

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 91/2024  
[2024] NZSC 141

BETWEEN AMITESH KUMAR SHARMA  
Applicant

AND AUCKLAND COUNCIL  
Respondent

Court: Ellen France, Williams and Kós JJ

Counsel: T A Hwang for Applicant  
J B Carter for Respondent

Judgment: 22 October 2024

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JUDGMENT OF THE COURT

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**A The application for an extension of time to apply for leave to appeal is granted.**

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

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REASONS

**Introduction**

[1] The applicant, Amitesh Kumar Sharma, pleaded guilty to two charges laid under the Dog Control Act 1996 (the Act), namely, owning a dog that attacked a domestic animal,<sup>1</sup> and owning a dog and failing to comply with the effects of a menacing classification.<sup>2</sup> The sentence imposed included, amongst other matters, an order for the destruction of the applicant's dog, Kaiser.<sup>3</sup> In making the order for

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<sup>1</sup> Dog Control Act 1996, s 57(2).

<sup>2</sup> Sections 33E(1)(a) and 33EC. The classification was imposed under s 33A on 30 January 2017.

<sup>3</sup> *Auckland Council v Sharma* [2023] NZDC 20024 (Judge Tan).

destruction, the sentencing Judge rejected the argument for Mr Sharma that, in terms of s 57(3) of the Act, “the circumstances of the offence were exceptional and [did] not warrant destruction of the dog”.

[2] The High Court dismissed an appeal against the order made in the District Court for destruction of the dog.<sup>4</sup> Mr Sharma applied for leave to appeal that decision to the Court of Appeal but leave was declined.<sup>5</sup> As there is no right to seek leave to appeal from the latter decision,<sup>6</sup> Mr Sharma seeks leave to appeal directly from the decision of the High Court.

### **Background**

[3] The incident giving rise to the charges occurred after Kaiser and the applicant’s other dog, Shady, got out of the applicant’s property late in the day in question because the garage door was left open. The complainant and his dog, Mary, were out for a walk. Mary was on a leash. The applicant’s two dogs ran towards the complainant and his dog. Kaiser bit and latched onto Mary. The complainant went to pick up Mary and he too was bitten. Mary received puncture wounds requiring vet treatment and stitches to the main wound area. The complainant had two wounds and required hospital treatment.

[4] The circumstances relied on by the applicant in arguing a destruction order should not have been made as set out in the High Court judgment are as follows:<sup>7</sup>

- (a) Mrs Sharma was [very] sick that day ... ;
- (b) Mrs Sharma was unable to walk Kaiser that day;
- (c) Kaiser could not go to doggy daycare;
- (d) Kaiser’s dog walker was unavailable that day to walk Kaiser;
- (e) Kaiser was not walked at all, when normally she is walked twice a day;
- (f) Kaiser was confined in the home all day;

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<sup>4</sup> *Sharma v Auckland Council* [2023] NZHC 1755 (O’Gorman J) [HC judgment].

<sup>5</sup> *Sharma v Auckland Council* [2024] NZCA 252 (Courtney, Muir and Cull JJ).

<sup>6</sup> Criminal Procedure Act 2011, s 213(3).

<sup>7</sup> HC judgment, above n 4, at [11].

- (g) Mr Sharma was stuck at their café business as he was understaffed and could not walk Kaiser or take Mrs Sharma to the hospital or doctors;
- (h) Mrs Sharma forgot to shut the internal garage door and does not even recall how or when it was opened;
- (i) it was raining and dark which meant Kaiser could not hear Mr Sharma;
- (j) when the garage door opened, Kaiser immediately ran out and found Mary and the complainant, rushed to Mary to play, but Mary became frightened because of his size, resulting in the “play gone wrong” and injuries; and
- (k) the complainant, who was walking Mary, had earphones and a hoodie on and could not really see through the rain and dark. He tried to pick up his dog Mary during the “play gone wrong” and was bitten by Mary, not Kaiser.

[5] We interpolate here that the respondent, Te Kaunihera o Tāmaki Makaurau | Auckland Council, disputes that there is any evidence to show that Mary, not Kaiser, bit her owner.

[6] Applying the Court of Appeal decision in *Auckland Council v Hill*,<sup>8</sup> O’Gorman J rejected the argument that these matters comprised exceptional circumstances. The Judge said that to qualify as exceptional “circumstances of the offence”, the relevant events:<sup>9</sup>

... must form a proximate part of the attack, such as where the victim attacks the dog or its owner in the immediate lead-up. It does not reopen the door to consider the circumstances of the owner or the attacking dog (as opposed to the attack itself) that arose earlier in the day.

