



Neutral Citation Number: [2019] EWCA Crim 17

Case No: 201803576 B2

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM Newcastle Crown Court**  
**HHJ Earl**  
**T20180151**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 22/01/2019

**Before:**

**THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON**  
**THE LORD CHIEF JUSTICE OF ENGLAND AND WALES**  
**THE HONOURABLE MRS JUSTICE CHEEMA-GRUBB**  
and  
**THE HONOURABLE MR JUSTICE GOOSE**

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**Between:**

**Regina**  
**- and -**  
**PY**

**Appellant**

**Respondent**

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**Mr Louis Mably QC and Mr Brook (instructed by Crown Prosecution Service)**  
**for the Appellant**  
**Mr Selva Ramasamy QC (instructed by Taylor Law) for the Respondent**  
**Mr Tom Little QC – Advocate to the Court**

Hearing dates: 27 November 2018  
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**Approved Judgment**

**The Court has directed that automatic Reporting  
Restrictions do not apply to this judgment in accordance  
with s.71(3) of the Criminal Justice Act 2003**

## **The Lord Burnett of Maldon CJ:**

1. This is a prosecution appeal brought pursuant to section 58 of the Criminal Justice Act 2003 (“the 2003 Act”) against a binding ruling made pursuant to section 40 of the Criminal Procedure and Investigation Act 1996 by His Honour Judge Earl in the Crown Court at Newcastle. It was handed down on 20 August 2018. The ruling concerned the meaning of section 10(3) of the Dangerous Dogs Act 1991 (“the 1991 Act”). That provides protection for police constables by exempting a dog being used for a lawful purpose by a constable from being regarded as dangerously out of control. The respondent is a police constable. He faced a single count indictment alleging that he was in charge of a dog on 6 June 2016 which, whilst he was exercising him in a field, was dangerously out of control and attacked and injured a runner, contrary to section 3 of the 1991 Act.
2. The judge gave leave to appeal.
3. The dog was a police dog. The respondent cared for two police dogs at home and was exercising both when this incident occurred. He was obliged to exercise the dogs, and otherwise care for them as he would his own dog, and was paid an additional allowance for looking after them.
4. Section 10(3) of the 1991 Act provides:

“For the purposes of this Act a dog shall be regarded as dangerously out of control on any occasion on which there are grounds for reasonable apprehension that it will injure any person or assistance dog, whether or not it actually does so, but references to a dog injuring a person or an assistance dog or there being grounds for reasonable apprehension that it will do so *do not include references to any case in which the dog is being used for a lawful purpose by a constable or a person in the service of the Crown.*” (emphasis added).

The question was whether, at the time of incident, the dog was “being used for a lawful purpose by a constable” with the consequence that the incident fell outside the scope of section 3. The judge ruled that the statutory exclusion applied. It is that ruling which the prosecution seek to appeal.

5. But there is a preliminary issue. Section 58(8) of the 2003 Act obliges the prosecution to inform the court that the respondent should be acquitted of the offence in the event that leave to appeal is not obtained or the appeal is abandoned. It must do so at the same time or before it informs the court of its intention to appeal. This is generally referred to as “the acquittal undertaking” or, more accurately, the acquittal agreement. The prosecution notified the court of its intention to appeal and gave the acquittal agreement by email. The question arises whether that satisfied the statutory scheme, or whether the steps specified in the statutory scheme must take place in open court. The parties addressed submissions on this issue at the invitation of the Registrar and we have been assisted by the submissions of Tom Little QC as advocate to the court.

*The Jurisdiction Issue*

*The legal framework*

6. The general right of appeal against a ruling made in a Crown Court criminal trial was created by section 58(1) of the 2003 Act. Section 58(4), (8) and (9) specify the procedural requirements:

“(4) The prosecution may not appeal in respect of the ruling unless—

(a) following the making of the ruling, it—

(i) informs the court that it intends to appeal, or

(ii) requests an adjournment to consider whether to appeal, and

(b) if such an adjournment is granted, it informs the court following the adjournment that it intends to appeal.

