

**IN THE DISTRICT COURT
AT HAMILTON**

**CRI-2015-019-002750
[2016] NZDC 14591**

MINISTRY OF PRIMARY INDUSTRIES
Prosecutor

v

CHRISTOPHER MARK BENNETT
Defendant

Hearing: 27-28 July 2016
Appearances: M Dunn for the Prosecutor
J Buckle for the Defendant
Judgment: 29 July 2016

ORAL JUDGMENT OF JUDGE P I TRESTON

Charge

[1] The defendant faces one charge laid under s 29(a) Animal Welfare Act 1999 in that he ill-treated a cow, number 147, causing the cow to fall using a quad bike causing lameness.

[2] In an opening for the prosecution, the prosecution indicated that there were certain facts to be proved. At the outset it was conceded that identity, time, date and place were not an issue.

[3] The defence was, as indicated by counsel, that the defendant did not do what was alleged against him.

[4] In the facts to be proved, the prosecution indicated that the defendant was a contract milker at a dairy farm in Raglan in 2014. Three witnesses were being called

by the prosecution to give evidence that on 1 November they saw the defendant on a quad bike chasing a cow and then riding the bike into the animal causing it to fall over.

[5] The prosecution said the cow was limping immediately afterwards and was lame for some days and then went on to indicate that one of the eye witnesses, Teresa Hayes, who owned the property jointly with her husband, took four short videos of the cow which was subsequently played and that two expert witnesses would be called, Paula Grant a vet and Professor Richard Laven, who had viewed the four videos taken by Teresa Hayes.

[6] In an interview the prosecution said with an MPI Animal Welfare Inspector, indeed the defendant denied the allegations saying that he was trying to stop the cow getting in with the bulls and the cow kept slipping over.

The evidence

[7] I have considered the evidence and some of it, or the essential parts of it bear repeating. The first witness for the prosecution was Isa June Hulena Leslie, who is employed as a junior vet nurse in Raglan for the last couple of years. She had previously been an AB technician.

[8] She said that on the day in question, 1 November 2014, she and Ms Hayes and her daughter were horse riding on the farm owned by Ms Hayes and her husband and they were heading back along the dairy race back towards the house. They could see the person subsequently identified as the defendant from just over 100 metres away going around on a motorbike chasing two cows and two bulls, she said, having trouble splitting them off from each other.

[9] She went on to say that he managed to do so, that is split them, but then continued to chase the cows, in particular a small jersey looking cow who tripped at one point, got back up and continued to run with the defendant, she said, chasing it. He then bumped into it and it tripped over onto its knees, got back up at that point to continue on a little way before he bumped into it again. That, the witness said,

looked quite purposeful and it looked like quite a solid hit. The cow fell over and lay down with its legs in the air and at that point she saw the defendant get off the bike and walk over to it and she said that the defendant lifted his foot and either kicked or booted it in the head or possibly in the chest. She was quite confident about that. He got back on his bike and rode off.

[10] The three of them continued down the track and were all quite upset with what they had seen.

[11] The witness Ms Leslie said that she could see that the cow had a sore right hind leg. It was flexing and extending it and it looked like it was in a bit of pain.

[12] She did not see the cow doing that prior to it being bumped and said that the defendant had been going quite fast on his quad bike but she said she had a clear view because she was mounted on a horse and what she could see was quite clear because of that.

[13] Under cross-examination she was consistent in saying that she saw the cow bumped by the defendant's quad bike which was going as fast as it possibly could. She did not recall the defendant lifting the cow up and said that she had seen quite clearly from her position on horseback what had occurred.

[14] Ms Evans, a neighbour of the property owned by the Hayes and had been so for 22 years, was out in her garden. She heard a quad bike revving madly, had a look over her gate and could see the defendant from a distance of just over approximately 300 metres going through the gate and chasing a cow. She said that he and the cow went to the left of the pump station which was shown in the exhibits, chasing the cow and then brought it down. She said that the cow stumbled, got up and galloped away and she had seen the other three persons, two on horseback and one walking, near the bridge. She said that it was near the yellow cross word "Teresa" next to it, and she again was quite upset about what had occurred.

