IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2021-404-000224
[2021] NZHC 3363

IN THE MATTER OF	an appeal against conviction and sentence under ss 232 and 244 of the Criminal Procedure Act 2011
BETWEEN	ALEXANDRA JOHNSTON and GRAHAM WESLEY JOHNSTON Appellants
AND	AUCKLAND COUNCIL Respondent

Hearing: 6 December 2021

Appearances: Appellants in person and with R Simpson as a McKenzie friend
L V Faletau for Respondent

Judgment: 9 December 2021

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 9 December 2021 at 2.00 pm
Registrar/Deputy Registrar

Date:……

Solicitors/counsel:
D J Collins/L V Faletau, Auckland Council

Copy to:
Mr and Mrs Johnston, Appellants

Introduction

[1] On 20 April 2021, following a trial before Judge J F Munro in the District Court at North Shore, the appellants, Alexandra Johnston and Graham Johnston, were found guilty of two offences against s 57(2) of the Dog Control Act 1996 ("the Act").[1] They were fined $750 and ordered to make emotional harm payments of $150 to each of the victims of the offending. The Judge also made an order pursuant to s 57(3) of the Act for the destruction of the dog.

[2] On 10 May 2021, Mr and Mrs Johnston filed an appeal against both conviction and sentence. They filed comprehensive submissions in support of their appeal raising a large number of issues, many of which are beyond the scope of this appeal.

[3] The appeal is opposed by the respondent, Auckland Council ("the Council").

Background

[4] The charges faced by Mr and Mrs Johnston were in identical terms. It was charged that each of them owned a black and white coloured male Siberian Husky named Aspen. It was alleged that, on 23 May 2020, while Mr Johnston was in control of Aspen at Glamorgan Drive, Torbay, the dog attacked two domestic animals – a chicken and a guinea pig.

[5] On 19 October 2020, both Mr and Mrs Johnston entered not guilty pleas to the charges. Both of them had however been interviewed by an animal management officer from the Council and both had given statements. So had the owners of the chicken, Sandra and Cesara Chwieduk, and the owner of the guinea pig, Belinda Tustin. The key facts were not in dispute. At trial, Mr and Mrs Johnston accepted that the offences had occurred.

[6] The Judge summarised the position as follows:

> [1] … The defendants have pleaded not guilty to the charges, although the facts of the case are not in dispute. The defendants accept that their dog did attack a chicken and killed it and also caused the death of the guinea pig. They accept that the dog was not under proper control at the time and that they

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1 *Auckland Council v Johnston* [2021] NZDC 6929.

> are liable pursuant to s 57(2). They accept that an offence occurred and that they are liable for a fine and any damages.

[7] A summary of the agreed facts was read in Court. The Judge recorded these as follows:

> [3] On 23 May 2020 Mr Johnston took Aspen out for a walk on the beach near their home. He let Aspen off his lead and Aspen ran off. Mr Johnston was unable to call him back and Aspen ran approximately 300 metres to the property at 2 Glamorgan Drive and attacked and killed one chicken. There is some evidence to suggest that there may have been two chickens killed but the charge relates to one only. Mr Johnston pursued Aspen but by the time he reached the property Aspen was coming down the drive with a chicken in his mouth. The chicken was found dead on the driveway of the property shortly after. Aspen then went to the next door property at 4 Glamorgan Drive, entered a guinea pig enclosure and caused the death of one guinea pig. Mr Johnston pursued Aspen onto that property but by the time he reached it the guinea pig was lifeless.
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> [4] It is accepted that Aspen caused the death of at least one chicken and the guinea pig and that he was not under proper control. Following complaints by the owners of the chicken and the guinea pig the Council Officer visited the properties the following day and as a result Aspen was seized. He was returned to the care of Mr and Mrs Johnston subsequently on conditions of being muzzled and only permitted to be taken out for exercise during certain hours of the day. Because those conditions were not strictly complied with the Council seized Aspen again and he remains in the custody of the Auckland Council.

