



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: **A 04/17**

In the matter between:

JIMMY BARNARD

and

THE STATE

Coram: Steyn et Parker JJ

Date of hearing: 3 November 2017

Date of judgment: 5 December 2017

JUDGMENT DELIVERED THIS 5th DAY OF DECEMBER 2017

PARKER, J

[1] This is an appeal against both the conviction and sentence of the appellant in the magistrate's court at Mossel Bay. The 29 year old appellant was convicted on the main count (Count 1), being the contravention of s 2(1)(a)/ 2(1)(b)/ 2(1)(c) of the Animals Protection Act 71 of 1962, ('the Act'), and sentenced to a fine of R7 000-00 (seven thousand Rand) or 7 (seven) months imprisonment totally suspended for a period of 5 (five) years on condition that the appellant not again be convicted of the contravention of the said subsections of the Act during the period of suspension. In addition the appellant was, in terms of s 4(3)(b) of the Act, ordered to pay an

amount of R3 211-85 (three thousand two hundred and eleven Rand and eighty five cents) to the Society for the Prevention of Cruelty to Animals (SPCA).

[2] In addition to the abovementioned main count the appellant had been charged, in the alternative, with the common law offence of Malicious Injury to Property as well as a count 2, namely the contravention of s 120(3)(a) read with ss 1; 103; 117; 120(1)(a) and s 121 read with Schedule 4 and s 151 of the Firearms Control Act, 60 of 2000, the Negligent Use of Firearm, namely a rifle.

[3] After being convicted on count 1 (main count) as stated above and acquitted on count 2 on 18 March 2016, appellant was sentenced on 26 April 2016. He unsuccessfully applied for leave to appeal, but on 24 March 2017 on petition to this Court leave was granted leave to appeal against both conviction and sentence. The appellant now comes before us in prosecution of such appeal.

[4] The gravamen of the charges against the appellant is that he, on 27 October 2014, at or near Buffelsdrift in the district of Mossel Bay unlawfully and intentionally shot an animal, to wit a German Shepard Cross dog and thereby inflicted a fatal injury to the said dog. Alternatively it was alleged that he had on the same date and at the same place maliciously damaged the property of one Kowa Jonkers (Jonkers) when he shot and killed her said German Shepard unlawfully with intent to kill the said animal and in so doing damaged the latter's property. In count 2 it was alleged that the appellant was guilty of the contravention of the Firearms Control Act in that he, on the same date and place, unlawfully caused injury or fatally injured the said dog by negligently firing a firearm, to wit a rifle, when shooting the said dog.

[5] Although the appeal, in the rather over simplistic words of Mr Brand, the appellant's attorney, "merely" turns on the issue of whether the dog that was shot by the appellant, was subjected to torture, as meant in s 2 of the Act, the context and background which gave rise to a far more fundamental and rather disturbing

narrative seemingly elevates this matter beyond the apparent scope of the Act .On the facts of this case, which will be summarised hereunder, I am of the view that the appellant may have been fortunate to benefit from the rather generous interpretation of the law and the facts resulting in him being acquitted of the charge embodied in count 2. The appellant is further also fortunate in the present era of heightened awareness and recognition of the rights of all living beings who occupy this earth, if not the universe, that he fell to be dealt with in terms of an antiquated Act promulgated in 1962 and not materially amended since.

[6] It is common cause that the appellant, a local farmer, had on the day in question gone into his house, fetched a rifle, and thereafter proceeded to where the dog in question had been chained and fired two shots at the dog, the second of which was the fatal shot. It is also common cause that he had fired the second shot specifically intending to kill the dog which at that stage constituted no danger/nuisance to him, anyone else or thing. It is not really disputed that the dog had belonged to and had been raised by its owner, Ms Jonker, lovingly since being a small puppy until it was killed by the appellant some 13 years later, though the appellant tried to create confusion and give the impression that he did not really accept that the dog belonged to Jonkers.