[15] Under cross-examination she confirmed that the defendant had hit the cow just in the vicinity of the pump shed and the cow stumbled and went down on its

legs. She said that she was experienced in farming matters for her lifetime and was quite sure about what she had seen. She said that the quad bike ran directly into the back of the cow causing it to go down. She said that she still recalled the matter, at night, because it goes through her head even though nearly two years had passed by and it was the loud revving of the motorcycle which she demonstrated in Court that had attracted her attention to what she said she saw.

[16] Ms Hayes gave evidence. As I say, she was the co-owner of the property and she confirmed that they milked 400 cows and that the defendant and his wife were employed as contract milkers to milk the cows, report on milk production, the general day to day farming tasks and also look after the animals and anything that needed to be done on the farm. She said that were there any indications of mastitis, lameness or other injuries they were to treat the cows or get a vet to look after them.

[17] She confirmed that she had been in the position shown in the diagram with her name and the yellow cross on 1 November. She said that she was with her daughter and Ms Leslie. She was walking and she saw the defendant chasing around six bulls and three or four cows she said down the race and into the paddock number 37.

[18] She said that the defendant, once the stock were in the paddock, proceeded to single out a small jersey cow and chase it around the paddock with the quad bike. She said that he kept on ramming it and hitting it with the quad bike and it fell over and managed to get up and look like it was okay and went down into a rough area. The defendant, she said, kept chasing the cow for a few minutes. It went up onto the flat again running as fast as it could and it fell over again by being hit by the quad bike. She said that she observed the cow to be uncomfortable, sore and limping on its right hind leg. The defendant, she said, then turned around and saw them and left the paddock.

[19] She said she went to the paddock to check on the animal. There was no blood on it but clearly the animal was suffering from soreness and limping and she took a video of how it looked at the time and then later on, as I will detail, she took other videos which I will refer to later.

[20] She said that she took the other videos to check and track the progress of the cow to see how it was getting on.

[21] Her view was that, when she was cross-examined, she could not believe what had happened. It was so blatant, she said, to chase a young cow like that and keep hitting it with a quad bike until the cow fell over twice. She said that the defendant kept having a go and attacking the young cow and she was really upset, horrified and disgusted that that should happen.

[22] She again was cross-examined carefully and did not resile from what she had seen. She said the quad bike had been immediately behind the cow and hitting the cow a number of times and conceded that there could have been wound or blood, but she had not observed any. She said the quad bike was quite noisy and on the second occasion she saw it, she said it was nowhere near the fence with any possibility of having its right hoof caught up in the wire of the fence that was electrified.

[23] The witness said she did not ring the vet because the defendant was responsible as part of his contract for the animal welfare of the herd, or herds, because as I understand it the evidence was there were two herds of 200 cows each.

[24] Ms Grant is a veterinary manager at the local clinic in Raglan and on 10 November was called by the defendant to go to the address of the farm in Raglan to visit six cows. She observed this particular one that the case is about, a jersey cow, tag number 147 and her observations were that the animal was lame in its right hind leg and the degree of lameness was six out of 10, due to a swollen hock joint. There was no obvious wound around the swollen area which was hot but not excessively painful on palpation. She then administered some medicine to the cow and recommended that it also be treated again.

[25] The prosecution called a second witness, Professor Laven who was eminently qualified and his qualifications were accepted by the defence. He is currently an Associate Professor for Animal Health at Massey University and he viewed the videos which had been taken by Ms Hayes to give his expert opinion upon them.

[26] In the first one taken on the day in question, 1 November 2014, he observed that the cow was moderately lame, lameness score being two out of three and needed treatment within 48 hours, according to his opinion. It had reduced movement of the upper left hind limb as well lameness of the back right hind. The stride was shortened. The left leg was brought through relatively quickly. Head was nodding and was readily apparent. Weight bearing on the affected foot appeared even which indicated a limb rather than a foot problem.

