

MAGISTRATES COURT OF SOUTH AUSTRALIA
(Criminal)

**THE ROYAL SOCIETY FOR THE PREVENTION OF
CRUELTY TO ANIMALS (SA) INC V NEWTON**

Remarks on Penalty of Mr C.W Kitchen SM

3rd December 2010

Complainant: THE ROYAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS (SA) INC
Counsel: MR HORE-LACEY SC WITH MS MARCOU
Defendant: LEONARD SAM NEWTON
Counsel: MR LYONS SC WITH MR ZOLLO

Hearing Date/s: 11/11/10, 3/12/10

File No/s: MCPAU-10-1520

**The Royal Society for the Prevention of Cruelty to Animals (SA) Inc v Leonard
Sam Newton**

**Mr C.W. Kitchen SM
Criminal Jurisdiction**

1 Leonard Newton has entered a plea to one count of ill treating animals, namely 250 sheep. It is agreed that being the owner of those sheep he recklessly caused unnecessary harm to those animals by transporting them from his property at Mt Ive in the Gawler Ranges to the Dublin Livestock Exchange.¹

2 On the 6th April 2009, at about 10.30 a.m. the defendant caused a total of 750 sheep to be loaded onto transport at his property. The sheep spent approximately 8 hours in stock crates before being unloaded that same evening at Dublin. They were unloaded into yards which contained no water or food. That is not uncommon.

3 Prior to being loaded the sheep had not been given water for a period between 24 and 36 hours. A document that was tendered during the hearing (VP.5) titled, "National Vendor Declaration (Sheep and Lambs) and Waybill" signed by the defendant indicates that the sheep had been off feed and water for 36 hours prior to transport. I understand that it may have been only 24 hours.

4 Upon arrival at Dublin the sheep attracted the attention of an officer from the Department of Primary Industry due to their condition. The RSPCA were advised and the following day at about 12.50pm, Ms Andrea Lewis, an inspector with the RSPCA attended at the yards together with a veterinarian by the name of Groves. Following an inspection during which a number of photographs were taken, an "RSPCA Seizure Receipt" for 464 live ewes and 3 deceased ewes was issued to the defendant. The following day a notice pursuant to s.31B(1) of the Animal Welfare Act was issued to the defendant requiring that the sheep be held at the livestock yards at Dublin until the 13th April and that they be fed.

5 Three dead sheep were taken from the mob and sent to Gribbles Pathology. A copy of the pathology report was tendered as VP.3.

6 Ms Lewis gave evidence on the voire dire that was held to decide upon the admissibility of a record of interview. She told the court that she has been an inspector for six and a half years. She observed a large number of emaciated and very thin sheep. She saw that a large number were sitting down and that they looked very tired. There was no food or water in the yards and she saw only a small amount of fecal matter. The photographs that were taken were shown to me. They clearly indicate that the sheep are in a poor condition. Apart from the dead sheep taken for pathology there were other dead sheep and photographs were taken of a number of deceased animals in the back of a truck.

¹ The defendant was initially charged with "unreasonably" causing the animals harm. The Information was amended by consent at the conclusion of the voire dire.

7 Ms Lewis subsequently attended at Mt Ive and conducted a record of interview with the defendant.

8 Mark Groves gave evidence. He is a consultant veterinarian to the RSPCA. He told the court that of the sheep he inspected, 80 per cent were score 1 and the remainder were score 2. It was his opinion that the sheep had not been fed for about 48 hours and had no water for at least 24 hours. He thought that many of the sheep had suffered trauma at shearing. In his opinion many of the sheep were severely exhausted and they would have been in a similar condition when loaded at Mt Ive. In cross examination, Mr Groves said that it was his opinion that the sheep had had no significant food for 3 or 4 days. He accepted the suggestion that it is industry practice not to water sheep for 24 hours before they are transported but did not accept that this was humane or necessary practice. He said that it was well known that water is not provided at Dublin unless it is expressly requested.

9 Following the entry of the defendant's plea to count 2, Mr Hore-Lacy SC told me that 40 sheep were found dead in the yards after delivery to Dublin. A further 6 had to be destroyed. Two hundred were drafted off and sold. Two hundred and fifty of the sheep were in score 1 condition and the remainder in score 2. A zero score represents skeletal condition and a score of five represents a fat sheep.

10 The prosecution submit that the sheep were not in a fit condition to transport and a reasonable person would have left them for a further week on feed before transport. It was the transporting of the sheep that caused the deaths and added to the poor condition in which they arrived. I was referred to the record of interview and the defendant's answer to the following question. Ms Lewis asked;

"Were you, were you confident when you loaded the sheep onto the truck that they were strong enough to make the journey?" The defendant replied'

"Well I, I was with what they were loading, but, but they certainly didn't look like I expected them to look. They couldn't, the previous week I, I wasn't sort of happy with the way they looked, but the truck was here, we didn't really have an alternative. He was ready to go, the sheep didn't look, I mean to me they were a lot poorer than I thought, but I was, but they certainly looked loadable."