...

(8) The prosecution may not inform the court in accordance with subsection (4) that it intends to appeal, unless, at or before that time, it informs the court that it agrees that, in respect of the offence or each offence which is the subject of the appeal, the defendant in relation to that offence should be acquitted of that offence if either of the conditions mentioned in subsection (9) is fulfilled.

(9) Those conditions are—

(a) that leave to appeal to the Court of Appeal is not obtained, and

(b) that the appeal is abandoned before it is determined by the Court of Appeal.”

7. Section 58(3) specifies that the ruling is to have no effect whilst the prosecution can take the steps under subsection (4). If the court is informed of an intention to appeal in accordance with that subsection, then by section 58(10) the ruling continues to have no effect whilst the appeal is being pursued. By section 58(12):

“Where the prosecution has informed the court to its agreement under subsection (8) and either of the conditions mentioned in subsection (9) is fulfilled, the judge or the Court of Appeal must order that the defendant in relation to the offence or each offence concerned be acquitted of that offence.”

If leave to appeal is granted, then the ruling has no effect pending the resolution of the appeal: section 58(10).

8. Part 38 of the Criminal Procedure Rules 2015 governs appeals under section 58 of the 2003 Act. Those material for the purposes of this appeal are:

“38.2 - (1) An appellant must tell the Crown Court judge of any decision to appeal—

(a) immediately after the ruling against which the appellant wants to appeal; or

(b) on the expiry of the time to decide whether to appeal allowed under paragraph (2).

(2) If an appellant wants time to decide whether to appeal—

(a) the appellant must ask the Crown Court judge immediately after the ruling; and

(b) the general rule is that the judge must not require the appellant to decide there and then but instead must allow until the next business day.

...

38.3 - (2) The appellant must serve the appeal notice not later than—

(a) the next business day after telling the Crown Court judge of the decision to appeal, if the judge expedites the appeal; or

(b) 5 business days after telling the Crown Court judge of that decision, if the judge does not expedite the appeal.

...

38.5 - (1) An appellant who wants the Crown Court judge to give permission to appeal must—

(a) apply orally, with reasons, immediately after the ruling against which the appellant wants to appeal; or

(b) apply in writing and serve the application on—

(i) the Crown Court officer, and

(ii) every defendant directly affected by the ruling

on the expiry of the time allowed under rule 38.2 to decide whether to appeal.

...

(4) The general rule is that the Crown Court judge must decide whether or not to give permission to appeal on the day that the application for permission is made.”

### *Chronology*

9. The issue under the 1991 Act was argued at a pre-trial hearing on 20 July 2018. At the conclusion of that hearing the judge reserved judgment. He listed the case for a further hearing 22 August 2018. On the 18 August 2018 the judge placed his draft ruling on the Digital Case System. He gave notice to the parties by email that the wider dissemination of his judgment was embargoed until it had been handed down formally. On the 20 August 2018, in the absence of the parties, the judge handed down his ruling at just after 16:00.

10. On the same day that the ruling was handed down, the appellant sent an email message to the judge and the respondent at 14:16 in the following terms:

“Following the handing down of your ruling, the prosecution wish (with respect) to appeal the ruling. Given that we are not due to appear before you until the 22<sup>nd</sup> August 2018, please may this email be considered to satisfy the provisions of section 58(4)(a)(i) of the Criminal Justice Act 2003?

In accordance with section 58(8) the prosecution agrees that, in respect of the offence which is the subject of the appeal, the defendant should be acquitted if either of the conditions mentioned in subsection (9) is fulfilled”.

11. Whilst that email was sent approximately two hours before the judge’s ruling was in fact handed down, nothing turns upon the point. It expressed the appellant’s intention to appeal and was couched in terms that indicated that its purpose was to inform the court after the court had handed down its ruling. The email was copied to the respondent’s solicitors who acknowledged receipt of the ruling and the statements in the email. The respondent drew attention to the requirements of section 58 with CPR Part 38. On the 21 August 2018 the appellant sent a further email to the judge:

“The prosecution had anticipated applying orally at tomorrow morning’s hearing for permission to appeal (on the basis that tomorrow would be the first opportunity to do so) pursuant to CPR 38.5(1)(a). However, the prosecution have prepared an application in writing which we now formally serve pursuant to CPR 38.5(b) (as if time had been allowed under rule 38.2)”.

