

The SPCA (Auckland) Inc v Van Den Bogaart

District Court Pukekohe

9. 10 October; 29 November 1996

Judge C M Nicholson QC

CRN 6057004533-4

Criminal law — Animal protection — Sheep neglected to the point they died — Statutes — Interpretation — Basis upon which a defendant might be guilty of aggravated cruelty to an animal — Whether aggravated cruelty to an animal can be inflicted by acts of omission — Animals Protection Act 1960, ss 2, 4.

Van Den Bogaart ran two egg production farms and also regularly traded sheep. On 14 February 1996, an inspector with the Auckland SPCA called at his farm at Buckland, Pukekohe and found one dead sheep and another severely affected by flystrike. She took the sick sheep away to the SPCA premises but, in spite of treatment, it died that night. The next day the inspector, together with another SPCA inspector and a MAF inspector, returned to the farm and found two more dead sheep and five more sick sheep. The sick sheep were removed; two were in bad condition and were euthanased. The SPCA veterinary surgeon obtained post-mortem findings and concluded that the three sheep that had died would have been experiencing pain, suffering and distress and that it would have been obvious to an observer that the sheep had not been well for at least a week.

Van Den Bogaart stated in defence that he believed that the sheep had been trucked off the property; he did not know there were sheep on the Buckland farm and therefore he could not have been cruel to them or neglected them.

Held (finding the charges of neglect proved but not the charges of aggravated cruelty)

The conclusion that the defendant neglected the sheep followed logically from the bad condition of the sheep and was confirmed by the fact that there were also three dead sheep in the paddocks. In the light of all the evidence, the defendant's assertion that he believed that there were no sheep on the property was false and contrived.

It was not proved that the defendant committed an act of aggravated cruelty. The relevant provisions did not include acts of omission. For a person to be guilty of aggravated cruelty, it must be proved that the infliction of pain and suffering was by a positive act which caused the pain

and suffering and that the infliction of pain and suffering was intentional and with knowledge of it.

Case referred to in judgment

Dallimore v Society for the Prevention of Cruelty to Animals (High Court, Auckland AP 203/90, 22 March 1991, Gault J)

Hart v Police [1965] NZLR 666

Simes v Ministry of Agriculture & Fisheries (High Court, Wellington AP 27/94, 28 April 1995, Grieg J)

Summers v Society for the Prevention of Cruelty to Animals [1991] 2 NZLR 469

Information

This was an information charging that the defendant wilfully committed an act of aggravated cruelty in respect of three sheep or alternatively without reasonable cause neglected them so that they suffered unnecessary pain, suffering and distress.

Barbara H McCarthy for the informant
Barbara Hunt for the defendant

JUDGE C M NICHOLSON QC. The defendant, Mr Van Den Bogaart, is charged that between 7 and 14 February 1996, he wilfully committed an act of aggravated cruelty in respect of three sheep, being an offence against s 4 of the Animals Protection Act 1960 (the Act). Alternatively that being the owner or a person in charge of those sheep, without reasonable cause neglected them so that they suffered unnecessary pain, suffering and distress, and thereby committed an offence against s 3(bb) of the Act.

Mr Van Den Bogaart pleaded not guilty to each charge. At the trial Ms McCarthy, for the informant, called five witnesses, and Ms Hunt, for Mr Van Den Bogaart, called him and an employee.

At the suggestion of counsel I inspected the Buckland farm.

Mr Van Den Bogaart runs two commercial egg production farms under the name Summerdale Poultry Farm. One farm is at Papakura, and the other at Lonan Road, Buckland, near Pukekohe.