11 The prosecution accept that the defendant was not motivated by malice but submit that he showed a lack of judgment for a man with 22 years of experience in the livestock industry and was influenced by commercial interest. It was suggested to me that offences of this kind are difficult to detect as they often occur in remote locations. I was further urged to consider deterrence as an important factor in sentencing and the prosecution submit that a conviction is appropriate given the gravity of the offending and the intention of parliament.

12 Mr Lyons told me that the defendant accepts that he did not pay close attention to the condition of the sheep and that the 250 sheep should not have been transported.

13 The defendant is 61 years of age and was born in Germany. He arrived with his parents when he was 6 months of age and lived for a number of years in migrant camps. He attended school at Oakbank and Verdun and after leaving school at age 15

he has been in continuous employment. The defendant has been employed as a labourer, a fishing boat deckhand, a pearl diver and as a cray fisherman. He purchased an abalone divers licence in 1980 which he held until 1997. During that period he purchased a farming property at Mt Wedge and he attended to that at the same time as his diving. In 2002 he and his wife purchased Mt Ive Station. They have 5 children including a child whom they adopted from the Philippines.

14 The defendant has no history of offending. He has been a member of the Royal Flying Doctor Service, St Johns Ambulance, the CFS and a number of sporting clubs. He was a member of the Elliston Hospital Board for 5 years and has been a member of the RSPCA for 4 years. To use Mr Lyons words, this incident has had a “devastating effect” upon the defendant.

15 In the course of his submissions, Mr Lyons suggested that his client was, to use a familiar phrase, “between a rock and a hard place”. It was suggested to me that he either sent the sheep to Dublin as they were or he turned them out knowing that the drought conditions and the paucity of feed were unlikely to assist in improving their overall condition. I was told that it even in a reasonable year, the sheep in this area average score 2. I understand the basis of this submission but with respect it is too simplistic and overlooks the obligations that arise from the Act.

16 Whilst I accept that the Gawler Ranges were in drought as was much of the State at the relevant time, I have received no evidence to suggest that there was not sufficient feed to maintain the sheep concerned if they had been turned out to graze. In fact, I received submissions to the effect that the defendant had been providing hay for the sheep from his other property. It appears that the sheep were not used to this feed but I do not understand the submission to suggest that they had rejected it and were not able to become conditioned to it if it was all that was available. I also heard nothing to suggest that there was no other feed available and it was confirmed in submissions that at least 200 of the animals had been sold off. I can only assume that their condition was a direct result of having grazed over the property at Mt Ive.

17 As indicated during submissions, I have some familiarity with the livestock industry. I have significant experience of the livestock transport industry in particular and I am aware of the reasons for keeping sheep from water prior to transport. Notwithstanding, I am in agreement with Mr Groves that the preferences of the transport industry cannot and must not be seen as an excuse to avoid the responsibilities arising from the terms of the Animal Welfare Act. In fact, it seems somewhat anomalous in my opinion that the transport operator has not been called to account for his involvement in this matter in addition to the defendant. After all, it appears that most of the sheep that perished did so whilst they were being transported.

18 However, the inescapable fact is, that the responsibility for ensuring that sheep and other animals that are commonly transported by road are in a fit condition to travel rests with the consignor. If it appears after a proper assessment of the condition of the animals concerned that they are not fit to travel, then a simple phone call to the transport operator is all that is required to postpone the transport. To continue in spite of that assessment is a clear breach of the Act. In this case, the

defendant's reckless disregard for his responsibilities resulted in the death of some 46 sheep and a period of suffering for many others.

19 If, as I accept, it is the custom to quarantine sheep from water to accommodate the demands of hauliers, then that must become an important factor for the consignor when assessing the likelihood that the sheep will be capable of transportation without breaching the terms of the Act. The Animal Welfare Act and the Regulations under the Act provide and incorporate a comprehensive code for the humane treatment of animals in this State.² It is inconceivable that anyone who has, as a principal source of income, the care and control of large flocks of sheep, should not be fully aware of the responsibilities that the Act and the applicable Code create for the proper management of those animals.

20 The maximum penalty for a breach of s.13 (2) of the Act is a fine of \$20,000 or imprisonment for up to 2 years. The prosecution submit that a fine at the high end of the scale is the appropriate penalty. Mr Lyons has urged me to consider a bond without conviction. In support of that submission I am told that the defendant is a director of a company known as Western Abalone and that he attends conferences in various parts of the world including the USA. It is suggested that a conviction will prejudice his ability to obtain a visa and that the knowledge he is able to obtain will be lost to other primary producers if he is unable to attend such conferences.

