PARTIES:	LEE, Jeffrey
	v
	RICHARDSON, Ronnie
TITLE OF COURT:	SUPREME COURT
JURISDICTION:	SUPREME COURT
FILE NO:	No 45 of 1992
DELIVERED:	Darwin 21 July 1992
HEARING DATES:	25 March and 21 July 1992
JUDGMENT OF:	Martin J

CATCHWORDS:

Criminal Law and Procedure - Criminal liability and capacity - Owner of dog not under effective control - Requisite mental element not established -

Dog Act 1980 (NT), s37
Criminal Code (NT) O22
Criminal Law (Regulatory Offences) Act, s46

Pregelj v Manison (1987) 51 NTR 1, applied.
Linda Marie Sabolta & Anor v Darwin City Council (Unreported, 13 February 1991), considered.

Criminal Law and Procedure - Offences against public order - Dog attacking cyclist - "attack" -

Dog Act 1980 (NT), s42

Criminal Law and Procedure - Witnesses - Dog attack - Victim of attack not called to testify - Victim not required to testify where facts established by evidence of other witnesses

Justices - Appeal from and control over Justices -Application to adduce fresh evidence - Provisions of Justices Act (NT) -

Justices Act (NT), s176A

Animals - Liability of owners and keepers - Dogs - Criminal liability of owner for dog not under effective control - Requisite mental element -

Dog Act 1980 (NT), s37
Criminal Code (NT) O22

Pregelj v Manison (1987) 51 NTR 1, applied.
Linda Marie Sabolta & Anor v Darwin City Council (Unreported, 13 February 1991), considered.

REPRESENTATION:

Counsel:

Appellant:	In person
Respondent:	J R Withnall

Solicitors:

Appellant:	
Respondent:	Withnall & Cavenagh

Judgment category classification:	CAT B
Court Computer Code:	
Judgment ID Number:	mar920016
Number of pages:	15

LOCAL

mar920016

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 45/1992

BETWEEN:

JEFFREY LEE

Appellant

AND:

RONNIE RICHARDSON

Respondent

CORAM: MARTIN J.

REASONS FOR JUDGMENT

(Delivered 21 July 1992)

This is an appeal against conviction of an offence under s. 37 of the *Dog Act* 1980 (NT), (since repealed), recorded in the Court of Summary Jurisdiction on Monday 16 December 1991. The appellant appeared unrepresented and it was difficult at times to understand his submissions. The complaint against the appellant consisted of four counts, which were, in summary, that the appellant:

1. was the owner of a dog which attacked a person in a public place (s. 42(1)(a));

2. was the owner of a dog not under effective control in a public place (s. 37);

3. knowingly kept an unregistered blue heeler type dog (s.33(1));

4. knowingly kept an unregistered mixed breed type dog (s.33(2)).

The appellant pleaded guilty to count 3, and, though he pleaded not guilty to count 4, he does not seek to appeal against the conviction recorded upon that count or the penalty imposed. The appellant pleaded not guilty to counts 1 and 2 of the complaint. However, the learned magistrate took the view that counts 1 and 2 could be treated as one and the same, having arisen from the same set of events, and although he found both counts proved, he proceeded to convict the appellant only upon count 2, that of being the owner of a dog not under effective control in a public place. Nevertheless, his Worship appeared to take into account that the dog did in fact attack a person in determining the appropriate penalty for count 2. The appellant was fined $100 on count 2, and $25 on counts 3 and 4 respectively. There is no appeal against penalty.

The appellant appeals only with respect to count 2. However, as the attack alleged in count 1 was found to be proved and viewed as being in the nature of an aggravating circumstance by the learned magistrate, it is necessary to have regard to both provisions of the Act. They are as follows:

"37. Dogs at large

Subject to this Act, the owner of a dog which is not under effective control and is in a public place is guilty of an offence".

42. Dogs worrying persons, animals etc.

(1) The owner of a dog which is in a public place and -

(a) attacks or menaces any person or animal; or

(b) chases any vehicle or bicycle;

is guilty of an offence."

Each offence carries a maximum penalty of $200.

Three preliminary matters arose for adjudication during the course of this appeal. They were as follows;

1. The appellant's notice of appeal had been filed out of time and he sought to have that time extended. An extension of time within which to file the notice of appeal was granted, until 5 February 1992, the date the notice of appeal was filed.

2. The appellant's grounds of appeal were not clearly stated in the notice of appeal, where they appeared simply as "charges are irrelevant, my wife was unable to answer these charges". The appellant sought leave to amend his grounds of appeal. With the consent of counsel for the respondent, leave was granted, and the amended grounds of appeal may be stated as being:

(i) the appellant had no knowledge of the events alleged in counts 1 and 2 of the complaint, and therefore cannot be

guilty of an offence;

(ii) there was no evidence to support the findings of the learned magistrate, and the conviction of the appellant pursuant to s. 37 of the Act;

(iii) there was no "attack" upon any person by a dog of which the appellant was the owner;

(iv) the appellant was not at the material time responsible for the dog which is alleged to have been not under effective control, and to have attacked a person, in a public place.