[8] The respondent, Auckland Council ("the Council"), nevertheless called five witnesses – Mrs Chwieduk, Mr Chwieduk, Ms Tustin, Jaques Joubert (an animal management officer employed by the Council) and Carly Triska (a senior animal management officer employed by the Council). Both Mr and Mrs Johnston gave evidence. They called two witnesses, Elly Waitoa (a team leader in the Council's animal management team) and Cody Taylor (at the relevant time also an animal management officer employed by the Council). All witnesses gave evidence viva voce and each was cross-examined.

[9] As a result of the way matters unfolded at the trial, the primary issue before the Judge became the destruction of Aspen. Mr and Mrs Johnston sought to satisfy the Court that the circumstances of the offence were exceptional and that his destruction was unwarranted.

[10] The essence of Mr and Mrs Johnston's arguments under s 53 of the Act were summarised by the Judge as follows:

> [9] Mr and Mrs Johnston were self-represented in this case. They are aware of the relevant law. They understand the legal meaning of "strict liability". They have also read the Court of Appeal decision of *Auckland Council v Hill.* They are aware that the burden of proof is on them to prove exceptional circumstances.
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> [10] The defendants argue that the owner of the chickens failed to comply with the by-law which requires the owner of chickens to keep them confined on to their property. They allege that the chickens are not properly confined and that they are free to roam, not only on the unfenced property of their owners, but also onto the grass berm outside their property. They allege that the chicken coop was not adequate to prevent the chickens from roaming despite the fact that the coop does have a wooden gate. In relation to the guinea pig the defendants also allege that the coop was not adequate to prevent a dog from entering it.
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> [11] The thrust of the defendants' argument relating to exceptional circumstances is that there is an onus on the owners of these domestic animals to keep them confined to the extent that a dog would not have access to them and that particularly in the case of the chickens the owners were in breach of the by-law, and the failure of the owners of both the chickens and the guinea pig constitutes an exceptional circumstance and satisfies the test under s 57(3).
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> [12] In relation to the guinea pig, the defendants apportion some blame on the owners of the chickens for preventing Mr Johnston from gaining control over Aspen before he went to the neighbouring property, by engaging him in a heated discussion regarding the event.
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> [13] There have been previous difficulties between the defendants and Mr and Mrs Chwieduk, the owners of the chickens. There was a similar incident in August 2019 and concerns have been raised by the defendants that the chickens have been allowed to roam off the property regularly. I note that neither of the defendants were on the property nor witnessed the actual attack on the chickens. There is no evidence before the Court that any chickens were outside of their enclosure on the day of the attack, although photographic evidence has been submitted indicating chickens off the property on dates prior to and later than the day of the attack.
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> [14] Mrs Johnston has taken steps to address the failure of Mr and Mrs Chiedwick to comply with the relevant by-law by raising the issue with the Council to little or no avail.

[11] The Judge considered these arguments and the evidence adduced and concluded that the threshold of exceptional circumstances set out in s 57(3) of the Act had not been met. She held as follows:

> [15] The question is whether any perceived failure on the part of the owners of the domestic animals to ensure their containment constitutes a

> special circumstance, particularly given their obligation to comply with the by-law. I have not been provided with any case law on this point. There does not appear to be any authority to suggest that the onus is on owners of domestic animals to prevent a dog attack. In any event, the evidence before me is that the chickens were in their coop on the day, and the owners witnessed the dog enter the coop and attack the chickens. There were no other witnesses to the attack.
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> [16] The onus is clearly on the owner of the dog to prevent attacks on domestic animals. That is made clear in s 4(a)(iv) of the Act which provides that one of the objects of the Act is to "make better provision for the care and control of dogs by imposing on owners of dogs obligations designed to ensure that dogs do not injure, endanger, or cause distress to any stock, poultry, domestic animal or protected wildlife". This is repeated in s 5, confirming the obligations of dog owners to keep the dog under control at all times.
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> [17] I do not accept the defendants' argument that whether the chickens were confined or not, and whether the guinea pig was adequately confined, could constitute exceptional circumstances of the offending.