[7] Against the above backdrop, and being fully mindful of the need to evaluate the facts of this case, as any case, and to apply the law to such facts objectively and dispassionately, sight cannot be lost of the fact that:-

- 7.1. Cruelty to animals outrages public sensibility and is punished for this reason¹.
- 7.2 The object of any legislation designed to combat cruelty to animals is not so much only to prevent cruelty *per se* but rather to prevent the

¹ JRL Milton and M Cowling South African Criminal Law and Procedure Vol.3 Statutory Offences 2nd Edition (1989) (loose leaf) E6

affront to the sensibilities of human beings,² and to prevent degeneration of the finer human values in the sphere of the treatment of animals³. **B Schwartz**. 'Morals, offences and the Model Penal Code (1963) 63 and Columbia Law Review 669 at 676 stated:-

' . . .It is not the mistreated dog that is the ultimate object of concern: The concern is for the feeling of other human beings ,a large proportion of whom . . . identify themselves with a tortured dog or horse and respond with great sensitivity to its sufferings.'

- 7.3 In keeping with the above sentiments one cannot lose sight of the special bond between man and dog which has existed since time immemorial. It is not without good reasons that a dog has been described as "man's best friend". There exists a symbiotic relationship between man and dog which has lasted for more than 30 000 years. Charles Darwin reportedly said that the love for all living creatures is the most noble attribute of man and it is generally accepted that the level of civilisation of a society is measured by the way it treats its animals, which explains the outrage noticeable in articles and letters in the media when commenting on instances related to perceived cruelty to animals.
- 7.5 Historically, and particularly prior to the 19th century, there existed no penal sanction for the infliction of cruelty upon animals. Society at large and South African civilization has evolved to the extent where the Constitutional Court, the highest court in our land, as recently as 8 December 2016, in a most comprehensive and scholarly judgment recognised the needs of animals and conferred powers on agencies such as the National Society for the Prevention of Cruelty to Animals to statutorily institute private prosecutions in terms of the SPCA Act 69 of

²**R v Moata** 1947(1) SA 490 (O) at 492 where Van den Heever, J observed 'the object of the legislation was not to confer legal rights upon animals and this prohibition is not intended to provide them with protection. The aim was obviously to prohibit a person from being so cruel to an animal as to give offence to the finer feelings and sensibilities of other persons'.

³ See JRLMilton and M Cowling South African Criminal Law and Procedure Vol.3 Statutory Offences 2nd Edition (1989) (loose leaf) E6 Page 1; **S v Edmunds** 1968(2) PHH 398N 'CF',

1993 read with section 8 of the Criminal Procedure Act 51 of 1977,⁴ where **Khampepe , J (Nkabinde ADCJ; Cameron, J; Froneman, J; Jafta, J; Madlanga, J; Mahlantha, J; Moosi, J and Zondo, J – concurring)** in the matter of *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* and another stated that:-

- "[1] *From the ancient Khoisan reverence of the eland to the contemporary conception of the dog as 'man's best friend', humans and animals have a historic relationship, one that is part of the fabric of society, homes and lives. Animals have shifted from being 'mere brutes or beasts' to 'fellow beasts, fellow mortals or fellow creatures' and finally to 'companions, friends and brothers'. (Keith Thomas Man in the Natural World, Penguin books, London 1984) at 172. To protect these voiceless companions, individuals have time and again stepped in where animals are mistreated. Around the world societies similar to the National Society for the Prevention of Cruelty to Animals (the NSPCA) zealously defend their welfare.*
- [2] *These organisations champion the norm that we do not accept acts of cruelty against those who cannot defend themselves.."*

[8] The background circumstances under which the events of the day, and in particular the appellant's conduct, manifested themselves, have to be evaluated against the development of the relationship between human beings and animals and the prevailing values, standards and responses by civilised society where the co-existence of living beings is regulated by democratic values which is underpinned by a Constitutional democracy in South Africa.

[9] The dog in question belonged to Jonkers who lives on a farm known as JanshulpPlaas at Buffelsdrift, near Great Brak River, Mossel Bay, where she has

⁴ National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and another 2017(1) SACR 284 (CC)

been living for many years as one of the workers/dwellers on the farm. The appellant farms on the farm together with his father, where they farm with cows and sheep. Jonkers was in a relationship with one Joseph Top (Joseph) who also worked for the appellant for some 6 years. Both Jonkers and Joseph had been living on the farm for approximately 14 years.

[10] Jonkers had received this particular dog when it was a new born puppy and had raised it caring for it lovingly almost as if it was her own child for approximately 13 years until the appellant shot and killed the dog.