[27] In his view, the animal was showing clear signs of pain and for cattle which are designed to not show disability that means it was significant pain which the animal could not hide. That is the distress of the animal he said was greater than the signs. Moderate lameness does not imply moderate pain but rather probably severe.

[28] The second video taken on 9 November 2014, indicated according to the professor much worse lameness, three out of three and immediate treatment was necessary. At standing abnormal stance was easily visualised with hyperflexion of the appropriate joint, prominence of the femur on the left hind limb indicated muscle wastage in that area. The animal was reluctant to move and could not keep up with the walking pace of a normal dairy cow. The level of pain which he observed or concluded on that day was that the cow was unable to move freely and meant that it was suffering from severe pain and distress which needed that immediate treatment to which he had referred.

[29] One particular problem with pain at that level is the animal will be more sensitive to other sources of pain which could persist for a period of one month or so.

[30] The third video taken on 13 November 2014 indicated the lameness was still apparent according to the professor, still in a standing cow but hyperflexion was reduced, movement was more fluid but the animal was still severely lame with reduced ability to maintain normal walking speed. The level of pain had decreased but this animal was still showing clear signs of pain.

[31] For the last video, 18 November 2014, the lameness he said had markedly improved with significant improvement in ease and fluidity of movement. It was no

longer lame while standing although weight bearing between the two hind legs was not equal; stride length was shortened but more normal; head nodding was much reduced and the cow was clearly more comfortable while walking and that walking speed was now normal.

[32] He concluded the animal was still showing signs of pain but much less than previously. At this time points some of the abnormality may be learned behaviour but the alteration still indicated significant pain.

[33] The professor said that he did not expect to see any kind of wound when he was cross-examined because of the injury. He said having seen quad bike damage and investigated things like that before, you could quite easily get damage to hard structures and around hard structure without actually getting a physical wound. If a cow had been rammed by a quad bike, he did not expect to see any external damage because there were not any sharp edges. What you are doing is smacking something hard against something solid and if you got damage to the hock and lower joint from a quad bike and you did not see any obvious external signs of injury because there is nothing really there, most of the damage would be done internally and not externally.

[34] He said that you are hitting something blunt against something solid and the contusions are not going to cause damage to the skin because the skin is pliable and soft. The damage would occur, he said, underneath where you have solid bone and ligaments that are really quite tight. He said that the injuries were much less likely to be consistent with a cow falling over and hurting herself because, although cows do regularly fall over, they do not suffer the sort of level of damage that was seen in that cow. He said he had seen lots of cows fall over, slip, and injuring themselves but the amount of damage he observed had to be a physical cause other than the cow just falling over.

[35] He said that it is unlikely that the sort of injury would have been caused by the cow simply falling over and even had there been multiple falls, it would be unusual for the same injury to occur each time and that the amount of injury caused for this particular cow indicated he would be extremely surprised if it was just multiple falls. He would suspect it would have been something going wrong with

the handling of the cow, not the cows fault, something else a human being would have had to be at fault.

[36] Mr Shaun Mercer is the officer in charge of this case and took the opportunity on 16 December 2014 to interview the defendant and a copy of that interview has been produced in evidence.

[37] The defendant said he had been long term experienced in farming and he confirmed that later on in his oral evidence. That was confirmed by Gavin and Teresa Hayes at that time and during the course of the interview when the allegations were put to him, he said on more than one occasion he actually did not run into the cow.

[38] He gave the explanation of how the cow had fallen on the first occasion when entering the paddock concerned by slipping on an effluent pipe and he said that on the other two occasions that it had gone down, he had hit the cow with the motorbike and had helped it up on one occasion and on the last occasion the cow had its right front leg entangled in the electric fence and he used his gumboot to avoid getting shocked to free it from there and that was how the incident had occurred on the third occasion, he said. But, he said, that although he had seen the hind leg swelled up some 10 days later, it had a bit of swelling but about 10 days later when they got the vet in it did not appear lame but it was not limping at the time that he had seen it fall over in the paddock.