[12] The Judge concluded as follows:

> [18] In making my decision I am acutely aware of the distress that an order for destruction will have on Mr and Mrs Johnston and their son. Aspen is a much-loved member of their family. I acknowledge that distress, however I must apply the law which is very clear. There were no exceptional circumstances. The threshold pursuant to s 57(3) has not been met.

She convicted Mr and Mrs Johnston on both charges, ordered that they make emotional harm payments of $150 to Mr and Mrs Chwieduk and to Ms Tustin, and imposed a fine of $750, half of which was to be paid to the Council. She then made an order pursuant to s 57(3) for the destruction of Aspen.

The appeal

[13] The appeal against conviction is brought pursuant to s 232 of the Criminal Procedure Act 2011.

[14] Relevantly, s 232(2) provides that this Court, as the first appeal Court, must allow the appeal if the Judge erred in her assessment of the evidence to such an extent that a miscarriage of justice has occurred, or that, in any other case, a miscarriage of justice has occurred for any reason. In any other case, this Court must dismiss the appeal.

[15] A miscarriage of justice is any error, irregularity or occurrence in or in relation to or affecting the trial that has created a real risk that the outcome of the trial was affected or which has resulted in an unfair trial or a trial that was a nullity.

[16] The correct approach to appeals where it is asserted that a Judge has erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred was discussed by the Supreme Court in *Sena v R*.[2] For present purposes, the approach can be summarised as follows:

(a) the appeal proceeds by way of rehearing. The appellate Court is required to form its own view of the facts and determine the appeal accordingly;

(b) if the appellate Court comes to a different view than the trial Judge on the evidence, the trial Judge necessarily will have erred and an appeal must be allowed. However, an appeal is not approached de novo. It is for the appellant to show that an error has been made. In assessing whether there is any error, this Court on appeal must take into account any advantages the trial Judge may have had, for example, in regard to credibility findings on contested oral evidence.

[17] The appeal against sentence is brought pursuant to s 244 of the Criminal Procedure Act. Pursuant to s 250(2), this Court, as the appellate Court, must allow the appeal if it is satisfied that, for any reason, there is an error in the sentence imposed on conviction and that a different sentence should be imposed. In any other case, the Court must dismiss the appeal.

[18] As was explained by the Court of Appeal in *Tutakangahau v R*,[3] the onus is on the appellant to identify any error made and to satisfy this Court that a different sentence should be imposed. This Court does not start afresh nor simply substitute its own opinion for that of the original sentencer. Rather, it must be shown that there was an error, whether intrinsically or as a result of additional material filed. The focus is

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2 *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [26]-[40].
3 *Tutakangahau v R* [2014] NZCA 279.

on whether the sentence imposed was within range rather than the process by which the sentence was reached.

Submissions

[19] As noted, Mr and Mrs Johnston's written submissions were wide-ranging. Some of the arguments were well beyond the scope of this appeal. For example, reference was made to a petition and arguments were made that dog control laws should be reformed. Other matters addressed were within the scope of the appeal.

[20] In the course of the hearing, the appeal points were substantially narrowed down. Mr and Mrs Johnston argued that the Judge erred when she treated the offences as strict liability offences. They also took issue with some of the Judge's factual findings and queried whether Mrs Johnston could be found guilty on the facts as found by the Judge. Other grounds of appeal referred to in the written submissions were expressly abandoned. There were no separate submissions as to the sentence imposed.

