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SUPREME COURT OF VICTORIA

MELLETT v LEAHY

Lush J

6, 10 May 1977

WATER – LANDOWNER INTERFERED WITH A SUPPLY/DRAINAGE CHANNEL – ERECTED A BANK SO AS TO IMPEDE FLOODING ON HIS PROPERTY – CONSENT NOT FIRST OBTAINED FROM THE RELEVANT AUTHORITY – DAMAGE NOT ESSENTIAL TO PROVE "INTERFERENCE" – "OTHER LAWFUL AUTHORITY" CONSIDERED – *PROUDMAN v DAYMAN* DEFENCE DISCUSSED – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *WATER ACT* 1958, S377.

The Magistrate dismissed an information laid under Section 377 of the *Water Act* 1958, ie. did without consent in writing of an authority, to wit the State Rivers and Water Supply Commission, (or without any other lawful authority), interfere with a supply channel, a drainage channel or other fixture of the authority.

The defendant had caused the erection of a bank super-imposed upon the existing bank of an irrigation channel continuing his added bank across the floodway, so as to impede the flow of flood waters in the vain hope of saving his crop from heavy flooding in the area. It was not clear whether the supply channel was built on land vested in the S.R. & W.S.C., on the defendant's land or land of some other person over which the Commission had an easement.

There was a conflict of evidence between the area water bailiff and the defendant as to whether the bailiff had given permission for the work. However evidence was that in any event, the bailiff had no such authority to give permission. The Magistrate in summarizing his finding of fact said, "It is reasonable to say that what transpired amounted to permission."

His Honour deciding a preliminary point said that in his opinion the words "interferes with" in the Section, used as they are alongside the words "destroys, damages and alters" were words which did not imply damage and held that proof of damage was not essential to the proof of the charge of interference.

Two Questions arose:
(a) whether permission given by the water bailiff constituted "lawful authority" within the meaning of the Act, and
(b) whether the finding that the defendant entertained an honest and reasonable belief in a state of facts which if they existed would have made his act innocent can be sustained. (*Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 per Dixon J at p540). Upon Order Nisi to review—

HELD: Order absolute.
1. So far as the point of construction was concerned, the words 'other lawful authority' appearing in the section as an alternative to 'consent in writing' could not be construed so as to include a consent by the Commission which was not in writing. To give them such a construction would defeat the obvious legislative intention that if the defence was to be consent, that consent must be in writing. No appeal to the principle that exceptions to a penal provision should be given a liberal construction can overcome that obstacle for the defendant.

2. In relation to the argument relating to the defence of honest and reasonable belief, so far as the defendant's mistake was one of fact and not merely a mistake as to the bailiff's general authority in law it must have involved a belief or assumption that the Commission had, by delegation or some other means, conferred authority on the bailiff to give the consent to which s377 referred, or to give a permission which could be regarded as an authority under s377. But on the construction of that section adopted, either the Commission could not have given an authority extending to unwritten consent, because such an authority would have been inconsistent with the Act, or if the Commission had given a general authority the only effective way in which it could have been used was by the giving of a consent in writing. If the latter, then the mistaken assumption that such an authority existed would not, since no consent in writing was given, have been a belief in a state of fact which would have made the defendant's action lawful.

3. Accordingly, the right or liberty of the lower landowner was not a lawful authority within s377 justifying an interference with works. This result in relation to the kind of works which the Commission, under its statute, must construct, maintain and operate was regarded as a practical result. The Commission's channels, and indeed a single channel of the Commission, may pass through

hundreds of properties in different ownerships and in affording protection to the integrity of those works by s377 Parliament could not have intended to reserve to the adjoining landowners the right to interfere with or alter items in such ways as they might conceive necessary for or appropriate to the protection of their own property or interests.

LUSH J: "Mr Uren, who appeared for the informant to move the order absolute, presented his argument under two headings, each of which had two sub-headings. The first argument was that the bailiff's consent, whether it was verbal or implied, could not, if given, amount to lawful authority within the meaning of the Section, first, because on a proper construction of the Act the expression 'other lawful authority' means an authority derived from a source other than the consent of the Commission or its servants.