21 In my opinion this is a serious offence of its kind. It is important that both the defendant and others who have control of large flocks of sheep are deterred from adopting a cavalier attitude to the welfare of those animals. I reject the suggestion that there were limited options available in this matter. I take into consideration all of the personal history of the defendant and his good record. I accept and it is not suggested otherwise that he is a person of good character. Notwithstanding, in my opinion a substantial penalty is appropriate and I do not believe that a bond sends the right message in these circumstances.

22 In assessing the penalty I take into consideration that it has been agreed that the defendant will pay the sum of \$7000 towards the legal fees of the prosecution. That amount undoubtedly reflects the fact that this matter went to trial, but I am conscious of the fact that had the matter been prosecuted by the police or a government agency, the award of costs would have been significantly lower.³ There will be a fine of \$5000.00.

23 I am conscious of the fact that I am able to consider the provisions of s.16 and s.39 of the Sentencing Act. There are differences in the provisions of both sections but notwithstanding, similar issues arise for consideration.⁴ I have taken into consideration all of the information about the defendant and his circumstances when considering whether I should record a conviction. I have had regard to the issue of his overseas travel. In *Stubberfield*, The Court of Criminal Appeal said;

² S.5A of the Animal Welfare Regulations 2000 provides for compliance with the "Model Code of Practice for the Welfare of Animals – The Sheep"

³ *Wellington v Police* [2009] SASC 294.

⁴ *R v Stubberfield* [2010] SASC 9

“In deciding whether to impose a conviction, this Court should weigh the beneficial nature of the order to proceed without a conviction to the offender, with the public interest inherent in convictions being recorded. The tension between these factors or interests was highlighted by the Queensland Court of Criminal Appeal in *Briese*:⁵

...the effect of such an order is capable of considerable effect in the community. Persons who may have an interest in knowing the truth in such matters include potential employers, insurers, and various government departments including the Immigration Department...For present purposes it is enough to note that the making of an order [to proceed without conviction] has considerable ramifications of a public nature, and courts need to be aware of this potential effect...

On the other hand the beneficial nature of such an order to the offender needs to be kept in view. It is reasonable to think that this power has been given to the courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will be continually punished in the future well after appropriate punishment has been received. This potential oppression may stand in the way of rehabilitation...

The express mention...of the nature of the offence as a factor to which the court must have regard in the exercise of the discretion whether or not to record a conviction suggests that there are certain types of offences which will call for the recording of a conviction...A court will be more easily persuaded against the recording of a conviction where there are no prior convictions or a very minor history and where the offence in question is a so called ‘victimless’ crime.

Observations to this effect have since been enunciated by a number of courts in different jurisdictions, including this Court.⁶”

24 In *Lambert*, the Full Court referred to the issue and said;

“The recording of a conviction has a punitive aspect. In *R v Yousef*,⁷ Sulan and Layton JJ observed:⁸

A conviction does not merely record a finding that the person committed the crime charged: it condemns him for the crime; it is a communicative act, communicating censure to the convicted person. The recording of a conviction acts as a general deterrent to others who may be inclined to offend in a similar way.

There is an important public interest in convictions being recorded to express community disapproval of a defendant’s conduct. A court will be more inclined not to record a conviction where the offending has had no direct effect on a victim, and where the breach is not deliberate and blatant.

25 The recording of a conviction can have serious consequences for an individual, as it may affect his future employment prospects, his ability to travel and his acceptance into professional or trade associations linked with his profession or

⁵ *R v Briese* (1997) 92 A Crim R 75 at 79-81.

⁶ *Attorney-General v Smith* [2002] TASSC 10 at [18] -[26]; *Zefi v Police* [2003] SASC 218 at [15]-[16]; *Szep v Police* [2003] SASC 144.

⁷ [2005] SASC 203.

⁸ *Ibid*, [60] – [62].

trade. A submission to a court not to record a conviction is a matter that requires detailed consideration by the court.⁹

²⁶ In this matter, there is no suggestion that a conviction will interfere with the defendants ability to work or gain employment. In fact, the sole ground for the submission that a conviction should not be recorded is the possible impact upon the defendant's ability to travel. Apart from the general submission I have no other information or evidence upon which to work in considering this submission. It is one that is frequently made in this court and rarely if ever have I seen anything to substantiate the fact that a conviction will impede the defendant in the manner alleged.¹⁰ In my view, the fact that the defendant has no previous convictions and his record of community involvement present as much more discernible factors in support of an application of this kind.

²⁷ I have given earnest consideration to the application and the submissions of both parties. I am not persuaded that this is a matter where no conviction should be recorded. In my opinion, this is a matter where the views expressed in *Yousef* are particularly pertinent. This is a matter where there is a public interest in recording a conviction to express community disapproval of the defendants actions.

²⁸ I record a conviction and I impose a fine of \$5000.00. I order that the defendant pay to the RSPCA the sum of \$7000 by way of costs as agreed. The defendant to pay court fees and levy if applicable.

⁹ *R v Lambert* [2009] SASC 307

¹⁰ See the discussion in *Forgione v Police* [2008] SASC 54 by Kelly J regarding this same issue.