[21] In relation to their strict liability argument, Mr and Mrs Johnston argued that s 25(c) of the New Zealand Bill of Rights Act 1990 guarantees to anybody charged with any offence the right to be presumed innocent until proved guilty. They referred to the judgment of the Supreme Court in *Hansen v R*[4] and also to ss 4 and 5 of the Dog Control Act. They argued that s 57(2) is subject to ss 4 and 5 and that there is no basis for finding that the offence created by s 57(2) is a strict liability offence. They put it to me that the High Court and the Court of Appeal have erred in so finding and that the Courts have failed to acknowledge the statutory liability in negligence referred to in s 5(1)(f) and (g) of the Act. They asserted that the Council did not discharge the burden of proving that either of them was negligent and that accordingly, the appeal must be allowed.

[22] Ms Faletau, for the Council argued that there was no miscarriage of justice. She submitted that it is settled law that the offence created by s 57(2) of the Act is a strict liability offence and that the Judge did not err in so treating it at trial. She further argued that the Act contemplates that dogs can have multiple owners and that the

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4 *Hansen v R* [2007] NZSC 7.

charges against the appellants were not duplicitous. It was submitted that there is no evidential foundation to support the suggestion that the appellants were misled when they agreed the relevant facts prior to the trial and that in any event there was no conflict in the evidence adduced at trial as to what happened on the day of the attack. It was submitted that the appeal should be dismissed.

Analysis

[23] Section 57 of the Act provides as follows:

> **57 Dogs attacking persons or animals**
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> (1) A person may, for the purpose of stopping an attack, seize or destroy a dog if—
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> (a) the person is attacked by the dog; or
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> (b) the person witnesses the dog attacking any other person, or any stock, poultry, domestic animal, or protected wildlife.
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> (2) The owner of a dog that makes an attack described in subsection (1) commits an offence and is liable on conviction to a fine not exceeding $3,000 in addition to any liability that he or she may incur for any damage caused by the attack.
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> (3) If, in any proceedings under subsection (2), the court is satisfied that the dog has committed an attack described in subsection (1) and that the dog has not been destroyed, the court must make an order for the destruction of the dog unless it is satisfied that the circumstances of the offence were exceptional and do not warrant destruction of the dog.

[24] As can be seen, the elements of the offence created by s 57(2) are straightforward – the person charged must be the owner of the dog and the dog must have made an attack of the kind described in s 57(1)(a) or (b). It is an offence of a regulatory nature dealing with welfare and public safety. There is nothing in the subsection to suggest that mens rea is an element of the offence.

[25] Many offences of a similar regulatory nature are strict liability offences, where the prosecution is required to prove the actus reus of the offence, but there is no mens rea element. Such offences generally involve little or no stigma, and the need for a mens rea element is not seen to be pressing. Proof of strict liability offences is prima

facie complete as soon as the prosecution proves, beyond reasonable doubt, that the actus reus has occurred.

[26] The leading cases on strict liability offences in this country are the decisions of the Court of Appeal in *Civil Aviation Department v Mackenzie*[5] and *Millar v Ministry of Transport*.[6] They adopted the approach taken by the Supreme Court of Canada in *R v City of Sault Ste Marie*,[7] where the Court distinguished between "true crimes" and public welfare offences. It observed that public welfare offences reflect the needs and the complexities of modern society to maintain, through effective enforcement, high standards of public health and safety but that such offences are not criminal in any real sense. It recognised three categories of offence – first, those in which mens rea must be proved by the prosecution; secondly, strict liability offences in which the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he or she took all reasonable care; and thirdly, absolute offences.[8] The Court considered that public welfare offences prima facie fall in the second category, unless it is clear from the statute that either absolute liability or full mens rea was specifically intended.[9]

[27] The nature of the offence created by s 57(2) has been discussed in a number of cases in this Court. In *King v South Waikato District Council*,[10] the owner of a dog was convicted of two offences under s 57(2) notwithstanding that, in both cases, the owner was in no position to exercise control over the dog. The first attack involved a pet rabbit. The dog was in the custody of other people at the time. The second attack occurred in a Council pound after the dog was impounded following the rabbit attack. Heath J held that the offence created by s 57(2) is a strict liability offence but that a total absence of fault defence is available if the owner can establish that he or she did everything reasonably possible to ensure that those with temporary responsibility for