Within that email message, the prosecution repeated its agreement that the respondent should be acquitted in the event that leave to appeal was not obtained or that the appeal was abandoned before being determined by this court.

12. At the directions hearing on 22 August 2018, when the parties were represented, it was acknowledged by the judge and the respondent that good notice had been given

under section 58 of the Act. At that hearing the prosecution applied for leave to appeal, which was granted.

13. Based on this chronology the issue which arises is whether the failure to give notice of an intention to appeal and the acquittal agreement orally in court means that this court does not have jurisdiction to hear this appeal. In short, did the appellant comply with the requirements of section 58 and CPR 38 by email rather than in open court?

*The parties' submissions*

14. In a joint submission by Mr Mably QC for the appellant and Mr Ramasamy QC for the respondent, it is argued that the appellant complied with the procedural requirements. In the result the respondent does not challenge this court's jurisdiction to hear the appeal.

*Submissions of the advocate to the court*

15. Mr Little QC submits that the appellant did not comply with the jurisdictional conditions precedent of section 58 of the 2003 Act. He submits that section 58, properly construed and consistent with the authorities, requires that notice of an intention to appeal and the acquittal agreement must be given in open court. If, however, the notice can be given electronically then there will be jurisdiction to hear this appeal. He also suggests that there may be practical difficulties in permitting an electronic based procedure to be used. The important steps required under section 58 would not be in open court, nor transparent and visible to the public. Further, it may not give the court proper control of the proceedings, with a possibility of confusion being caused between the parties and the court.

*The Authorities*

16. The procedural requirements for an appeal under section 58 and their impact on the jurisdiction of the Court of Appeal have been considered in a number of authorities, some of which we will touch on.
17. In *R v Arnold* [2008] EWCA Crim 1034; [2008] 2 Cr App R 37 the Courts-Martial Appeal Court considered the issue of jurisdiction in an appeal by the prosecuting authority under article 4(4) and (8) of the Courts-Martial (Prosecution Appeals) Order 2006. Those provisions mirrored those within section 58 of the 2003 Act. The prosecutor did not inform the court either before or at the time of indicating an intention to appeal that the defendant should be acquitted if the conditions in article 4(9) were met. The acquittal agreement was given later in the notice of appeal. That was not good enough. The court had no jurisdiction to hear the appeal. In deciding that the requirements of the equivalent of section 58 must be complied with to confer jurisdiction upon this court, Hughes LJ (as he then was) said at [26]:

“...we are unable to see how these statutory provisions can be read as meaning anything other than that there is no right of appeal unless the undertaking is given to the court of trial at the time of the announcement of the intention to appeal. The Order, with section 58 of the Criminal Justice Act 2003, represents a

major departure from the former law. The Crown is given a right of appeal in relation to trial on indictment for the first time. Moreover, it is given a right of interlocutory appeal. The new right is given on strict terms...The words “may not unless, at or before that time” must be given their effect. They require the giving of the undertaking in open court at the time of invocation of the right of appeal and they say that the prosecution “may not” inform the court it intends to appeal, unless this is done. ...

As we have made clear, Art. 4 of the Order is in terms materially identical to s.58 of the Criminal Justice Act 2003. Prosecutors who wish to launch appeals against rulings must give the Art.4(8)/s.58(8) undertaking in open court at the time of invoking the right of appeal. We are not asked to consider whether it must be given in any particular form, and have not done so; it may well be that it can be given in shorthand or by reference to the statute; given, however, it must be, and that must happen at or before the time of invoking the right of appeal.”

The ruling in that case had been given in court in the usual way with no email exchanges. Nonetheless, it is the observation made by Hughes LJ that the right of appeal must be invoked in open court which has led some to question whether an email notification may suffice.