[39] He expressed some concern about the distance that the witnesses had been away, particularly Ms Evans in excess of 300 metres about what they could see and they were mistaken. He denied ramming the cow or touching it with the motorbike and he gave the explanation about the electric fence.

[40] On numerous occasions he denied during the course of the interview hitting the cow with the quad bike. He denied kicking the cow and accepted that he may have touched the cow on one occasion when it had fallen but he never ran into it with the quad bike.

[41] The defendant elected to give evidence at this summary trial and gave the explanation as to the occurrence entering the particular paddock, paddock 13, he had endeavoured to draft the bulls that were there away from the milking herd so that they were not in the yard when the cows were milking but, this particular cow and some others had got by him and had ended up in the same paddock. He said that the cow he was chasing was number 147 and that she had tripped over the effluent pipe with her front feet and went down on her knees and then got up again. He said he was about five to two metres away from the cow at various times and he gave the explanation about using his gumboot to unthread the wire off her because it was live.

[42] He decided to leave the cow there in the paddock while he went back to the shed to continue with his milking because it was getting quite exhausted and when he came back after milking the cow was lying on the ground with two bulls standing over it just out from the pump shed.

[43] He denied again ramming the cow but said the closest he would have got to it would be about 200 millimetres away, or about a foot, six or eight inches, and he said that the witnesses have obviously been mistaken.

[44] He said he had treated the cow with Metacam anti-inflammatory on either the 3rd or the 4th but did not write it down because the dairy diary was missing. He gave evidence about the differences that he had talked about that he had been behind the cow under cross-examination.

[45] So I have taken a little time as is important for both parties to highlight the appropriate parts of the evidence that have been placed before the Court for this particular summary trial.

General matters

[46] The onus or burden of proof is on the prosecution from the beginning to the end of the trial. There is no onus or burden on the defendant to prove anything at all and the standard of proof the prosecution must reach is proof beyond reasonable

doubt. That is I as a presiding judicial officer must be sure that the allegations have been proved to that standard of proof beyond reasonable doubt.

[47] There are some standard evidential matters that have arisen in this Court that I refer to briefly. During the trial I saw and had the transcript of the recorded interview with the defendant that he had with Mr Mercer.

[48] It is, of course, routine to give a defendant the opportunity to comment on the allegations. A defendant does not have to say anything but here the defendant has chosen to do so despite being given his rights that he did not have to make any statement. Although not given on oath or subject to cross-examination the account and explanation that the defendant gave in the interview is to be treated as normal evidence, just as all the other evidence. What weight I give to it is a matter for me. I can accept some of it, all of it or none of it and I can view it as favourable to the defendant or unfavourable, it just depends how I assess it at the end of the day.

[49] Again, this defendant has elected, as well as making that statement, to give evidence at his summary trial. He did not have to do that either. The fact that he has done so does not change who must prove the allegations. It is the prosecution who has that task and the defendant does not have to establish his innocence.

[50] The question remains the same. Has the prosecution proved the defendant's guilt beyond reasonable doubt?

[51] He has explained his version of events to the Court and I have already been through that in a little detail. He denied ramming or hitting the cow at all and says that the allegations, in his case, are that it never happened in that way.

[52] If I accept what he has to say then obviously the proper decision would be not guilty because he would not have done what the prosecution said he did.

[53] If what he says leaves me unsure, then again the proper decision would be not guilty because I would be left with a reasonable doubt.

[54] If what the defendant says seems a reasonable possibility the prosecution would not have discharged its task and again the decision which I reach out to be not guilty.

[55] If I disbelieve the defendant's evidence about what he said happened, that he did not touch the cow at all with the quad bike or ram the cow, then I must not leap from that assessment to guilt because that would be to forget who has to prove the case. Rather, I must assess all the evidence that I accept as reliable. Does that evidence satisfy me of the defendant's guilt to the required standard?

[56] Here, effectively there is expert evidence which has been given, that to a small extent was given by Ms Grant the vet but more particularly by Professor Laven, whose evidence I have already had the opportunity of reminding myself about.

