

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 5/2022  
[2022] NZSC 40

BETWEEN                      ALEXANDRA JOHNSTON AND  
   GRAHAM WESLEY JOHNSTON  
   Applicants

AND                              AUCKLAND COUNCIL  
   Respondent

Court:                          William Young, Glazebrook and O'Regan JJ

Counsel:                      Applicants in person  
   D J Collins and V Schaaf for Respondent

Judgment:                      6 April 2022

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**JUDGMENT OF THE COURT**

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**The application for leave to appeal is dismissed.**

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**REASONS**

[1]     The applicants were convicted after a Judge-alone trial in the District Court on two charges under s 57(2) of the Dog Control Act 1996 (the Act).<sup>1</sup> Section 57(2) provides that the owner of a dog that attacks a person, stock, poultry, domestic animal, or protected wildlife commits an offence.

[2]     The incident that led to the charges involved the applicants' dog entering two private properties and killing a chicken and a guinea pig.

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<sup>1</sup> *Auckland Council v Johnston* [2021] NZDC 6929 (Judge Munro). Judge Munro fined the applicants \$750 and ordered reparation totalling \$300, as well as making an order under s 57(3) of the Act for the destruction of the dog.

[3] The applicants unsuccessfully appealed to the High Court.<sup>2</sup>

[4] They now seek leave to bring a leapfrog appeal to this Court against the High Court decision. Under s 75 of the Senior Courts Act 2016, this Court must not grant leave for a leapfrog appeal unless satisfied not only that the appeal standard in s 74 is met but also that there are exceptional circumstances justifying taking the proposed appeal directly to this Court.

[5] The applicants say they wish to seek answers to the following questions of law if leave to appeal is granted:

- (a) What is the mental element (or mens rea) of the offence created by s 57(2) of the Dog Control Act?
- (b) Does s 5(1)(g) of the Act impose liability and negligence in respect of the offences under s 57(2)?
- (c) Is strict liability for the offences under s 57(2) of the Act inconsistent with the right to be presumed innocent guaranteed by s 25(c) of the New Zealand Bill of Rights Act 1990?

[6] These are not suitable questions for the granting of leave because they are abstract and not tied to the facts of the case. But it is clear they are directed to the essence of the applicants' dissatisfaction with the District Court and High Court decisions, namely that both Courts found the applicants had committed the s 57(2) offence on the basis of strict liability.

[7] The applicants wish to argue that the s 57(2) offence is not a strict liability offence and that the Crown should be required to prove mens rea. This explains their first question. A similar point was raised in a recent application for leave to appeal to this Court, *Newlands v Nelson City Council*, in respect of which leave was refused.<sup>3</sup> In *Newlands*, this Court referred to the observation made by the Court of Appeal in

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<sup>2</sup> *Johnston v Auckland Council* [2021] NZHC 3363 (Wylie J) [HC judgment].

<sup>3</sup> *Newlands v Nelson City Council* [2021] NZSC 100.

*Epiha v Tauranga City Council* that since 1984 decisions of the High Court have confirmed that offences under s 57(2) are strict liability offences.<sup>4</sup> This Court observed that the strict liability nature of the offence under s 57(2) was a matter of settled law.<sup>5</sup> We do not see an argument to the contrary, which the applicants seek to make if leave is granted, as having sufficient prospect of success to justify leave for a further appeal.

[8] The second question relates to s 5(1)(g) of the Act. That section provides that the obligations imposed on dog owners by the Act require every owner of a dog 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. It does not impose criminal liability and does not qualify the scope of the offence created by s 57(2). Accordingly, we do not see the question of law which the applicants wish to raise in relation to s 5(1)(g) as having any relevance to the proposed appeal against conviction for which they seek leave.

[9] That said, we observe that, although the High Court Judge found s 57(2) created a strict liability offence, he also noted that a defence of complete absence of fault was potentially available.<sup>6</sup> This requires a defendant to prove on the balance of probabilities that the actus reus of the offence was not something for which they were at fault.

[10] The third question relates to the presumption of innocence set out in s 25(c) of the New Zealand Bill of Rights Act. The applicants wish to argue on appeal, if leave is granted, that s 57(2) of the Act should be interpreted subject to s 25(c) of the New Zealand Bill of Rights Act and that such an interpretation would mean the offence created by s 57(2) was not a strict liability offence. This argument was made in the High Court and was rejected.<sup>7</sup> As the High Court Judge pointed out, strict liability does not negate the presumption of innocence. The prosecutor is still required to establish beyond reasonable doubt the actus reus of the offence and defendants may avoid conviction by proving on the balance of probability that the occurrence of the

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<sup>4</sup> *Epiha v Tauranga City Council* [2017] NZCA 511, [2017] NZAR 1664 at [6].

<sup>5</sup> *Newlands*, above n 3, at [11].

<sup>6</sup> HC judgment, above n 2, at [27]–[28], citing *Epiha*, above n 4, at [6]–[7].

<sup>7</sup> At [29].

actus reus was something for which they were not at fault. We do not see this argument as raising a point of public importance or as being sufficiently arguable to justify a further leave to appeal.<sup>8</sup>

[11] We are not satisfied that it is in the interests of justice to grant leave to appeal. None of the requirements of s 74 of the Senior Courts Act is made out, let alone the “exceptional circumstances” requirement set out in s 75 of the Senior Courts Act in relation to leapfrog appeals.

[12] The application for leave to appeal is dismissed.

Solicitors:

D J Collins and V Schaaf, Auckland Council, Auckland for Respondent

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<sup>8</sup> Senior Courts Act 2016, s 74(2)(a).