3. The appellant sought leave to adduce fresh evidence on the grounds that a material witness, being the alleged victim of the attack, was not called to give evidence at the hearing before the learned magistrate. The appellant submitted that the evidence of such person would corroborate his contention that no actual "attack" occurred. This application was rejected. Section 176A of the *Justices Act* (NT) provides for the tendering of evidence upon appeal to the Supreme Court. In accordance with that section the appellant's application failed on a number of grounds, those being:

(a) He has not complied with the requirement to give notice under s. 176A(1)(c),(2) and (3).

(b) The failure to call the witness in the proceedings before the magistrate was the appellant's, and there has been no

reasonable explanation given for that failure (s.176(1)(b)).

(c) There was no conviction for the charge under s. 42.

The appeal raises two main issues:

(1) The appellant's first ground of appeal, that he had no knowledge of the dogs alleged activities, and fourth ground of appeal, that he was not responsible for the dog at the time of the alleged activities, challenge the finding of criminal liability against him.

(2) The appellant's third ground of appeal, that no "attack" actually occurred, may be taken with his second ground of appeal, that there was no evidence to support the findings of the magistrate, as challenging the magistrate's findings of fact based upon the evidence of two prosecution witnesses.

1. <u>The liability of the appellant</u>

Before the magistrate the appellant gave evidence that he was not at home at the time of the alleged activities, that his wife had care and control of the dogs, that it was she who would have let them onto the street, and that he could therefore not be held responsible for their behaviour. Both s. 37 and s. 42(1) stipulate that it is the "owner" of the dogs who shall be guilty of the offence. Though the dogs were not registered at the time of the alleged activities, s. 5(2) of the *Act* provides that a reference to the owner of a dog

includes (a) the person for the time being under whose control the dog is, or (b) the occupier of the house or premises or part of the house or premises where the dog is ordinarily kept.

By pleading guilty to the third count in the complaint, the appellant admitted that he did "knowingly keep" one of the dogs on his premises. He was found guilty on count four and does not appeal. There can therefore be no doubt that the appellant was at the material time the occupier of the premises where the dogs were normally kept. Even if, as the appellant asserts, his wife was "the person for the time being under whose control the dog" was, and there might equally have been brought a complaint against her, the appellant may quite properly be found to be the "owner" for the purposes of the Act.

The appellant submitted that even though the dogs were kept by him he had no knowledge of the events alleged and cannot be found guilty of an offence under either s. 42(1) or s. 37. An offence under s. 42(1) is prescribed as a regulatory offence under s. 67A of the *Dog Act* and the appellant's own state of mind at the time of the events alleged is irrelevant to the question of his guilt (*Criminal Code* O.22). He was not convicted of that offence.

However, as the learned magistrate convicted the appellant on the s. 37 offence, that is, being the owner of a dog not under effective control in a public place (which is not prescribed as a regulatory offence), some requisite state of mind on the part of the appellant forms an element of the offence.

The common law doctrines of criminal responsibility have been displaced in the Northern Territory by the *Criminal Code* (NT) : *Pregelj v Manison* (1987) 51 NTR 1. Pursuant to s. 23 of the *Code* the appellant "is not guilty of an offence if any act, omission or event constituting that offence done, made or caused by him was authorised, justified or excused".

Section 31(1) of the Code provides that "a person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct".

The question of criminal responsibility with regard to s. 43(2) of the *Act* has been the subject of an appeal to this Court : *Linda Marie Sabolta and Another v Darwin City Council*, unreported, 13 February 1991. Pursuant to that section the owner of a dog who permits that dog to be or become a nuisance is guilty of an offence. It was held by Gray AJ. that the word "permit" involved "a state of mind amounting to acquiescence in, or failure to prevent, the prescribed state of affairs", and that "the requisite mental element was proved if the learned magistrate was satisfied beyond reasonable doubt that the particular defendant had knowingly permitted the dog to bark consistently". He considered that "the learned magistrate did make findings which ... demonstrate that the mens rea element was made out to his satisfaction", although "no express reference was made to the mental ingredient", and dismissed the appeal.

In the present matter it does not appear to be the case that the learned magistrate was directed to a consideration of the appellant's state of mind with respect to counts 1 or 2. Furthermore, the requisite mental element of

s. 37 is not as clearly expressed as that of s. 43(2), where the word "permit" was held to connote an awareness of, and "an acquiescence in, or failure to prevent" the dog's behaviour.