[57] The role of an expert witness such as Professor Laven, is a little different to ordinary evidence. Normally witnesses give evidence only about what they saw, or heard, or did. They are not allowed to express opinions, but people who have specialised qualifications as Mr Laven has and experience are permitted to give evidence of opinions about matters within their area of expertise. They are allowed to do so because their expert knowledge may help the Court understand subjects that are outside most people's general knowledge. Such expert opinions may provide substantial help and understanding and place into proper context other evidence in the particular hearing.

[58] In assessing the evidence I am aware that I must have regard to the qualifications and experience of the witness. That is not challenged. But, of course, this is a trial by the Court and not a trial by expert and it is for me, at the end of the day, to decide how much weight or importance I will give to the opinion of the expert or indeed whether I accept it at all in the context of all the evidence which I have heard.

[59] As well, I remind myself that expert witnesses give their evidence in relation to their areas of expertise. I need to be mindful on what factual basis that expert

opinion was given and the factual basis of course is the viewing by the expert of the videos that were taken by Ms Hayes.

[60] I must determine first the facts of the case and see how that compares to the expert and then give due regard to the expert and his testimony. If there are factual similarities then I must factor that in when weighing the helpfulness of such evidence because my task is to reach a conclusion on all of the evidence and that, of course, is an important approach which I do take.

The law

[61] The relevant legislation is the Animal Welfare Act 1999 and s 29(a) of that Act states a person commits an offence who ill-treats an animal. "Ill-treats" is defined in s 2 which says this, "In relation to an animal it means causing the animal to suffer by any act or omission, pain or distress that in its kind or degree or in its object or in the circumstances in which it was inflicted is unreasonable or unnecessary."

[62] This is a different charge to some which come before the Court because s 29(a) is a strict liability offence pursuant to s 30 of the Act which provides that it is not necessary for the prosecution to prove that the defendant intended to commit an offence. So, of course, I approached the matter on that basis.

[63] There are some statutory defences available within s 30(2) but that is not the issue because first, no notice has been given to the prosecutor about that and the defence simply here is that the defendant did not hit the cow with his quad bike.

Findings

[64] I move then to the findings which I make pursuant to the evidence which I have detailed already.

[65] I, of course, now have the advantage of seeing and hearing the witnesses. It is not a numbers game of course in that there were more witnesses saying that they saw the defendant hit the cow with his quad bike, then the defendant who says he did

not. It is the quality of the evidence that is important and the consistency of the evidence between witnesses with each other and within their own evidence is the important factor that I must consider.

[66] Among that is the visibility which they may have had of the events which is an important factor.

[67] The demeanour of witnesses is important but is not determinative and it is but one factor to take into account and in saying that I pay due regard to the conclusions that I reached about how the witnesses came across to me in Court.

[68] Having assessed the witnesses and carefully considered their testimony I have got to say that I prefer the evidence of the prosecution. The three eye witnesses, Ms Leslie, Ms Evans and Ms Hayes, in my view were credible and consistent. Ms Leslie had the advantage of being on horseback with a slightly elevated view point. Ms Evans had lived in the immediate area for 22 years and although she was in excess of 300 metres away she was quite clear in what she said and I find that she had a clear view of what she saw of the cow being struck by the quad bike and of the incident. She did not embellish her evidence by saying she saw the cow go down more than once. Ms Hayes was the co-owner of the farm and familiar with it of course. And I find that she and Ms Leslie were on the race in the position marked with the yellow cross next to her name.

[69] The fact that Ms Leslie saw the cow go down three times; Ms Evans once, and Ms Hayes on two occasions does not mean that there is contradiction between their evidence or testimony. It is simply that they saw different aspects of the same incident and that does not in my view detract from their credibility and consistency.

[70] There was some suggestion by the defendant that the two eye witnesses, Ms Leslie and Ms Evans, were further up the race by the two clumps of trees at the top right of exhibit 1, photo 1, as the defence would have it. Again, all three witnesses were upset about what they had observed.

[71] Somewhat curiously the defendant said that he did not see them watching but then was adamant that they were further away than they had said and that reflects somewhat, I find, upon his credibility.

