

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**IN THE DISTRICT COURT
AT NEW PLYMOUTH**

**I TE KŌTI-Ā-ROHE
KI NGĀMOTU**

**CRI-2019-043-000172
[2020] NZDC 2631**

NEW PLYMOUTH DISTRICT COUNCIL
Prosecutor

v

STEVEN PAUL BROOKE SCHRADER
Defendant

Hearing: 15 January 2020
Appearances: J Bourke for the Prosecutor
S Hurley for the Defendant
Judgment: 15 January 2020

ORAL JUDGMENT OF JUDGE G P BARKLE

[1] Steven Schrader faces four charges laid under the Dog Control Act 1996. Two charges relate to an incident on 9 December 2018 and the second two concern an incident on 11 December 2018. On each day the allegation of the New Plymouth District Council is that Mr Schrader’s dog, named Duskie, rushed at a person in a public place in a manner that caused that person to be endangered.

[2] In addition, because Duskie is classified as a menacing dog in accordance with s 33E(1) Dog Control Act (“the Act”) Duskie is required to be muzzled when in public. The balance charge in respect of each day is that Duskie was not muzzled in accordance with the Act.

[3] At the commencement of the hearing Ms Hurley who is counsel assigned to act for Mr Schrader confirmed that her client accepted that Duskie was classified as a menacing dog and that on each of the two days that Duskie was with the defendant. Mr Schrader did give evidence and confirmed that he was aware of Duskie's classification and had indeed agreed to that taking place as a result of an incident in the Wellington region on 23 May 2017.

[4] The notice issued by the Hutt City Council was produced in evidence. Annexed to the notice was advice of the effect of such classification along with s 33E of the Act. For today's purposes that states at s 33E(1)(a) that the owner of the dog:

must not allow the dog to be at large or in any public place or in any private way except when confined completely within a vehicle or cage without being muzzled in such manner as to prevent the dog from biting, but to allow it to breathe and drink without obstruction.

[5] In terms of the evidence, [the victim], who is now [an employee] of the Centre City complex in New Plymouth, described that he was going about his duties on that day. Soon after 1.00 pm he came upon Mr Schrader and Duskie sitting outside the Vodafone entrance to the Centre City complex. He described Mr Schrader sitting with his back against the glass entrance with Duskie alongside him. [The victim] has had a number of prior interactions with Mr Schrader and Duskie before this particular day so was familiar with the defendant and his dog.

[6] [The victim] wished to have Mr Schrader move along as he was sitting asking for money from persons entering and leaving the City Centre. Apart from that not being something which was encouraged by the owners of shops at the City Centre, Mr Schrader and Duskie also created a safety risk if there was some form of emergency and egress from the complex was required to be undertaken quickly and at short notice.

[7] [The victim] described that he moved towards Mr Schrader and in a civil manner asked him to move along or words to that effect. He was, he accepted, relatively close to Mr Schrader and Duskie. He noticed that the muzzle of the dog was hanging down around his neck area and was not over the snout and mouth area of Duskie.

[8] As he made the request of Mr Schrader, he observed the defendant to lean or move towards his dog and whisper something in Duskie's ear. While he could not hear what was said, immediately thereafter [the victim] described Duskie as "bouncing up and snapping" at him. It was described as, "a quick movement accompanied by a growl" with the dog's focus on [the victim]. There was the one snap directed at the witness. The impact on [the victim] was for him to move or jump quickly backwards and to tell Mr Schrader in a colourful expletive where he could go with his dog.

[9] [The victim] was so perturbed and uncomfortable about the action of Duskie that he both called the police and went to the local police station. He was advised by the police that it was a matter for the local council and accordingly [the victim] directed his complaint to the dog control section of the New Plymouth District Council.

[10] [The victim] said that he has had some experience with dogs and hunting with them. That being the case, one infers that he felt at quite some risk to both take the immediate action he did when Duskie lunged forward at him and then complain. The particular remark directed at Mr Schrader by [the victim] was clearly an automatic response to feeling in some danger and then he felt so concerned about what had taken place to both advise the police and then take the matter further with the Council. This all reflects in my view that [the victim] was much concerned about his own welfare as a consequence of what took place.

