In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2025: No. 4

BETWEEN:

KYLE SMITH

Appellant

-and-

THE KING

Respondent

Before: The Hon. Mr. Justice Patrick Doherty, Assistant Justice

Appearances: Mr. Michael Scott for the Appellant
Ms. Matthew Frick for the Respondent

Date of Hearing: 14th August 2025
Date of Judgment: 15th August 2025
Date of Reasons:

EX TEMPORE JUDGMENT

Introduction

1. The Appellant appeals his conviction under section 22(1)(a) of the Dogs Act 2008 ("the Act") on March 12, 2021 the Appellant's dog, Trouble, bit the Complainant on her arm and leg causing injuries which required medical treatment. The matter went to trial before Magistrate Tokunbo. The case took a most unusual course thereafter. I read from the first paragraph of the Learned Magistrate's judgement in this matter:

"By way of quick but pertinent background Worship Tokunbo heard the entire case over 2 days. It commenced on 16 June 2023 and was completed on 14th August 2023, when on that date Worship Tokunbo informed the parties "I will notify you of the judgement". No notification was given for any judgement before Wor. Tokunbo retired from the magistracy in October 2023"

The Magistrates' decision that I am considering is by a magistrate who was parachuted in to complete the matter which was essentially complete, save and except for the final decision. The parties relied on s. 10(1) of the Magistrates Act 1948 which allows for a new magistrate to complete a trial if the original magistrate is absent.

Issues on appeal

2. Were the Learned Magistrates' credibility findings regarding the Appellant and the Complainant without supporting reasons in error? If so, does the evidence of the Appellant at trial taken at its highest afford a legal defence under section 22(3) of the Act?

Factual Background

3. Much of the evidence in this matter is not contentious. The Complainant parked her vehicle near the Appellant's repair shop on the date in question. The Appellant was in his residence in a seated position and she spoke to him through an open door. She asked the Appellant if he does window tinting for cars, he replied that he did not but that his friend did. She then went to her car to write her telephone number on a piece of paper with the intention of giving it to him. As she approached the tall fence surrounding the Appellant's shop, Trouble managed to open the fence with his nose. He then proceeded to bite her on the leg and her arm. She agreed that before being attacked by the dog, she saw the Beware of Dog sign displayed outside the shop.

4. The Appellant testified that the fence surrounding his shop was secured by two bungee cords. He said he had secured it in such a way so his dog could not get out. He agrees that the Complainant did approach his shop with the paper containing her contact details, but as she approached the fence she tripped because her pant leg got caught on the bumper of a car which was parked out in front of his shop. This caused her to fall against the fence

allowing the door to the fence to open. At that point the dog managed to get out through the gate, jumped up and bit the Complainant.

5. Neither the Appellant nor the Complainant said anything to each other about the dog before the incident, such as whether it was safe or not safe to approach the fence. It was also agreed by the parties that the dog was not displaying aggressive behaviours before the attack of the Complainant such as barking or growling.

Position of the Parties

The Appellant

6. The Appellant takes issue with the Magistrate's finding that the Complainant was a credible witness and points to parts of the Complainant's evidence which he submits are inconsistent with other evidence in the case. However, in his oral submissions, Mr. Scott primarily focused on the Magistrate's treatment of the Appellant's evidence as compared to the Complainant's evidence. He argues that the Magistrate treated their evidence as an either or proposition thus improperly shifting the burden of proof to the Appellant.

The Respondent

7. Mr. Frick on behalf of the Respondent takes a pragmatic approach to this appeal. He agrees that the Learned Magistrate may have erred in his reasons when he addressed the credibility of the Appellant, however he submits that if one were to put the Complainant's evidence aside and accept the evidence of the Appellant, the conviction is still safe as there is no evidence from the Appellant which could amount to a defence under section 22(3) of the Act.

Statutory Framework

8. The charge falls under section 22(1)(a) of the Dogs Act 2008 which reads as follows:
"(1) Subject to subsections 3 and 4 a person who keeps a dog commits an offence if the dog (a) causes death or injury to another person."