On 14 February 1996, Ms Wright, a warranted inspector with the Society for the Prevention of Cruelty to Animals (Auckland) Inc (the SPCA), called at Mr Van Den Bogaart's Buckland farm. She spoke with Ms Adair, who worked for Mr Van Den Bogaart, as an egg collector. She said that she was there to look at some sheep. Ms Adair did not seem to know what sheep she meant. She said "One over there" and pointed to a dead sheep in an adjoining paddock. Ms Adair took Inspector Wright to see a man who also worked for Mr Van Den Bogaart. He was named at the trial as Pene. Inspector Wright explained to him why she was there and asked his name. He ignored her and walked off. She followed him. He said that he would remove the dead sheep and tried to start a tractor.

Inspector Wright asked Ms Adair if the man starting the tractor was the owner of the sheep. She said no. When asked who owned them she said that it was Garry Van Den Bogaart, and gave his phone number.

There were three main paddocks on the farm which Ms Adair named at the trial as the pen, middle and bamboo paddocks. The pen paddock

adjoined the driveway area. There was an old truck in it. As Inspector Wright walked past the old truck, she saw and smell a sheep underneath it. (sheep A). It made no attempt to get up or run away. She pulled it out from under the truck. She described the smell and blowflies that came from it as rather disgusting. She could see that it had a bad case of flystrike with blowflies flying off it and wool hanging from it. Inspector Wright could see other sheep, but because sheep A was very sick and possibly dying, she took it away for urgent attention deciding to return the next day with help to look at the remaining sheep. She gave Ms Adair her card and asked her to give it to Mr Van Den Bogaart and get him to give her a call. As she left Pene was removing the dead sheep with a tractor. In Inspector Wright's opinion that sheep had been dead for several days.

Inspector Wright took sheep A to the SPCA premises, where it was examined by Mr P McQueen, a veterinary surgeon. He saw that it was unable to stand, had pale mucous membranes, and extensive wool loss over its back and flanks. It had severe fly strike with hundreds of fly maggots in the loose wool and eating into the skin under the wool, although none had penetrated it. Hundreds of fly eggs were also present. Mr McQueen treated sheep A, but it died that night. He sent the carcase to the Auckland Animal Health Laboratory for post-mortem.

The following day, 15 February at approximately 3 pm, Inspector Wright telephoned Mr Van Den Bogaart. She told him that she and another SPCA inspector and a MAF inspector were going to his poultry farm at Logan Road as they had received a complaint about the sheep, and she was letting him know so that he could be there. She told him that they were on their way then. He said that he could not go now and did not want to. He said he was delivering his eggs in Auckland. Inspector Wright said that she would get back to him and let him know how she got on. She then drove to the Logan Road farm and met there Mr M McWilliam and Miss M Powley from Animal Control Services, and Mr L Smith from MAF. Inspector Harris of the SPCA arrived. They looked around the farm.

From the gate between the pen and middle paddocks they saw what they estimated to be five to six sheep and several goats in the middle and bamboo paddocks. There was a clump of bamboo near the far end of the bamboo paddock. Behind the bamboo they found two dead sheep, which were quite decomposed, smell disgusting, and in Inspector Wright's opinion had been dead for several days.

They rounded up the five sheep which were in the paddocks. Two were badly affected with fly strike and had wool hanging from their sides (sheep B and sheep C). The other three were heavy in fleece and needed crutching and shearing.

Inspector Wright wrote a notice addressed to Mr Van Den Bogaart advising that one sheep was removed on Wednesday 14 February, and five had been removed that day due to their condition. The notice asked him to contact her within 24 hours to discuss the matter, and gave her phone number. She gave a copy of the notice to one of Mr Van Den Bogaart's employees.

Inspector Wright took the sheep to a veterinary clinic in Pukekohe and then to the SPCA Animal Village at Mangere, where they were examined

by Mr McQueen. As sheep B and C were in the same, if not worse, condition as sheep A had been, Mr McQueen felt that it was not humane to let them die on their own, and he therefore euthanased them. Their bodies were sent to the Auckland Animal Health Laboratory. The other three sheep were in reasonable condition, and were held.

In Mr McQueen's opinion sheep A, B and C would have been experiencing pain, suffering and distress. He believed that his opinion was supported by the post-mortem findings.