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5 *Civil Aviation Department v Mackenzie* [1983] NZLR 78 (CA).
6 *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA).
7 *R v City of Sault Ste Marie* [1978] 2 SCR 1299.
8 At 1325.
9 At 1326.
10 *King v South Waikato District Council* [2012] NZHC 2264, [2012] NZAR 837.

the care of the dog were actually in a position to take appropriate steps to exercise control.[11] This approach has been taken in other cases in this Court.[12]

[28] Further, the position reached by this Court has been endorsed by both the Court of Appeal and the Supreme Court.

(a) In *Epiha v Tauranga City Council*,[13] the Court of Appeal was dealing with an appeal from Woodhouse J in this Court. He had held that the offence under s 57(2) is an offence of strict liability. The Court of Appeal observed as follows:

> [6] We agree with Woodhouse J that an offence under s 57(2) of the Act is one of strict liability. As he observed, the High Court has consistently followed this approach with respect to the offences in ss 57 and 58 of the Act. Apart from one decision concluding that the offence imposed absolute liability, it seems the strict liability analysis extends back at least as far as 1984 (in the context of the former legislation).
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> [7] We consider that this long-standing approach is clearly correct. This is a classic public welfare offence directed at protecting the public interest. There is no express mens rea element in the section. Once the prosecution has proved that the defendant is the owner of the dog that has attacked a person, the onus shifts to the defendant to prove total absence of fault on the balance of probabilities.
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> (citations omitted)

(b) Similarly, in *Auckland Council v Hill*,[14] the Court of Appeal stated as follows:

> [47] The offence provided for in s 57(2) is a strict liability offence: being the owner of a dog that makes a relevant attack. The prosecution is not required to establish a lack of care on the part of the owner. The owner of the dog may be convicted without any consideration of the precautions (if any) that were

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11 At [28].

12 See for example *Epiha v Tauranga City Council* [2016] NZHC 2660, [2016] NZAR 1535; *Tauranga City Council v Julian* [2014] NZHC 2132, [2014] NZAR 1322; *McKenzie v Auckland City Council* HC Auckland CRI-2006-404-343, 6 December 2006; *Walker v Nelson City Council* [2017] NZHC 750; *Turner v South Taranaki District Council* [2013] NZHC 1603, [2013] NZAR 1046; *Namana v Masterton District Council* [2010] NZAR 182 (HC) at [16]; *Simpson v Kawerau District Council* [2005] NZAR 529 (HC) at [28]; and see Neil Wells and M B Rodriguez-Ferrere *Wells on Animal Law* (online ed, Thomson Reuters) at [5.26.4].

13 *Epiha v Tauranga City Council* [2017] NZCA 511.

14 *Auckland Council v Hill* [2020] NZCA 52.

> taken by the owner to prevent an attack, the reasons why those precautions failed, and whether the owner should have taken additional precautions. Indeed, the offence may be committed even if the owner did not, at the relevant time, have possession of the dog because it had been left in another person's care for less than 72 hours.
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> (citations omitted)

(c) More recently, leave to appeal to the Supreme Court was sought in a dog control case – *Newlands v Nelson City Council*.[15] In declining leave, the Supreme Court observed as follows:

> [11] In *Epiha*, the Court of Appeal pointed out that decisions of the High Court since 1984 have confirmed that offences such as s 57(2) are strict liability offences. Thus, this is a matter of settled law. While this Court has not considered the point, we note that even if we were satisfied that a point of law justifying an appeal to this Court arose, on the facts of the present case the outcome would not be affected. Nor do we consider there is any risk of a miscarriage of justice in the way the case was determined at the District Court and High Court level.
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> (citations omitted)