9. The defence to the charge is found in subsection 22(3) of the Act. It reads:

"(3) where a person who's been injured or the personal property of a person has been damaged by the act of a dog, an offence is not committed against subsection 1(a),(b) or (c)

if the Act of the dog was provoked by a criminal committed by the person or by behaviour of a person which was otherwise unreasonable in the circumstances."

10. The Jurisdiction for considering appeals under the Summary Offences Act is found in section 18 the Criminal Appeals Act 1952. It reads:

"18(1) subject as hereinafter provided the Supreme Court in determining an appeal under Section 3 by an appellant against his conviction shall allow the appeal if it appears to the court-

(a) that the conviction should be satisfied on the grounds that upon weighing up of all the evidence it ought not to be supported

(b) that the conviction should be set aside on the ground of a wrong decision in law; or

(c) see that on any ground there was a miscarriage of justice;

And in any other case shall dismiss the appeal:

Provided that the Supreme Court notwithstanding that it is of the opinion that any point raised in the appeal might be decided in favour of the appellant may dismiss the appeal if it appears to the court that no substantial miscarriage of justice in fact occurred in connection with the criminal proceedings before the court of summary jurisdiction"

Analysis

Preliminary point

11. As a preliminary observation I have to remark that the Learned Magistrate was placed in a very difficult position in the way this matter came before him. He was required to make findings of credibility when he did not see and hear the witnesses give their evidence. He did have an opportunity to read the transcription of their testimony and have the witnesses confirm their testimony before him, but that in my view was an inadequate solution for him to properly assess the issues of credibility in this matter. Section 10(1) of the Magistrates Act 1948 provides for an efficient resolution of proceedings when the first magistrate is absent. It allows for a second magistrate to assume conduct of the proceedings and finish the trial. There appears to be no restriction on the types of matters this section applies to.

However, in my view, where important issues of credibility must be resolved, it is preferable that the case begin afresh before a new magistrate. It is untenable that the second magistrate who assumes conduct of the case, is placed in the very awkward position of having to resolve conflicting testimony and issues of credibility without having the opportunity of actually hearing the witnesses give their evidence.

Credibility findings

Inadequate reasons

12. Mr. Frick on behalf of the Respondent acknowledged that the Learned Magistrate likely erred when he simply stated that "the Defendant is not a witness of truth" and "the Complainant is a witness of truth" without providing any basis for such a finding. This failure in my view is not in compliance with the minimum statutory requirements imposed on magistrates in providing their reasons. Section 83(5) of the Criminal Jurisdiction and Procedure Act 2015 reads as follows:

"(5) The record of proceedings must include the magistrates' court's final judgement in writing which will include-

(a) point or points for determination;

(b) be the decision made on such points; and

(c) see the reasons for the decisions."

13. In *Shae-Butterfield and the King,* Criminal Appeal #2 of 2023 the court had occasion to consider this section in the first part of paragraph 17 of it's reasons:

"Section 83(5) has been drafted with admirable clarity. Its literal meaning is perfectly clear. Its underlying purpose is equally clear once one remembers that the law generally requires, as an incident of fair hearing rights, that a person against whom a judicial decision has been made should be able to identify and understand the reasons for the adverse decision."

14. In my view the Magistrate fell below the required standard by not explaining in any form why he found that the Appellant was not a witness of truth or on what basis he found that the Complainant was a witness of truth. He clearly and correctly reviewed their evidence but he offered no reasons why he accepted one witness over the other.