[11] [The victim] accepted in cross-examination that he had during his [over 10] year tenure of working at the City Centre come into contact with Mr Schrader on prior occasions, including with Duskie, and been required to move them along. However, there was no suggestion that [the victim]'s making of the complaint was driven by any dealings prior to 9 December 2018, but solely as a consequence of how he felt uncomfortable about what had taken place on that day.

[12] Mr Schrader described the incident when he gave evidence. He disputed that he was positioned as described by [the victim] but rather said he was some metres away from the door entrance. He, Mr Schrader, described [the victim] as approaching him in an aggressive manner and voicing a number of unpleasant remarks towards

Mr Schrader. When asked in cross-examination if that was indeed how he conducted himself, [the victim] denied that was the case. Mr Schrader said that all that Duskie did was to bark at [the victim] on 9 December 2018 and at no time had he lunged towards the witness nor snapped at him.

[13] Mr Schrader conceded that the muzzle was not on Duskie in the required manner at the time that the dog was observed and the incident took place involving [the victim]. He explained that was because he had just finished feeding Duskie and when he had finished doing that he placed the muzzle back around the required area. In effect really, that is a concession on the part of Mr Schrader, that the muzzle was not secured in a fashion that meant there was compliance with s 33E(1) of the Act.

[14] The second incident took place at the Westown shopping centre on 11 December 2018. The evidence on behalf of the Council was given by [Constable A]. She has been a member of the police for [over 20] years and in December 2018 was posted as part of the community policing operation at Westown.

[15] As a result of information provided by a member of the public [Constable A] went to the shopping centre and observed that Mr Schrader together with Duskie was outside the Subway food store. In a Google Map photograph, that was produced by the informant, she indicated the Mr Schrader was sitting on the ground with his back against a doorway beside the ANZ ATM machine. Rather than approach him immediately [Constable A] decided to observe what was going on from behind a low fence area at the Nag 'N' Noggin tavern. From that position the constable was able to see Mr Schrader's legs protruding on the footpath and also see a part of Duskie.

[16] She then observed a lady carrying a small child with a Labrador dog walk along in front of her towards where Mr Schrader and Duskie were positioned on the footpath. The constable's evidence was that she observed the lady take a wide berth around the defendant and Duskie. As she was moving past the pair Duskie barked and lunged out at the woman as well as her dog. Her evidence was that Duskie rushed out at them. Further she said that the woman was clearly given a fright and moved quickly away.

[17] Shortly after that she saw Mr Schrader leave Duskie and move down the footpath in front of her towards the pharmacy which is further along the shopping area past the Nag 'N' Noggin tavern. Mr Schrader observed the constable at that stage and he became unpleasant towards her, including making some abusive remarks. He also asked her, I understand, for a can opener, presumably to try and extract some food from a can he had.

[18] The constable had with her a photograph of the woman, child and dog as well as Duskie. It again is quite clear that the muzzle required to be worn by Duskie is around his neck area, not on the snout and mouth of the defendant's dog. I note that again Mr Schrader conceded that was the case in giving evidence but once more explained that that had only occurred because he had just fed Duskie.

[19] Mr Schrader's evidence about the event on 11 December 2018 was not to contest that he was at the shopping area. He said he was begging for money for himself and his dog. He said that Duskie knew the Labrador dog and that there had been some interaction, relatively often in the past period, between those two canines and all that Duskie did was to bark at the dog. There was no action, he said, by Duskie as described by the constable.

[20] Mr Scott Goldfinch, animal control officer, also gave evidence on behalf of the Council. While there was no contest about the classification of Duskie he produced the notice from the Hutt City. He confirmed that Mr Schrader was the registered owner of the dog as was accepted by the defendant. Mr Goldfinch explained that the classification ascribed to Duskie by the Hutt City had effect throughout New Zealand due to provisions of the Act.

[21] He explained that having received advice from the police on 11 December 2019 he and another dog control officer had gone to the Westtown Police Station and secured Duskie. The appropriate notices have been served pursuant to the Act and since that date in December 2018 Duskie has been kept at the Council pound.