[11] It was common cause, or at least not seriously disputed, that the appellant was experiencing problems with dogs in general, getting in amongst the animals and biting cows and sheep and possibly even at times killing the calves. There was no direct evidence linking the dog in question to this phenomenon. The appellant testified that he, at best, on occasion saw this particular dog nibbling on a carcass but he had never actually seen the dog attacking and/or biting any of his cows or sheep. For this reason it was required of the owners of dogs on the farm to ensure that the dogs were tied up and only allowed to run loose when the appellant's animals were not in the vicinity. According to Jonkers, she in fact kept the dog in question known as "Spotty", tied up and would only let it loose at night.

[12] On 27 October 2014 some strange dogs had entered the farm which resulted in "Spotty" breaking loose and running after the strange dogs. Jonkers immediately fetched "Spotty" and tied it to its chain again. When the appellant saw "Spotty" running after the other dogs he fetched a rifle and proceeded to where "Spotty" had by then again been tied up outside Jonkers' house. It is common cause that when he got to Jonkers, who was in the company of her children, he enquired from her as to which of the two dogs (there was another dog chained, together with "Spotty") he should shoot. When Jonkers protested and asked him not to shoot either of the dogs, the appellant summarily fired a shot at "Spotty". According to the appellant Spotty then started crying/moaning whilst Jonkers said that "Spotty" jumped and

barked at the appellant, who then without any further ado fired a second shot aimed at the head of "Spotty", which struck it and instantly killed the dog. The appellant simply walked back to his house.

[13] The local SPCA was summoned resulting in inspector Baartman attending on the scene. The latter's evidence was that when he got to where "Spotty" had been shot his first observation was that the dog was still chained where it was shot and where it had died. He was of the firm view that if the dog was shot twice then it must have suffered between the two shots, assuming the first shot had caused it to be injured. In my view, in any event it is only logical that the attitude of the armed appellant who fired the first shot, must have caused the dog to feel threatened and that it must have been terrified, whether it was struck or not.

[14] The appellant justified his actions by rather unconvincingly trying to convey that the problems with the dogs and, in particular "Spotty", were such that he was suffering losses and importantly that he had previously obtained Joseph's permission to shoot and kill the dog, which he claimed to have thought belonged to Joseph. His reasons for thinking thus were unconvincing. Eventually it became apparent that on the day (after never having previously seen "Spotty" chasing after or biting any of his cattle/sheep) he had actually shot "Spotty" out of anger because the dog had on the previous day fought with one of his dogs. It was abundantly clear that when he shot "Spotty" it constituted no danger and/or nuisance to any man or beast, nor could it reasonably have been perceived to have been a dog which had in the past caused the appellant any grief or loss. When he shot "Spotty" he did so in the full view and presence of not only Jonkers' neighbours but also her children.

[15] In my view the court *a quo* correctly described Jonkers as a satisfactory witness who was both reliable and credible. She was described by the court *a quo* on page 88 line 6 to 16 of the transcript of the proceedings ⁵as follows:-

⁵page 88 line 6 to 16 of the transcript of the proceedings

"Nou die getuienis van Kowa Jonkers, klaagster in die saak, daar is nie veel kritiek wat die hof kan uitspreek op Kowa Jonkers as 'n getuie nie, in teendeel die hof se bevinding is dat sy 'n geloofwaardige getuie is. Ek het nooit die idee gekry in haargetuienis dat sy probeer om die beskuldigde valslik te inkrimineer nie, ek het nooit die idee gekry dat sy valse getuienis teen die beskuldigde aflê nie.

Die hof bevind verder ook dat sy nooit afgekraak is in kruisondervraging nie, sy het deurgaans by haarweergawe gehou. Ek aanvaar en bevind dat Kowa Jonkers 'n geloofwaardige getuie is."

[16] In contrast to the court *a quo*'s finding in respect of Jonkers, the court clearly expressed serious concerns about the evidence of the appellant. In fact it would not have been unjustified if the court *a quo* had in fact gone so far as to describe the appellant as an unreliable witness. What the court in fact stated was that he had, in material respects, contradicted himself when testifying, compared to his written plea explanation in terms of s 115(1) of the CPA, where he, *inter alia*, stated:-

"Ek ontken dat die betrokke hond aan Kowa Jonkers behoort. My werknemer, Joseph Top, die saamleefmaat van Kowa Jonkers het aan my meegedeel dat dit sy hond is en het hy aan my toestemming verleen om die hond te skiet."

[17] When he testified the appellant did not testify that Joseph had ever said to him that it was his dog. In fact Joseph, when he testified, also stated that he had never told the appellant that it was his dog, ownership of the dog had never been discussed between them. It is further significant to note that this version is not pursued, as on appeal the ownership of the dog was not in issue neither was the owner's permission to shoot and kill the dog. The court *a quo*, in my view correctly, proceeded to find that the dog belonged to Jonkers.

