s 58 to be a strict liability offence and that its purpose of public protection would suggest it should be a strict liability offence.