All that can be said of the mental element in s. 37 is that if the owner of a dog intends that the dog be not under effective control, or if the owner of a dog foresees that effective control over the dog may be lost as a possible consequence of conduct on his part, then the mental element of the offence is satisfied. It is up to the prosecution to prove either of these elements beyond reasonable doubt and, in the latter case, the conduct from which it is said the foreseeability arose.

The requisite mental element forming part of the offence under s. 37 was not considered either expressly or by implication, nor was any conduct from which it could be found that foreseeability arose.

There is nothing in the evidence to support any of the requisite findings.

The appellant also sought to dispute the learned magistrate's adjudication upon count 1 of the complaint, on the basis of lack of evidence of an actual attack occurring.

2.<u>The evidence before the Court of Summary Jurisdiction</u>

The appellant contends that there was no evidence upon which the learned magistrate could have found him guilty of counts 1 and 2 of the

complaint, that is, the s. 37 and s. 42(1)(a) offences. He seems to base his contention on two grounds, the first being that the victim of the alleged attack was not called to give evidence, and if he had been he would have supported the appellant's claim that no attack had actually occurred. The second is that the testimony of the two witnesses called by the prosecution was not compelling for want of proper identification of the offending dogs as being those owned by the appellant.

The first ground is misconceived. There is no statutory requirement or general proposition of law that the victim of an offence be called to testify against the person accused of committing that offence. The complainant in this case is quite properly the Palmerston Town Council, in its position as the authority administering the provisions of the Act.

The offence alleged under s. 42(1) of the *Dog Act* is prescribed as a regulatory offence (s. 67A of the Act), and the predominant public interest component of such an offence obviates any need to prove actual damage or injury, or to produce an alleged victim. A dog which attacks or menaces a person in a public place is not only a menace to that person, but to all those who may have cause to pass through that place, and whose safety is threatened by the dog's activity. The essential element of the offence is not injury suffered or damage caused, but the very action of attacking or menacing a person or animal. The victim is not a single person but the community at large, and the testimony of any witness to such an event may of itself be quite persuasive and sufficient evidence going to the guilt of a defendant.

As it happens, even if the behaviour of the appellant's dog failed to amount to an attack or menace under s. 42(1)(a), the alleged activity falls well within that prescribed by s. 42(1)(b), of chasing a vehicle or bicycle. However, in as far as the appellant was charged with the offence under s. 42(1)(a), and the learned magistrate, despite not convicting the appellant of that offence, considered the allegation that an attack had occurred had been proved, and gave this finding some weight in determining the appropriate penalty for the s. 37 offence, the phrase "attack or menace" calls for consideration.

The appellant gave the following evidence before the Court of Summary Jurisdiction:

> "Les (the person allegedly attacked) had complained about the dog and I went and see him and had a beer with him and that was the end of the matter".

The following exchange with the learned Stipendiary magistrate is recorded:

The Appellant: "It wouldn't attack someone. It might give them a nip, but not attack them, not viciously."

His Worship: "You wouldn't regard the dog going up to a person and nipping it as an attack?"

The Appellant: "Not as a vicious attack, no."

The learned magistrate was unable to accept the appellant's view of

what might constitute an attack, and neither, with respect, am I.

The Oxford Dictionary defines attack as to "act against with force; seek to hurt or defeat; criticise adversely; act harmfully on". The definition of attack for which the appellant appears to contend is much narrower, and not supportable. The nature and degree of an attack may go to the question of penalty.

At the hearing before the learned magistrate two witnesses to the events in question were called by the prosecution.

The evidence of the first witness, Sheryn Lee Johnson, was that she saw two dogs snapping at a man on a pushbike, that the man got off the pushbike and went over to the appellant's unit, and then, as he was returning to his pushbike the dogs came after him again and he picked up a piece of wood to defend himself. Ms Johnson further testified that she had seen a child on that same morning being chased and nipped at by the same dogs.

The evidence of the second witness, Michelle Anne Pearce, was to the effect that the two dogs were attacking a man whilst he was riding his pushbike, that they were nipping at his feet and he was attempting to kick them off, that he went into the appellant's unit, that as he returned to his pushbike the dogs attacked again, and that he picked up a lump of board. Ms Pearce also testified that the dogs had been chasing children that morning.

Both witnesses identified the dogs as being those seen in the company

of the defendant at his residence, and one of them told of a conversation in which the defendant said that they were his.

The learned magistrate found the testimony of both these witnesses "impressive" and proceeded to find the appellant guilty of an offence under s. 42(1)(a) of the Act upon the strength of their evidence, and that of the appellant himself. That was a proper course to take even in the absence of the alleged victim.

The learned magistrate satisfied himself beyond reasonable doubt that an attack had occurred, that was a finding of fact and has not been shown to be wrong.

The appeal against the conviction for the offence against s. 37 of the *Dog Act* is allowed.