[72] None of the three eye witnesses were shaken by close and detailed cross-examination and although they may have had different viewpoints and observed how many times, different times the cow had gone down, and exactly where the falls had occurred to a precise degree. That is to be expected and does not affect again the quality of their evidence as to the central issue of whether the defendant struck the cow with his quad bike.

[73] There was a suggestion by the defence that if the cow had been hit by the quad bike that there would have been an external wound or bleeding but that contention was well put to rest by the evidence of Professor Laven who I have already referred to and who clearly stated that the cow showed severe pain and ordinary pain at different times in the different videos which Ms Hayes had made and which he viewed and analysed.

[74] Further to that, Professor Laven said that cows regularly fall over but don't do the sort of damage seen in cow 147 as a result of the incident. Even if there had been multiple falls. He said the degree of damage indicated that something had gone wrong with the handling of the cow and it resulted from the handling of the cow not the cow's fault but a human being at fault. So, in short, from his evidence it is clear the injuries were inconsistent with a fall or even falls without human intervention or some human fault.

[75] There were differences between the interview carried out by Mr Mercer with the defendant in the interview of 16 December 2014 and his evidence at the hearing. For example, when he went out the gate of the paddock number 37 where the allegations occurred, he said Ms Leslie and Ms Hayes were at one stage the last time he had seen them up by the trees then said that they were by the bridge, up the race, just not far from paddock 37. That is the distances which he gave from time to time although he said he had not observed them observing him were different.

[76] Then there were the discrepancies in his statement and in his evidence about how far back he had been from the cow in the course of the incident itself. At one stage in the interview he said he was 5 metres away from the cow. In evidence he said he was only about 800 millimetres away and again at times from the witness box the distances that he was behind the cow were given differently. While those distances may have been at different times, in my view, having analysed the statement and his oral testimony there were inconsistencies in what he said.

[77] Next, there is the dichotomy of whether he was chasing the cow or following it. For example, in a question and answer with his own counsel the question was, "So the cow you were chasing is that cow 147?" And the defendant replied, "Yes, that's the cow." What I emphasised in the question is the word "chasing". There was no objection taken to that question by the defendant when he answered it.

[78] I find, having said that and examined carefully the evidence that the defendant was contradictory and unconvincing and, in my view, was making up his evidence to escape the inevitable conclusion that he struck or hit the cow with his quad bike.

[79] As I have said for the reasons clearly expressed I prefer the evidence of the prosecution eye witnesses as to that key and main point.

[80] I find beyond reasonable doubt that the defendant did hit or strike cow number 147 on a number of occasions with his quad bike causing it to fall down twice and causing the cow to become lame. I find clearly that in accordance with the law that was ill-treatment of the animal causing it to suffer pain and distress by those acts and that those acts were unreasonable and unnecessary.

[81] I find effectively that the actions of the cow in being noncompliant frustrated and angered the defendant causing him to lose control and physically hit the cow with his quad bike. That was unnecessary as it turned out because I find once he realised he was under observation he left the cow in paddock 37 and went back to his milking duties. When he returned to the paddock after milking I find that he understated the injury and consequences of what had occurred and of what the cow

had suffered and manifested as a result of his actions and even later in my view in the following days the suffering that the cow exhibited in the DVDs was largely ignored by the defendant.

[82] As to whether he had administered the anti-inflammatory Metacam on 4 November 2014 or thereabout before the vet Ms Grant attended on 10 November, that is a matter of conjecture in the absence of any record but it seems at odds with the defendant's evidence that he had not noticed much amiss with the cow number 147 and continued milking it.

[83] As to the evidence from Ms Leslie that she saw the defendant kick or boot the cow in the head or chest, I make no finding as to that as it is not part of the allegations against the defendant but his evidence that he was using his gumboot to untangle the cows right front leg from the electric fence is again at odds with the eye witness evidence from Ms Hayes that the cow had fallen some metres away from the fence line that electric fence was located on.

Decision

[84] For the above reasons, I find that the offence as alleged in the charging document has been proved beyond reasonable doubt.

P I Treston
District Court Judge