In Mr McQueen's opinion the suffering and distress of sheep A would have been present probably for at least two weeks or more. Going by the changes on the skin due to the larvae eating it, he considered that it would have had pain somewhere between two to seven days. In his view, the overall condition of sheep A would have been obvious from a distance, because there were such large patches of no wool. This was an obvious sign that sheep A was not well. He considered that it would have been obvious to an observer for at least a week, that sheep A was unwell but noted that it probably would have taken longer for the amount of wool to break and come free.

In Mr McQueen's opinion the time-frame for the experiencing of pain and distress by the sheep B and C would have been slightly less. In his view, an observer could have seen that each of them was unwell for at least a week.

On 21 February, Inspector Wright telephoned Mr Van Den Bogaart. She said that she was calling regarding the sheep removed from his property at Buckland last Thursday. He said "Which sheep?". She said "Six sheep from your poultry farm. Did you not get the notice I left you?". He said "No". She said "I left it with one of your employees". He replied "I haven't been over to the farm for a while so I haven't got your note". She asked if he could come in and talk with her about them. He replied "No they are your sheep now". She said that it was possible that an offence under the Animals Protection Act 1960 had been committed, and that she would like to ask him some questions and get his side of the story. He asked why. She said "Because they are your sheep". He said "They were, but they're yours now. Last time this happened I had to get a lawyer in to get my animals back". She said she did not know what happened last time. He said "You people are a law unto yourselves. I don't have enough time to do what I have to do on my farm let alone come and talk to brick walls". She said "Well, it is possible an offence has been committed". He replied "Well, you'd better speak to my lawyer then". She said "Do you want me to call your lawyer?". He said "Yes". She said "Who is he?". He said "Peter Neumegeen".

Inspector Wright telephoned Mr Neumegeen the following day. He suggested that she write him a letter explaining what happened and asking him to arrange a time for interview with Mr Van Den Bogaart.

Accordingly on 23 February, Inspector Wright wrote to Mr Neumegeen stating:

Ref.: Mr Van Den Bogaart your client

Further to our telephone conversation on 22 February 1996 I would like to confirm that it is possible that an offence has been committed under the Animals Protection Act 1960 in regards to some sheep belonging to your client.

I have spoken to your client on the telephone and asked him to make himself available for an interview, he declined stating that I must speak to you.

Could you please advise your client that we wish to speak to him as soon as possible. If we do not hear anything within two weeks of this letter we will proceed with this matter as we see fit.

Inspector Wright received no response from Mr Neumegen or Mr Van Den Bogaart.

At the trial Mr Van Den Bogaart did not challenge that he was the owner of the three sheep, that they suffered unnecessary pain, suffering and distress, and that the pain and suffering resulted in the death of sheep A or such disability that it became necessary to destroy sheep B and C in order to terminate their suffering. His defence was that he did not know that the sheep were at the Buckland farm, and therefore he was not cruel to them and did not neglect them without reasonable cause. In evidence Mr Van Den Bogaart said that he believed that the sheep had been trucked off the property days or "Maybe up to a week" beforehand to another property by some of his staff. Just prior to that happening there was anywhere between 20 to 30 sheep on the Buckland property. He could not give a precise figure because "I'm trucking stock in and out all the time". He said that he gave Pene instructions to move the stock, and that he did not specifically make sure all the stock had been moved, but in his weekly rounds of the environs outside, he saw no stock "Because there was not supposed to be any stock there". When asked how long before he received the phone call from Inspector Wright on 14 February had he arranged for Pene to take the sheep away, he replied "Can't say definite. One day, two days or a week beforehand".

Mr Van Den Bogaart said that the stock had been trucked to a property at Bombay that was leased for grazing purposes. When they reached it they were drenched as normal practice between his father and himself in case there were parasites in the stock from one property and to get a fresh start on the next. He said that the numbers of stock on the Bombay property tallied with what he was told was trucked off the Buckland property. He could not say how long he had the sheep at Buckland before they were taken away in February as he was buying sheep practically every week on sale day and moved them around.