[18] It also troubled the court *a quo* that the appellant had not at all considered any other options to deal with what he claimed to be a problem relating to "Spotty" but

instead had acted in a most brazen, arrogant, insensitive and cavalier manner towards Jonkers and those around her and clearly in total disregard for the animal which was clearly close to Jonker's heart. The circumstances under which he then proceeded to shoot Spotty, whilst the dog was chained and as previously stated of no danger and/or nuisance to anyone, displayed a disconcerting measure of callousness if not downright cold bloodedness on the part of the appellant.

THE LEGAL POSITION/THE LAW:

[19] The relevant sections of Act 71 of 1962 (Animals Protection Act) provides that:-

"(1) In this Act, unless the context otherwise indicates-

(i) "animal" means . . . any dog, cat or other domestic animal. . .

(ii) . . .

(iii) "owner" in relation to an animal, includes any person having the possession, charge, custody or control of that animal . . .

(2)(1) Any person who

(a) Cruelly overloads, overdrives, beats, kicks, goads, ill-treats, neglects, infuriates, terrifies, tortures or maims any animal;

(r) By wantonly or unreasonably or negligently doing or omitting to do any act or causing or procuring the commission or omission of any act, causes any unnecessary suffering to any animal,

Shall be guilty of an offence...

(4)(1) Whenever any person is convicted by a magistrate's court of an offence under this Act . . .

(4)(2) *Any such judgment shall have the effect as if it had been given in a civil action duly instituted before such court.*

(4)(3) *The provisions of subsections (1) and (2) shall mutatis mutandis apply in respect of:-*

(a) . . .

(b) *any costs incurred in connection with the destruction of an animal in terms of an order under paragraph (1)(a) of section three and the removal and burial or the destruction of the carcass."*

[20] In s 2(1)(a) all types of conduct is outlawed other than the shooting of an animal. It does provide that the ill-treatment, infuriating, terrifying, torturing or maiming of an animal is prohibited. As far as this conduct is concerned towards Spotty on the day in question, it is the SPCA inspector, Baartman's evidence, though not that of a veterinary surgeon and as such not an expert, but nevertheless the evidence of a vastly experienced inspector who has been working at the local SPCA for almost 5 years that:-

"Daardie dier het volgens my tremendously gesuffer between the first and second shot"

[21] The appellant, in a rather unconvincing manner, tried to convey to the court that he considered the second shot to be a mercy shot to prevent "Spotty" from suffering further after the first shot. I say unconvincing because he was not able to categorically say whether the first shot had struck "Spotty" or not. The evidence of Jonkers was that after the appellant had fired the first shot, "Spotty" had jumped at him and was barking. It is uncertain whether it had already been struck by a bullet, though it is probable considering the proximity of the appellant to the dog when it was shot.

[22] The above scenario is open to two possibilities, namely that Spotty was struck but not so that he could not jump and bark at the appellant and therefore must have suffered between that and the second shot and secondly it is possible that the first shot had not struck and that there was absolutely no need for the second shot, which means that the appellant fired the second shot unnecessarily and maliciously intending to kill Spotty. Regardless of whether the first shot struck the dog, it must have suffered in that it was infuriated and clearly terrified, unable to defend itself against an obvious attack as it was chained.

[23] Apart from the fact that the Act was promulgated in 1962 and despite the numerous amendments to it since, the essence of the Act has remained the same. I am of the view that the harm which the Act set out to combat or prevent is in fact a scenario where an animal is subjected to ill-treatment and infuriation, in what appears to have been a fit of rage and without any good cause.

[24] On either version (that is Jonkers' version and that of the appellant) Spotty may not have been struck by the first shot or if it was it was probably not mortally injured because it could still jump and bark at the appellant. The second shot was therefore aimed at and definitely struck "Spotty", which though not scientifically established, must have instantly killed the dog. In these circumstances the argument on behalf of the appellant that "Spotty" could not have suffered any pain and was therefore not tortured, is by no means a foregone conclusion. In any event the dog was definitely terrified, infuriated and ill-treated. The appellant maintained that when he fired, particularly the second shot, he intended for "Spotty" to be killed. He must have anticipated that he would cause suffering and ill-treatment of the dog, while wanting to be unkind or unpleasant in causing pain or distress to "Spotty". I do not believe he changed his obvious intention in a rage to shoot an animal to one where he suddenly wanted to alleviate the pain and suffering of the animal, by firing the second shot.