[7] The Judge then worked through the factors relied on by Mr Sharma, noting that they could be grouped into three categories, that is, why Kaiser had not been exercised that day, why Kaiser had escaped and was not under control at the relevant time, and what occurred between the time of the escape and biting Mary. The Judge said that the circumstance of the dog not being exercised that day was “something relevant to the circumstance of the attacking dog as opposed to the circumstances of the attack itself”.<sup>10</sup> As with the strict liability of failure to keep a dog controlled, it is not treated

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<sup>8</sup> *Auckland Council v Hill* [2020] NZCA 52, [2020] 3 NZLR 603.

<sup>9</sup> HC judgment, above n 4, at [37].

<sup>10</sup> At [41].

as exceptional for the purposes of s 57(3) even if it is not expected to occur. The Judge continued:<sup>11</sup>

Even one-off failures by an otherwise responsible owner to maintain effective control of the dog cannot qualify as an exception, and a one-off failure to exercise the dog logically falls in the same category. A combination of factors certainly can be considered together and have been in this case. However, ... such circumstances relating to the owner and/or dog may make the attack exceptional, but this does not qualify to prevent a destruction order unless they have a direct bearing on the attack itself.

### **The proposed appeal**

[8] The proposed appeal would have this Court reprise the arguments made in the Courts below. The applicant maintains that s 57(3), properly interpreted, would encompass the circumstances he relied on unsuccessfully in the High Court, as well as in the Court of Appeal. As we have discussed, the High Court applied *Hill*. At its heart, then, the proposed appeal challenges the approach of the Court of Appeal in *Hill* to what constitutes “exceptional circumstances of the offence”.

[9] In terms of *Hill*, it is sufficient to note that the Court of Appeal in that case said that the text of s 57(3), read in light of its purpose, suggested a two-step inquiry. The first stage is “what happened?”<sup>12</sup> The second stage is whether what happened was exceptional — “an unusual or one-off occurrence that is most unlikely to be repeated” — and whether in light of the exceptional nature of what occurred, the Judge is satisfied destruction is not necessary to remove the risk of a future attack.<sup>13</sup>

[10] In terms of the second step, the Court noted first that the circumstances have to be exceptional in a way that means destruction of the dog is “not warranted”.<sup>14</sup> Second, the Court of Appeal continued:

[75] This test requires the court to focus on the circumstances of the offence/attack, and the risk that similar circumstances will occur in the future. It does not require the Court to undertake the difficult, if not impossible, task of inquiring into the psychology of the dog and making predictions about how the dog is likely to behave in the future. The inquiry contemplated by the Act is in our view much simpler. Section 57(3) proceeds on the basis that the

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<sup>11</sup> At [41].

<sup>12</sup> *Auckland Council v Hill*, above n 8, at [64], and see at [5].

<sup>13</sup> At [64].

<sup>14</sup> At [74].

previous attack establishes that there is a risk of the dog attacking again in similar circumstances. So the focus is on whether those circumstances were sufficiently exceptional that that risk is remote and does not justify destruction of the dog in the interests of public safety.

[11] The example the Court gave of what may comprise exceptional circumstances was where “the owner of dog A was rushed or attacked by dog B, and dog A attacked dog B in order to protect its owner”.<sup>15</sup>

[12] The correctness of this approach to what constitutes exceptional circumstances in s 57(3) of the Act may raise a question of general or public importance.<sup>16</sup> But we consider that resolution of the appeal will be largely governed by the specific facts of this case. As to those facts, nothing advanced by the applicant suggests there was an error in the assessment of the High Court that the, essentially mitigating, factors advanced by Mr Sharma were not the exceptional circumstances contemplated by the text and purpose of the Act. Accordingly, we do not see this case as an appropriate one to address the wider issue given the case has insufficient prospects of success. Against this background, nor is there an appearance of a miscarriage of justice.<sup>17</sup>

[13] In granting leave for a direct appeal from the High Court, the Court must be satisfied that it is necessary in the interests of justice for the Court to hear and determine the appeal and that there are exceptional circumstances justifying a direct appeal.<sup>18</sup> The proposed appeal does not meet this threshold.

[14] An extension of time to apply for leave to appeal is required given the lapse of time since the High Court judgment.

## **Result**

[15] The application for an extension of time to apply for leave to appeal is granted.

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<sup>15</sup> At [76].

<sup>16</sup> Senior Courts Act 2016, s 74(2)(a).

<sup>17</sup> Section 74(2)(b).

<sup>18</sup> Section 75.

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

Solicitors:  
Queen City Law, Auckland for Applicant