The second argument related to what I have described as the second question. The first part of it was that whether authority existed in the bailiff was a question of law and that any mistake concerning that was a mistake as to a matter of law and not as to a matter of fact. The second part was that there was no evidence on which the Magistrate could have found that the defendant's belief that the bailiff had authority was based on reasonable grounds.

In my opinion the second part of the first argument and, with a variation, the first part of the second argument are correct and are decisive of the case in the applicant's favour. Accordingly it is not necessary for me to canvass the whole of the remaining parts of Mr Uren's argument.

So far as the point of construction is concerned, in my opinion the words 'other lawful authority' appearing in the section as an alternative to 'consent in writing' cannot be construed so as to include a consent by the Commission which is not in writing. To give them such a construction would defeat the obvious legislative intention that if the defence is to be consent, that consent must be in writing. No appeal to the principle that exceptions to a penal provision should be given a liberal construction can overcome that obstacle for the defendant. I think it is useless to elaborate on this conclusion and, as I have said I think it is decisive of the case or at least of the considerations presented to the magistrate.

Mr Uren's argument under his first heading extended to attempting to establish a definition of 'authority'. The argument was an incisive one, focusing upon the two South Australian cases, *Crafter v Kelly* (1941) SASR 237 at p243 and *Satterly v Palmer* (1947) SASR 346 at p350. He also referred to an article by Mr RIE Card of the University of Birmingham in [1969] Crim LR 359. In that article at p362 the general conclusion is drawn that in such phrases as 'without lawful authority or excuse' the authority referred to is some form of authority derived from a public source and supported by law.

In deference to this argument, but by way of comment only, I say that I find some difficulty in forming any definitive idea of what amounts to lawful authority for the purposes of s377. No doubt a direct instruction by the Commission to carry out work constitutes such an authority. It is conceivable that in times of emergency there may be situations in which a fine line or even chance alone separates consenting to the act of another or giving initial instructions that action should be taken. The expression 'authority' in s377 would appear to extend to the statutory powers of other bodies. In dealing with an argument developed by Mr Radford I shall have to speak of a still further possibility.

Turning to the argument relating to the defence of honest and reasonable belief, so far as the defendant's mistake was one of fact and not merely a mistake as to the bailiff's general authority in law it must have involved a belief or assumption that the Commission had, by delegation or some other means, conferred authority on the bailiff to give the consent to which s377 refers, or to give a permission which could be regarded as an authority under s377. But on the construction of that section which I have adopted, either the Commission could not have given an authority extending to unwritten consent, because such an authority would have been inconsistent with the Act, or if the Commission had given a general authority the only effective way in which it could have been used was by the giving of a consent in writing. If the latter, then the mistaken assumption that such an authority existed would not, since no consent in writing was given, have been a belief in a state of fact which would have made the defendant's action lawful.

Mr Radford argued against the various submissions made by Mr Uren, and developed a submission of his own. That was that the evidence showed that this was a time of flood and that the defendant's property was imperilled by the flood. In those circumstances, the defendant, he submitted, had authority under the law to take such steps as were necessary to protect himself and his property from the threats and dangers which faced them.

In my opinion this argument must be subjected to a measure of re-adjustment before it is considered. It does not seem to me to be appropriate to put it in precisely the form in which it was put, in terms of necessity and the protection of property, because the respective rights of the higher and lower landowners in relation to the passage of waters which are not flowing in a defined stream is the subject of a number of rules of law. For Australia these have been authoritatively formulated, relatively recently by the High Court in *Gartner v Kidman* [1962] HCA 27; (1962) 108 CLR 12; [1962] ALR 620; (1962) 36 ALJR 43, and are set out in the judgment of Windeyer J at p48-9.