[25] The Act is aimed at preventing cruelty and what can be construed as cruelty in a given case. The actions of the appellant, by shooting at the dog, were intentionally cruel, whether or not the dog was struck and injured with the first shot, or not. Cruelty is behaviour which causes physical or emotional harm to the extent of ill-treatment and causing terror. There can be no doubt that the conduct of the appellant was cruel in the extreme. A finding that the conduct of the appellant did not comply with the provisions of the Act, thus not constituting cruelty based on the wording of the Act, will be a failure of justice.

[26] In the circumstances I am of the view that the conviction of the appellant of the contravention of the provisions of section 2(1)(a) of the Act was sound and justified and that the court *a quo*'s interpretation of the provisions of the Act as applied to the facts in this case did not constitute any misdirection.

[27] The appeal against conviction should in the circumstances be dismissed.

[28] Regarding the sentence appealed against it is interesting to note that though the petition for leave to appeal was against both conviction and sentence which was accordingly granted, no submissions were made in the heads of argument before us on behalf of the appellant advancing any grounds on which the sentence was appealed against. In argument in court, Mr Brand on behalf of the appellant, agreed that it appears from the facts that the appellant, who has two previous convictions for assault during 2010 and 2012, and who clearly on this day shot and killed "Spotty" when the dog constituted no danger and/or nuisance to any living being, and further without considering any other viable options, certainly suffers from a lack of the ability to control his anger. From the undisputed facts it is highly disconcerting that the appellant under these circumstances went into his house, fetched the rifle, walked up to where "Spotty" had been chained together with another dog, had the audacity to ask Jonkers which one of the two dogs he should shoot and when she pleaded with him not to shoot either of the two dogs he proceeded to callously and

brutally, almost with savage mindlessness shoot and kill "Spotty" in the presence of the neighbours and most importantly Jonkers' children, before walking off.

[29] A further even more disconcerting aspect of the appellant's conduct is that when he was brought to trial, after he must have had enough opportunity at introspection about his actions and the effect thereof, he did not show any compassion, regret or remorse for what he had done. He attempted to mislead the court about why he found it necessary to shoot "Spotty", under those prevailing circumstances. His plea explanation was in conflict with his evidence. His evidence particularly about whether or not he had permission from Joseph, whom he had allegedly considered to be the owner of the dog, without a firm basis for such a contention, also leaves one wondering whether the appellant even at this stage feels any remorse for what he had done. All indications are to the contrary if regard is had to what was persisted with in argument during the appeal.

[30] The appellant's conduct violated all sensibilities and sensitivities to animals and their owners, which prevail in a civilized society. Family dogs are part of a family and should be regarded as such. It can safely be accepted that the appellant has no remorse, a factor which clearly negatively impacts on his prospects of rehabilitation. Given his history of aggression (extrapolated from his previous convictions) together with his violent conduct on this day raises the very real spectre of him constituting a risk to the community at large and more particularly the specific farming community where he operates, and their animals. It must be remembered that according to Jonkers the appellant had previously shot "Spotty" in its eye with an air-gun. She also testified that the appellant had on occasion driven around in his bakkie with a firearm and shot randomly at dogs running loose on the farm and had once shot and killed another dog (admitted by the appellant). A truly frightening scenario.

[31] The total disregard displayed by the appellant for the safety of human beings (Jonkers; her neighbours and in particular her children) who were in the immediate vicinity of where he fired the two shots is frightening. It could so easily have

happened that one of these shots could have gone astray and struck any of those persons in the immediate vicinity.

[32] In these circumstances we are of the view that the sentence of the court *a quo* leaned generously in favour of the appellant, who would have benefitted greatly from a form of community service, coupled with the sentence imposed. However, in view of the fact that the State did not counter appeal the sentence, we are not in a position to intervene. It must also be recorded that we had seriously considered giving notice to the appellant of possibly imposing a harsher sentence but did not do so which is another reason we are not able to intervene. I do express the hope that the appellant will take note of the sentiments expressed in this judgment and will take the necessary steps to address his anger management (or the lack thereof).

[31] Accordingly I propose the following order.

The Appeal against both conviction and sentence is dismissed.



PARKER J

I agree and it is so ordered.



STEYN J