18. In *R v T(N)* [2010] EWCA Crim 711; [2010] 2 Cr App R 12 Lord Judge CJ conducted a review of all previous relevant authority before endorsing the conclusion in *Arnold* that strict compliance was necessary to clothe the Court of Appeal with jurisdiction:

“The requirement that the statutory undertaking in relation to the acquittal agreement should be given, and the latest time for giving it, are pre-conditions to this particular appeal process. Unless these mandatory pre-conditions are established, the court is unable to vest itself with a jurisdiction which it does not have, or permit the prosecution to exercise a power which it has failed to exercise in accordance with the statutory provisions.” [19]

The court also noted that although it was the CPR, and not the statute, that required the court to be informed “immediately”, it was a correct interpretation of the statute:

“Section 58(4) does not expressly require that this information should be made “immediately” after the questioned ruling. That is a provision of rule 67(2) of the Criminal Procedure Rules. Although these provisions do not assist in the construction of the statute, they plainly represent a correct interpretation of legislation which requires either that the court should be informed of the intention to appeal, or, alternatively, that an adjournment should be requested for the question to be

considered. Postponement of both these alternatives is not an option. In other words, unless the prosecution informs the court of its intention to appeal immediately following the making of the ruling, or immediately requests an adjournment to consider whether to appeal, this first pre-condition to an appeal is not fulfilled. In this present case this first condition was properly observed.”

But the term “immediate” does not imply split-second timing and should be interpreted flexibly to take account of the realities of the trial process and the need for reflection and consultation: see *R v Quillan* [2015] 1 WLR 4673 per Lord Thomas CJ at [33] to [35].

19. *R v F(JR)* [2013] EWCA Crim 424; [2013] 2 Cr App R 13 concerned a different issue. The judge sent a ruling to the parties by email but did not hand it down in open court. A hearing followed the circulation of the ruling, but not for about five weeks. The prosecution notified the court of its intention to appeal, pursuant to section 58(4), and gave the acquittal undertaking at that hearing. The defendant argued that both should have been given when the ruling was circulated by email, relying in particular on the rule which requires the judge to be told “immediately after the ruling” that the prosecution intends to appeal. That argument was rejected on the basis that the statutory scheme required the ruling to be given in a court room; and that effectively happened at the hearing five weeks later when the judge confirmed that the email represented her ruling: see Treacy LJ at [19].
20. In *R v The Knightland Foundation Jacob Friedman* [2018] EWCA Crim 1860, this court was concerned with notice of intention to appeal and the acquittal undertaking being given to the Crown Court by email. It was sent to the court and the defendant within the period of adjournment granted by the court after the ruling, pursuant to section 58(4). It was unnecessary for the court to determine the jurisdiction question, because leave to appeal was refused on other bases. Hallett LJ VP noted that the court would have wanted further argument before determining the issue and in particular argument on Parliament’s intention, but made valuable observations on the nature of the prosecutor’s appeal and electronic notification at [33]. It would be best practice to give the information in open court because: (a) that enables the judge to keep control over the proceedings, including directions if a jury is empanelled and expedition; (b) it provides openness and clarity, in particular for the defendant; (c) emails can get misdirected; (d) although CPR 5.1 encourages electronic filing of applications and notices, CPR 4.11 provides electronic service received after 14.30 is deemed service the next day. Hallett LJ added:

“34. However, it does not follow from the fact that giving notice in open court is best practice that we have no jurisdiction. The question remains – does a prosecutor lose his or her right to apply for leave to appeal by failing to give notice in open court?”

Those observations aptly identify some of the possible practical consequences of email, rather than oral, notification. We would observe, however, that the requirements to inform the court found in section 58 are not requirements to give notice as found in many statutes and rules, and would not fall within CPR 5.1 or 4.11.