When asked what steps he took to check the sheep were in good health when they were at the Buckland property he said that every fortnight he had them yarded and would look for the best sheep to truck off for slaughter, and looked to see "If there's anything untoward".

When asked what steps, if any, he took to check the sheep to see if they had been flystruck apart from the fortnightly round up, he said that he went round the fields every Sunday.

Mr McWilliam was one of the people who went to the Buckland farm with Inspector Wright on 15 February. He was a dog control officer. Prior to that he had been an SPCA inspector. He had been a farmer all his life, and owned a farm.

Mr McWilliam said that the sheep had too much wool for the Buckland farm. That was because it had poultry and as poultry dung

attracted flies the flystrike challenge to sheep was greater. He said that a sheep that was flystruck stood in a certain manner, had discolouration and nibbled at the site of the strike. He said that normal practice dictated that during the season of highest flystrike challenge that sheep be treated with substances to repel flystrike, most substances having a six to eight week cycle of use. He said that despite the help of chemicals the flystrike challenge could sometimes override sheep in extreme circumstances. He said that a wise man would check the sheep daily. That inspection would involve basically running an eye over the sheep.

The defence called Ms Adair. She said that Mr Van Den Bogaart would have told Pene to shift the sheep. She walked round the paddocks helping to move them up to the stockyards and checking all the areas. She said that Pene went on a tractor around the perimeter and she went round the inside. She said that the sheep were taken away with a truck. When Inspector Wright called and said she was there to look at some sheep, she asked "What sheep" because all the sheep had been shifted before Inspector Wright arrived. When asked how many days was it before the Inspector came that she and Pene rounded up and took the sheep to the pen, she replied "Sorry I don't know". When then asked "Within a week —two weeks — a day — two days?" she replied "I don't remember, sorry".

In light of all the evidence, and having seen and heard Mr Van Den Bogaart and Ms Adair give evidence, I have no hesitation in finding that the assertion that Mr Van Den Bogaart believed that there were no sheep on the Buckland property is false and contrived.

Mr Van Den Bogaart was an unconvincing witness. He impressed as self-serving, dogmatic and callous. At no stage has he expressed concern that his sheep had suffered.

Mr Van Den Bogaart could not say how long he believed the sheep had been trucked off this property before the SPCA called other than "Maybe up to a week," and Ms Adair said that she had no idea how long it was before that.

On inspection, I found the Buckland property to be a relatively small farmlet. From a position near the gate between the middle paddock and the pen paddock it would have been possible to easily see sheep in the three paddocks, except for the area behind the clump of bamboo. If, as Ms Adair deposed, Pene checked behind that clump, I find it most implausible that on a mission to take all the sheep from the property, they left at least six and possibly up to nine live sheep behind. It was not as if they were moving a flock of some hundreds from an extensive property. They were moving a flock of the order of about 20 to 30 from a relatively small farmlet.

Ms Adair seemed a timid person and was ill at ease in giving evidence. Bearing in mind that she is still employed by Mr Van Den Bogaart, and having regard to the bombastic and dominant attitude which he displayed in the witness box, I consider that Ms Adair was reluctantly saying what she had been told to say.

Significantly, if Mr Van Den Bogaart had believed that all the sheep had been taken from the property, I consider that it is extremely likely that

he would have told Inspector Wright this during at least one of their telephone conversations.

Incidentally, although the defence called Ms Adair, it did not call Pene. According to both Mr Van Den Bogaart and Ms Adair he was directly concerned with getting the instruction and carrying it out. His evidence would therefore have been highly relevant. He continues to work for Mr Van Den Bogaart on a casual basis. There was no suggestion that he was not available to give evidence.