There is nothing in the evidence before me to suggest that the flow of flood waters which gave rise to the situation where the defendant felt obliged to deal with in this case was affected by any circumstances which would make the higher landowners, or the Commission, by virtue of the existence of its works, liable for nuisance or in other respects. Essentially the flow of water involved appears to have been the natural flow of flood waters. The position of the defendant as the proprietor of lower land accordingly was that he was not bound to receive the waters, and he was entitled to put up barriers and pen the waters back. That right, however, only extended to permit activities on the defendant's own property. There was not a nuisance originating on the property of other people which might conceivably have put him in a position where he could enter to abate. There seem to be three possibilities concerning the title position to the channel, and it is unfortunate that I am not in the position of knowing which of those three is correct. It is possible that the commission owned the area of land on which the channel was constructed. It is possible that the defendant owned that land, subject to an easement in favour of the Commission. Or, it is possible that a stranger to these proceedings owned the land, subject to an easement to the Commission.

The concept of self defence available to the lower owner, to which I have just referred, would not have authorised the defendant to enter upon a stranger's land or to enter upon the Commission's land for the purpose of protecting his own. Accordingly, the point needs consideration only upon the supposition that the defendant was the owner of the land on which the channel was constructed, subject to an easement in favour of the Commission.

The question which then arises is whether, for the purposes of s377, the right or liberty of the lower owner to which I have just referred, would not have authorised the defendant to enter upon a stranger's land or to enter upon the Commission's land for the purpose of protecting his own. Accordingly, the point needs consideration only upon the supposition that the defendant was the owner of the land on which the channel was constructed, subject to an easement in favour of the Commission. The question which then arises is whether, for the purposes of s377, the right or liberty of the lower owner to protect himself is within the scope of the word 'authority' used in that Section.

On the supposition as to title which I am now making, the Commission had an easement and it or its predecessor under statutory authority had constructed and maintained works on that easement. The integrity of these works is protected generally by the terms of s377 itself. In my opinion, in such a situation as to title, the right or liberty of the lower landowner to protect his land cannot be exercised by interference with the Commission's works.

The terms and the size of the Act both appear to me to lead to the inference the intention behind s377 is that the Commission's right to an easement gives it a right to control what is done in respect of the works constructed on that easement, and to exclude the concept that others have the right to interfere with those works for the protection or advancement of their own proprietorial rights. This case was concerned with a flood situation: it may be noted that s377 protects drainage channels as well as supply channels.

Accordingly, I would hold that the right or liberty of the lower landowner is not a lawful

authority within s377 justifying an interference with works. I regard this result in relation to the kind of works which the Commission, under its statute, must construct, maintain and operate as a practical result. The Commission's channels, and indeed a single channel of the Commission, may pass through hundreds of properties in different ownerships and in affording protection to the integrity of those works by s377 it appears to me that Parliament could not have intended to reserve to the adjoining landowners the right to interfere with or alter items in such ways as they might conceive necessary for or appropriate to the protection of their own property or interests.

For these reasons, Mr Radford's argument in justification of the Magistrate's conclusion must fail. But before I leave it, I think that I should also say that I have been very doubtful whether I should entertain it at all, for the reason that it was not put below and will have been seen from what I have said, the title situation may have vitally affected its tenability and if it had been attempted below, the onus being on the defendant, it is at least possible that the title questions might have been brought to light. Again before leaving the case I say this, that while I must send it back in due course to the Magistrate, the defendant's material will remain available on the question of penalty, though I am not, of course, in a position to say whether that will be the only material relevant to penalty. The order of the court will be that the order nisi will be made absolute. The order of the Magistrates' Court will be set aside. The matter will be remitted to the Magistrates' Court with a direction that on the evidence the defendant should have been convicted and that the Magistrates' Court deal with the matter accordingly, and fix such penalty as it thinks proper.

APPEARANCES: For the applicant Mellett: Mr G Uren, counsel. State Crown Solicitor. For the respondent Leahy: Mr AE Radford, counsel. Morrison, Teare & Purnell, solicitors.