*Discussion and conclusion*

21. Section 58(4) and (8) require the court to be informed of two things in the absence of which the prosecution may not appeal. Section 58(4) requires the prosecution to inform the court that it intends to appeal (or request an adjournment and subsequently inform the court following the adjournment); and section 58(8) requires the prosecution at the same time or before it informs the court that it intends to appeal, also to inform the court of its acquittal agreement. Those two subsections contemplate the court potentially being informed of something at three different times: (a) following the ruling, of the intention to appeal; (b) following the adjournment, of the intention to appeal; and (c) at the same time or before either of those events, of the acquittal undertaking. Additionally, subsection (4) contemplates that the prosecution might make a request for an adjournment to consider whether to appeal.
22. There can be no principled reason to distinguish between the various obligations to inform the court in the determination of the issue we are considering, nor the request for an adjournment. Similarly, since appealable rulings can be given both before and during a trial (see section 58(13)) any statutory requirement regarding the mechanism for conveying the information would apply to both.
23. Section 58 of the 2003 Act does not explicitly specify any mechanism for informing the court (or requesting an adjournment). Does it implicitly require each of the steps we have identified to be taken orally in court?
24. Our conclusion is that it does not.
25. It remains the case in the Crown Court that most rulings which might be subject to a prosecution appeal will be given by the judge orally, and often *ex tempore*, with the consequence that the immediate steps which the statute requires to follow will be taken orally. But it is not uncommon for judges to reserve their decisions on applications that fall within the scope of the prosecution appeal rights provided by the 2003 Act, and hand them down rather than laboriously read them out. Moreover, in keeping with the widespread practice in all courts, the attendance of the parties at the handing-down of a ruling may, as in this case, be dispensed with to avoid unnecessary inconvenience and expense to the parties. It is often explicitly stated that consequential matters will be dealt with in writing. Rulings and judgments are routinely circulated in advance to enable the parties to assist the court with typographical or factual corrections and to enable consequential matters to be considered and discussed (and often agreed) by the parties. It is axiomatic that if the court communicates with the parties, all must be copied into any communication; and if a party communicates with the court the same practice applies.
26. The procedural timing obligations in section 58 are concerned with ensuring that there is no unnecessary delay caused by a prosecution appeal. They compel speed. Such appeals can and do arise in the course of a trial and are capable of being resolved without discharging the jury. That was a point made forcibly by Hallett LJ in the *Knightland* case. An appeal can be decided in the Court of Appeal very quickly, if necessary, within days. The statutory scheme requires even those which are not so time sensitive to be dealt with swiftly. Not only must the prosecution make haste but section 59, for example, requires the judge to consider expedition in

the event that the prosecution signifies its intention to appeal. In the context of criminal proceedings, whether or not a defendant is in custody, the desirability of proceeding quickly is clear. That haste is further reflected in CPR 38.3 which requires a notice of appeal to be served on the next business day in cases where expedition has been ordered by the judge, otherwise within five business days. But we can detect no implicit requirement in the statute that the obligations to inform and request which we have identified in section 58 must be performed orally in court. The statute is concerned that the steps are taken as required, not how they are taken.

27. We consider that there is no impediment to the prosecution informing the court by email, with effect from the handing down of a ruling, of its intention to appeal; nor requesting an adjournment by email, if that is what it seeks. Indeed, a short adjournment pursuant to section 58(4) might well be agreed by the defendant without the need for attendance. Similarly, the court can be informed of the acquittal agreement by email. The judge remains in control of the proceedings and can convene any necessary further hearings.
28. The statute could, but did not, specify the mechanism by which the court should be informed of the matters specified in section 58(4) and (8). There is no warrant to interpret the section in a way which would spawn unnecessary hearings or require the unnecessary attendance of parties at the handing-down of a ruling.
29. Moreover, although CPR 5.1 does not apply to informing the court of the matters set out in section 58, (it provides that, in general, notices and applications should be lodged electronically) our conclusion sits comfortably with the modern trend to use electronic means of communication in connection with proceedings when it is convenient to do so.
30. Concerns about “open justice” do not compel a different conclusion. There is no overarching requirement for all communications with a court, or even applications, to be in public, whether in the criminal or civil arena; nor even for all decisions to be given in public. In the criminal context, for example, notices of appeal to the Court of Appeal (whether against conviction or sentence) or applications for leave by the Attorney General to refer a sentence do not follow a public statement in court. Leave is generally considered on the papers, and not in public. Naturally, if leave is granted (or refused and renewed) the hearing is in public. In the criminal courts many procedural and interlocutory decisions are made on the papers. None of these practices offends a principle of open justice.
31. The reality is that there will be relatively few cases in which the parties will not be present in court when the judge gives a ruling which can be appealed by the prosecution, either because it is given orally or, even if handed down, the attendance of the parties has not been dispensed with. We emphasise the need for a ruling of this nature to be given in court. In such cases the use of email, or other written communication, to set in train a prosecution appeal would not arise. But in the rare case where a judge has dispensed with attendance, or had adjourned pursuant to section 58(4)(a)(ii) and then dispenses with the attendance of the parties at the adjourned hearing, it may well be entirely appropriate for the prosecution to take the initial steps towards an appeal in writing (and by email), taking care to comply with the statutory scheme.