[22] There is, of course, from what I have recorded as the evidence given by [the victim] as to what took place on 9 December 2018 and [Constable A] on 11 December

2018, divergence with what Mr Schrader says took place on each occasion. While Mr Schrader accepted being at each location and with Duskie, all that he said took place was that his dog barked. He denied that there was any action on the part of Duskie that could be regarded as “rushing” as required in terms of s 57A(1)(a)(i) of the Dog Control Act.

[23] The term “to rush” is not defined in the Act. In a decision of *Agnew v Police* His Honour Tipping J in the High Court at Christchurch stated that:¹

To rush at a person or vehicle seems to imply some intent on the part of the dog to focus on that person or vehicle. While hostility may not necessarily be involved, the idea of rushing at a person or vehicle contemplates at least that the person or vehicle is intentionally the subject of the dog’s attention.

[24] First, I determine that I accept the evidence of [the victim] as to what took place on 9 December 2018. I observed both him and Mr Schrader giving evidence. I have a clear preference for how [the victim] gave his evidence. He has obviously no particular loyalty towards Duskie as Mr Schrader himself does. In giving evidence Mr Schrader naturally said he loved his dog and that the dog was the most important thing in his life.

[25] I am quite comfortable that the incident as described by [the victim] took place in the way that he said that it did. I also determine that as he described what took place falls within the definition of “rushed” as set out by Tipping J. There is no question in my mind that [the victim] was the focus of Duskie’s conduct and that the situation was more grave because Duskie was not muzzled. Mr Schrader himself accepted that was the case. Whether it be for a short period or however long, s 33E(1)(a) is clear that when in public the muzzle must be secured around the snout and mouth. That was not the position.

[26] The offence also requires that [the victim], being the person rushed at, is endangered. His immediate reaction to jump or move rapidly upwards and backwards is evidence of him feeling endangered. Furthermore, the reaction of telling Mr Schrader curtly, quickly and directly where he “could go” also confirms that [the

¹ *Agnew v Police*, High Court, Christchurch, 13/5/1994, Tipping J.

victim] felt at risk. [The victim] is a mature man who is of relatively robust demeanour. For him then to feel that a complaint to the police, and then on advice to the Council was necessary, further underlines in my mind how he felt at risk.

[27] Accordingly, I am more than satisfied that the two charges relating to the incident on 9 December 2018 are made out.

[28] In respect to 11 December 2018 Ms Hurley has reminded me that the woman shown in the photograph produced by Mr Goldfinch in the photo booklet but taken by [Constable A] at the time the incident took place, made no complaint. That obviously must be weighed in my consideration. However, the first matter I must deal with in terms of the charge is whether or not there was a rushing on the part of Duskie. [Constable A]'s evidence was that Duskie "barked, then lunged out by rushing at them" referring to the woman, child and dog.

[29] Again, Mr Schrader's evidence was that there was no more than a barking. I accept the description of what took place that the constable gave in her evidence. She has absolutely no reason, in my view, not to provide to the Court an independent and unvarnished description of what took place. While she has had some interaction in the past with Mr Schrader, there was no evidence to suggest that she was other than impartial.

[30] The constable described her impression of the lady in the photograph as first "taking a wide berth," but then as, "clearly being given a fright." Mr Schrader has again conceded that at this stage Duskie was not muzzled. I also noted that Mr Schrader has accepted that in May 2017 Duskie did bite a member of the public on the arm causing injury that required medical attention. In those circumstances I am satisfied that Duskie rushing as described towards the woman, including the dog that she had with her, was a circumstance that resulted in and caused that person to be endangered. Fortunately nothing more grave occurred. That means that the particular charges laid were the appropriate ones.

[31] Again, there is really no dispute that Duskie did not have his muzzle appropriately secured and a second photo produced by the constable as exhibit 1, makes that quite apparent with the muzzle around the neck area of Duskie.

[32] Accordingly, again with respect to the two charges laid against the defendant as taking place on 11 December 2018, I am satisfied that the evidence has proved both charges and accordingly Mr Schrader will be found guilty of all four charges.

Judge GP Barkle
District Court Judge

Date of authentication: 28/02/2020

In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.