Shifting the Burden

15. There is also the issue raised by Mr. Scott's submission that the magistrate fell into error by framing the case as a credibility contest between the Appellant and the Complainant. Mr. Scott argues that this had the effect of shifting the burden of proof to the Appellant. The concern is that this statement fell into the credibility trap that can sometimes occur during a criminal trial where defendant testifies and the trier of fact indicates that they believe one witness over the other. This is not sufficient. The court must also go on and consider whether a reasonable doubt has been raised by the evidence which she/he does accept. The Magistrate did not consider this crucial step in his reasons and Mr. Scott in support cited the Supreme Court of Canada case of *R v. W.D.[1991] SCR 742*. This decision offers a framework for triers of fact where an accused testifies and issues of credibility need to be resolved. The framework is as follows:

> *" 1. if they believe the evidence of the accused they must acquit;*
> *2. if they do not believe the testimony of accused but are left in reasonable doubt by it they must acquit;*
> *3. even if not left in doubt by the evidence of the accused, they still must ask themselves whether they are convinced beyond a reasonable doubt of the guilt of the accused on the basis of the balance of evidence which they do accept."*

16. It should be noted that this framework arose as a recommendation for a jury instruction but it is also routinely employed in bench trials. The Supreme Court of Canada went on to say that the formula proposed is not required language, however in cases where issues of credibility need to be resolved, the judge has to make it clear throughout the trial the correct burden and standard of proof to apply.

17. The WD formulation is not without criticism. A scholarly article written by David Paciocco, *Doubt about Doubt: coping with R v. W(D) and Credibility's Assessment Paciocco*, David M. Canadian Criminal Law Review; Toronto Volume 22, Iss.1, (Feb 2017) : 31-75., offers some criticism of the formula and provides an alternate direction for triers of fact. Justice Paciocco was an academic when he wrote that article, he currently sits on the Ontario Court of Appeal.

18. Another possible direction which may assist magistrates on this issue is provided for in the Queensland model jury directions which have been judicially approved by two authorities: *R v. Armstrong* [2006] QCA 158 and *R v. McBride* [2008] QCA 412. The suggested direction is as follows:

1. *You may think the defence evidence is credible and reliable and that it provides a satisfying answer to the prosecution's case. If so, your verdict would be not guilty;*

or

2. *You might be uncertain about that evidence but consider that it might be true in that case your verdict should be not guilty;*

or

3. *You may not accept the Defendant's evidence- in which case you put it to one side. You must not jump from deciding not to accept the Defendant's evidence to an automatic conclusion of guilt. Go back to the evidence you do accept, and ask yourself if, on the basis of that evidence, the prosecution has proved prove that the Defendant is guilty beyond a reasonable doubt.*

19. In the end there is no required language for resolving conflicting accounts between the prosecution's evidence and the accused's evidence but it has to be made clear to triers of fact that is not an either or proposition. Trial judges must be careful not to give any impression that the burden has in any way shifted from the prosecution simply because the accused or the defendant has given evidence in the proceedings.

Is a defence to the charge raised by the Appellant in his evidence

20. Mr. Frick suggests that, if you put the Complainant's evidence aside, the Appellant's evidence at trial does not raise a lawful defence to the charges under subsection 22(3) of the Act. He submits the Act is clear that it is not an offence if a person injured provokes the dog by committing a criminal act or provokes the dog by doing behaviour that is unreasonable in the circumstances. He suggests that it cannot be said that the action of the Complainant in snagging her pant leg and falling on the fence can be seen to be unreasonable behaviour let alone unreasonable enough to justify a dog being provoked and attacking the Complainant. Accordingly, he argues that the proviso contained in subsection 18(3) of the Criminal Appeal Act 1952 should be applied and the conviction affirmed.

21. I do see that a potential defence could be made out in the circumstances of this case. Certainly the Respondent's submission on this point does carry some force: someone who falls accidentally can hardly be described as acting unreasonably. However there are more circumstances present in this case to be considered. The Complainant was aware of the dog's presence before she approached the area of the fence. She was also aware of the sign indicating a potentially dangerous dog. She did not ask if it would be safe to approach the fence given the dogs presence. It could therefore be argued that one should take extra care when approaching this compound in such circumstances.

22. Given the foregoing, I see the issue as to whether the Appellant has a defence or not as a matter for a trier of fact to resolve. Accordingly the appeal of conviction is allowed.

23. Since the Respondent is not seeking to have the matter retried, which I think is a very wise decision in the circumstances, I will make no further order.

Appeal Allowed.

Dated the 15th day of August 2025

The Hon. Mr. Justice Patrick Doherty
Assistant Justice