[29] Strict liability offences do not infringe the presumption of innocence set out in s 25(c) of the New Zealand Bill of Rights Act. The prosecutor is still required to establish beyond reasonable doubt the actus reus of the offence. However, it is possible for a defendant to show that the occurrence of the actus reus was not something for which he or she was at fault. The burden of proof of absence of fault rests with the defendant, on the balance of probabilities.[16] Nor do ss 4 and 5 of the Dog Control Act affect the position. Section 4 sets out the objects of the Act and s 5 sets out the obligations of dog owners. Section 5(1)(e) requires dog owners to take all reasonable steps to ensure that the dog does not cause a nuisance to any other person and s 5(1)(g) requires an owner to take all reasonable steps to ensure that the dog does not injure, endanger or cause distress to any stock, poultry, domestic animal or protected wildlife. These provisions do not afford a statutory defence to a criminal charge; rather, they are essentially a summary of the operative provisions of the Act.[17]

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15 *Newlands v Nelson City Council* [2021] NZSC 100.

16 A P Simester and W J Brookbanks *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at [5.1.1].

17 *Tauranga City Council v Julian*, above n 12, at [20].

The reference to "reasonable care" in s 5 supports the position taken by the Courts that the offence created by s 57(2), whilst one of strict liability, leaves it open to a defendant to avoid liability by proving that he or she took all reasonable care and that there was a total absence of fault.

[30] I am bound by the decisions of the Court of Appeal in *Epiha* and *Hill*. The observations of the Supreme Court, albeit obiter, in *Newlands*, are highly persuasive. This aspect of Mr and Mrs Johnston's appeal must fail. Judge Munro did not err in treating the offence as a strict liability offence. Indeed, she was obliged to do so.

[31] I now turn to the factual disputes raised by Mr and Mrs Johnston.

[32] As I noted, when the matter was before the District Court, Mr and Mrs Johnston accepted an agreed summary of facts. They sought to resile from that agreed summary at the appeal hearing. Mrs Johnston asserted that there was no direct evidence that Aspen actually killed the chicken and the guinea pig. She also reiterated the argument made by her in the District Court that Mr and Mrs Chwieduk illegally allowed their chickens to roam outside their property. I deal with each issue in turn, but before doing so, I observe that Mrs Johnston was not present when the attacks took place. Aspen was being walked by Mr Johnston at the time.

[33] Mrs Chwieduk had made a statement to a Council officer. She explained that on the day of the attack, she was at home and that she heard a commotion coming from chickens she and her husband kept on the property. She said that the chickens sounded panicked and that she looked through the window. She saw a dog chasing one of the chickens towards her driveway. She opened the window and shouted at the dog. It looked at her and then ran off. She then rushed outside and down the driveway to where she had last seen the dog. She then met Mr Johnston, who was pursuing Aspen. She then heard a woman screaming and realised it was her neighbour, Ms Tustin. She went towards Ms Tustin's property. When she arrived, Ms Tustin was holding a guinea pig in her hands. Ms Tustin was distressed and asked Mrs Chwieduk to check the guinea pig. She did so and found that it was dead. She returned to her home shortly

thereafter and found two dead chickens – one near the vegetable garden and the other under a car on the driveway.[18]

[34] Ms Tustin said that she was doing her washing and that she walked past her window towards the enclosure where her children keep guinea pigs. She noticed the tail of an animal. She rushed outside and was able to identify the animal as a huskie-type dog. She started screaming and tried to get the dog out of the enclosure. She noticed that the dog had something in its mouth. She screamed again and the dog dropped what it had in its mouth. She realised that it was a guinea pig. She said that she then picked up the guinea pig hoping that the dog would not get at it again. The guinea pig was limp and floppy. She did not however see any puncture wounds on the animal. It was however going cold. She said that Mr Johnston then arrived and pulled the dog out of the guinea pig enclosure and put a lead on it. Mrs Chwieduk also arrived, looked at the guinea pig and said that it was gone.

[35] Both Mrs Chwieduk and Ms Tustin read their written statements at the hearing. They were cross-examined by Mrs Johnston. Neither of them resiled from their written statements.