*The Appeal*

32. The essence of the argument advanced by the respondent police officer before the judge, and in submission before us, was that he was the designated handler of the dog in question (indeed had been since October 2011) with the result that he was obliged to care for and exercise the dog. He was doing so at the time the runner was attacked, because he had taken both the dogs for which he was responsible out for a walk. The care he was obliged to give the dogs included feeding them, exercising, training and caring for them as would any responsible dog owner. The exemption would, submits the respondent, protect him were his dog to behave inappropriately in his home because he would at all times be caring for the dog.
33. Mr Ramasamy submits (and Mr Brook does not demur) that at the time of the incident the respondent was acting in the execution of his duty. Had he been injured whilst exercising the dog, he would have been able to make any appropriate claim under the Police Injury (Benefits) Regulations: see *Merseyside Police Authority v Police Medical Appeal Board* [2009] EWHC 88 (Admin) and the discussion by Cranston J between [34] and [39]. That was a case which involved a police officer who was on annual leave but who was injured whilst exercising the police dog he cared for. Walking a dog is undoubtedly lawful and so, submits the respondent, the exemption provided by section 10(3) applies. It gives a blanket immunity against conviction for an offence under section 3 of the 1991 Act to a police constable (and other Crown servants) who is on duty when a dog in his charge behaves in a way which otherwise would satisfy the statutory test of being dangerously out of control. Given the breadth of the concept of being on duty when caring for a dog, or otherwise because the constable is required at all times to care for the dog, the exemption would apply universally. By way of example, the respondent submits that if he were to take the dog to the beach on a family day out, and it misbehaved, the exemption would apply.
34. Mr Brook submits that the focus should be on the word “used” and that the critical question is not whether the officer was on duty at the time. The respondent was not using the dog at the time of the incident. Moreover, in context, the word “used” imports the concept of using the dog for police purposes.
35. The judge accepted Mr Ramasamy’s submissions. He concluded that the submission advanced by the prosecution, which for shorthand was characterised as having to be on “operational duty” to gain the benefit of section 10(3), was wrong. Rather,
- “... the meaning of s.10(3) is clear. It means being used, as in employed by [the respondent] upon an act which is in itself lawful. Exercise is a necessity for a dog and, therefore, is such a lawful purpose. ... the exercise of [the police dog] by [the respondent] falls within the exemption of s.10(3) of the Dangerous Dogs Act 1991.”
36. The material words of section 10(3), namely “do not include references to any case in which the dog is being used for a lawful purpose by a constable or a person in the service of the Crown” imports four concepts. First, of the dog whose behaviour is under scrutiny; secondly, whether that dog was being used at the time; thirdly,

whether that use was for a lawful purpose; and fourthly, whether that use was by a police constable (or other Crown servant). The broad context in which these concepts fall to be interpreted is the statutory purpose of section 3 of the 1991 Act. That is to provide protection to the public from dogs which are dangerously out of control. The provision is one of strict liability. Criminal liability does not depend upon proof of any fault, negligence or even an ability to avoid the statutory harm. For that reason, although the respondent emphasises that the dog, who was exercised regularly off the lead, had never behaved in this way before and always previously responded to commands, those circumstances provide no defence.