I am satisfied beyond reasonable doubt that Mr Van Den Bogaart knew on 14 and 15 February that he had sheep on the Buckland property. A conclusion that Mr Van Den Bogaart neglected the sheep between 7 and 14 February follows logically from the bad condition of sheep A, B and C on 14 and 15 February, and is confirmed by the fact that there were also three dead sheep in the paddocks then. The only cause which Mr Van Den Bogaart offered for such neglect was that he thought that all his sheep had been taken from the Buckland property. As stated I find that explanation to be false. The irresistible inference which I draw from the evidence is that Mr Van Den Bogaart avoided discussion with the SPCA about the sheep; and declined to claim them was because he knew that he had neglected them and wanted to avoid responsibility for this.

The only aspect of the case which now causes me concern is whether Mr Van Den Bogaart's culpability exceeded neglecting the sheep and constituted aggravated cruelty.

Section 2 of the Act provides that unless the context otherwise requires:

"Aggravated cruelty", in relation to any animal, means cruelty which results in the death of the animal or which causes it to be so maimed or disabled or injured that it becomes necessary to destroy the animal in order to terminate its suffering.

Section 2 also provides that,

"Cruelty", in relation to any animal, means the wilful infliction upon the animal of pain or suffering that in its kind or degree, or in its object, or in the circumstances in which it is inflicted, is unreasonable or unnecessary;

The Act requires that to constitute cruelty, the infliction of pain and suffering upon the animal must be wilful. In *Dallimore v Society for the Prevention of Cruelty to Animals* (High Court, Auckland AP203/90 22 March 1991) Gault J stated, at p 14:

By adopting in the 1960 Act the different wording "wilful infliction upon the animal of pain and suffering" it appears to me that the legislature clearly meant more directly to link the mental element and the result. I take the view that it is not sufficient under the current provision to show merely that the causative act was wilful. It must be shown that the infliction of pain or suffering was wilful, that is intentional and with knowledge of what was being done or omitted. In proving the mental element in appropriate cases it will be legitimate to infer that the resulting pain or suffering was so obvious or inevitable that it must be taken to have been intended.

Gault J was considering an appeal against a conviction on a charge of cruelly ill-treating an animal. The s 2 definition of ill-treat was and is:

"ill-treat" means beat, whip, kick, wound, maim, abuse, worry, torment, torture, terrify, infuriate, override, overdrive, overload, drive when overloaded, or by any act or omission whatsoever cause pain, suffering, or distress;" (Emphasis added).

There is no reference to omission in the relevant provisions relating to aggravated cruelty. I therefore accept that for a person to be guilty of aggravated cruelty, it must be proved that the infliction of pain and suffering was by a positive act which caused the pain or suffering and that the infliction of pain or suffering was intentional and with knowledge of it. That has not been proved in this case. I accordingly find that Mr Van Den Bogaart did not commit an offence against s 4 of the Act. However, each of the ingredients of the offence of being the owner of each of the three sheep and without reasonable cause, neglecting each of them so that it suffered unnecessary pain, suffering and distress has been proved beyond reasonable doubt, and I accordingly find him guilty and convict him of the offence prescribed by s 3(bb) of the Act.

In her submissions Ms Hunt directed me to cases dealing with onus, standard of proof and necessity of a guilty mind in s 3(bb) cases, particularly the decision of Greig J in *Simes v Ministry of Agriculture & Fisheries* (High Court, Wellington AP277/94, 28 April 1995).

Ms McCarthy referred me in particular to the decisions of Perry J in *Hart v Police* [1965] NZLR 666 and Hillyer J in *Summers v Society for the Prevention of Cruelty to Animals* [1991] 2 NZLR 469. I do not find it necessary or appropriate to discuss and state the law on these aspects because I find that all elements of the charge including that Mr Van Den Bogaart acted without reasonable cause in neglecting the sheep and with a guilty mind proved beyond reasonable doubt.

Charges of neglect found proved; Charges of aggravated cruelty found not proved

Reported by: Robbie Lavén, Barrister