[36] Mr Johnston had also made a statement to Council officers. He said that he took Aspen for a walk on the day in question, that initially he had Aspen on the lead, but that he let him off the lead while he was on the beach. At one point, Aspen started running away via an underpass and across the road to the corner of Glamorgan and Deep Creek Drive. He pursued Aspen and when he finally got near him, "I noticed he had a chicken in his mouth". He shouted out at Aspen and tried to get hold of him but he moved too quickly. He heard a woman screaming from the adjacent property, and he rushed over to that property. He found a lady holding a guinea pig in her hands. It looked like the guinea pig was still alive. He noticed that Aspen was inside a pen and that he was just sitting. He attached the dog lead and re-established control over Aspen.

[37] Mr Johnston largely stuck by his statement when he gave evidence at the trial.

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18 The charges related to one chicken only.

[38] It seems that no-one actually witnessed Aspen killing the chicken or the guinea pig but he was seen with both animals in his mouth at different times. The inference that it was Aspen who killed the chicken and the guinea pig is irresistible. The Judge cannot be criticised for drawing this inference and, as I have noted, the Johnston's accepted at trial that Aspen killed the chicken and caused the death of the guinea pig. The Johnston's challenge to the Judge's finding that Aspen killed the chicken and caused the death of the guinea pig cannot succeed.

[39] Nor do Mrs Johnston's protestations that the chickens were freely roaming have any evidential support. Mrs Johnston produced photos taken both before and after the event which she said showed the chickens wandering free in the vicinity of the Chwieduk's property. However, the evidence presented at the hearing was that, on the day in question, the chickens were confined in a coop with wire netting around it and a wooden gate. Mrs Johnston sought to cross-examine Mrs Chwieduk about this issue. Mrs Chwieduk was adamant that the chickens were restrained on the day and that they could not get out of their coop.

[40] This was the only evidence before the Judge as to where the chickens were on the day and clearly it was open to her to accept it.

[41] The factual disputes raised by the Johnston's are not made out on the evidence that was before the Court.

[42] Mr and Mrs Johnston did not directly challenge the Judge's findings in relation to the absence of exceptional circumstances. As a matter of law, where an offence has been committed under s 57(2), s 57(3) applies. An order for the destruction of the dog is the normal consequence of an attack, absent exceptional circumstances. The Judge was not as a matter of law able to consider factors beyond the circumstances of the offence[19] and there were no exceptional circumstances established on the facts.

[43] Finally, I deal with Mrs Johnston's liability. The evidence before the Judge was that she was the registered owner of Aspen. She failed to adduce any evidence sufficient to establish a total absence of fault defence. There was, for example, nothing

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19 *Auckland Council v Hill*, above n 14 at [47].

to suggest that she took any steps to explain to her husband that Aspen had to be kept on a lead and under control at all times. There is nothing to suggest that she turned her mind to the possibility that Aspen might attack domestic animals on the day, notwithstanding that the dog had previously been involved in similar incidents.

[44] The word "owner" defined in the Act means, in relation to any dog, every person who owns the dog or who has the dog in his or her possession for less than 72 hours.[20] Both Mr and Mrs Johnston fell within the statutory definition. As the Court of Appeal noted in *Hill*, the offence created by s 57(2) can be committed even if the owner did not, at the relevant time, have possession of the dog.[21]

[45] For the reasons I have set out, the appeal against conviction must be dismissed. The Judge did not err when she found both Mr and Mrs Johnston guilty of the offence created by s 57(2).

[46] Mr and Mrs Johnston did not present any separate submissions in relation to the sentence imposed. I have nevertheless considered the sentence. It was well within the range available to the Judge. Mr and Mrs Johnston have not established that any error was made by the Judge or that a different sentence should be imposed. The appeal against sentence is also dismissed.

Wylie J

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[20] Dog Control Act 1996, s 2.
[21] *Auckland Council v Hill*, above n 14, at [53]-[84].