37. The interpretation of the exemption should not undermine the statutory purpose by giving it an extravagant meaning.
38. The statutory purpose underlying the exemption is clear. Dogs are used by the police and other Crown servants for many law enforcement purposes. They may be used to chase down fleeing suspects or detect crime. They are used in support of the maintenance of public order (at sports events and demonstrations, for example) and for security. They are used by both the police and military for display purposes; and as sniffer dogs for various purposes. Their effective use entails a risk that, absent an exemption, constables or other Crown servants might find themselves liable to prosecution for the strict liability offence created by section 3 of the 1991 Act. That would have the effect, inevitably, of curtailing the use of dogs contrary to the public interest.
39. There is likely to be no difficulty in determining whether the animal whose conduct is under scrutiny is a dog. But it should be noted that the exemption is not restricted to a police dog or dog in analogous Crown service. If an incident occurred whilst a dog was being used by a constable for a qualifying purpose, even if the dog was not a police dog, the constable could avail himself of the protection of section 10(3). Such a possibility is not entirely fanciful. A constable out walking his own dog might use it for law enforcement purposes if unexpectedly confronted by criminal behaviour or a breach of the peace. Police officers have a duty to intervene in such circumstances even when they are off duty.
40. Similarly, there will be no difficulty in determining whether the accused is a constable or other person in the service of the Crown.
41. In our judgment the key to the scope of the exemption lies in the concept of “being used”. The word “used” is an ordinary word in everyday use. The Shorter Oxford English Dictionary defines it thus:

“The act of using a thing for any (especially a profitable) purpose; utilisation or employment for or with some aim or purpose.”

It is possible to “use” an animal or even a person in the sense of this definition. But its essence is using the thing or animal for a purpose. The term “being used” suggests the active engagement of the dog in a directed task or in support of the person concerned for an identifiable purpose. Consider, by way of comparison, a sheepdog. A shepherd would be using his dog when working with sheep or taking it to and from the fields; but it would be a misdescription to suggest that he was using his sheepdog

when he took it for a walk or was playing with it on a beach or at home. A gamekeeper would be using his gundog when flushing out or retrieving game but not when taking it for a walk or playing with it. An obvious analogy is with sniffer dogs used to detect drugs, explosives or human remains. The controller of a drug dog sniffing around vehicles or piles of luggage would be using it and have the benefit of the exemption if it became dangerously out of control. But not if the same behaviour occurred when it was being taken for a walk or playing in the controller's garden.

42. Millions of people take their dogs for a walk, let them run in their gardens or play with them, every day. That can be in their own properties or in public places. But to say that they are using them whilst doing so would be a misuse of language.
43. The words "for a lawful purpose" reinforces this interpretation. One has to identify the purpose for which the dog is being used and then ask whether that purpose is lawful. There may be cases where there is no doubt that the dog was being used by a constable, but a question mark arises over whether that use was lawful. For example, using a dog to fell a suspect to arrest him, or unreasonable force to prevent crime.
44. The next issue is whether *any* use of a dog by a constable attracts the protection of section 10(3) or whether the words "by a constable" import some restrictions. In our view, the statutory exemption could not sensibly apply to circumstances where, for example, a police dog was being used recreationally to flush out game. The words "by a constable or a person in the service of the Crown" suggest a restriction on the purposes for which the dog is being used. The use must be as part of the activities of the police or other Crown body. In the context of a police constable, the use must be part of a policing activity. The term "operational duty" may confuse because of its similarity to the concepts of "on duty" and "in the execution of duty" which are distinct legal terms. Whether a dog is being used for a policing activity by a constable is a question of fact.
45. In respectful disagreement with the judge, we conclude that on the assumed facts upon which the issue was argued in this case, the exemption found in section 10(3) of the 1991 Act was not established. In particular, in exercising the dog as described the respondent was not using it.
46. In these circumstances, we allow the appeal and remit the matter to the Crown Court for the proceedings to continue.