13/90

SUPREME COURT OF VICTORIA

BERGIN v BROWN

Ormiston J

1, 2 May, 21 December 1989 — [1990] VicRp 78; [1990] VR 888

CRIMINAL LAW – SUMMARY OFFENCE – WILFUL DAMAGE – "WILFULLY" – MEANING OF – TEST TO BE APPLIED: *SUMMARY OFFENCES ACT* 1966, S9(1)(c).

On a charge of wilful damage pursuant to s9(1)(c) of the *Summary Offences Act* 1966, the question is whether the accused had the necessary intent either to cause specific damage or do an act or acts reckless or indifferent as to whether thereby damage would be caused. Proof of what was in the accused's mind (not merely that of a reasonable person) is essential to the charge. However, an inference may be drawn only if there is no other reasonable inference which could be drawn to the contrary.

ORMISTON J: [*After setting out the facts, the grounds of the order nisi, the relevant statutory provision and a number of authorities, His Honour continued*] ... **[10]** The word "wilfully" was first inserted in Victoria by s18(g) of the consolidating *Police Offences Act* 1912. The language of the offence now appearing in paragraph (c) of s9(1) has not been materially altered since that time, but that which is contained in sub-section (2) of s9 of the present Act took the form of a proviso to all the offences in the section until 1966.

During the whole of the period 1864 to 1978 each of the provisions in the *Crimes Act* imposing liability for criminal damage by way of indictable offences (see e.g. ss170-225 cf the *Crimes Act* 1890) was introduced by the words "unlawfully and maliciously". With one important omission they were taken, almost word for word, from the *Malicious Damage Act* 1861 (24-25 Vict. c 97) (UK). The important exception was s52 of the latter Act, which created a summary offence and which was replaced, in terms to not dissimilar effect, by s14 of the *Criminal Justice* **[11]** *Amendment Act* 1914 (UK). Each of these sections imposed liability upon persons who should "wilfully or maliciously commit any damage (injury or spoil) to ... any real or personal property whatsoever ... either of a public or private nature ...". It can be seen that the word "wilfully" played an important part in the English section, for, as was recognized by the authorities on that section, it was the one section retained in the *Malicious Damage Act* which was still qualified by the words "wilfully or maliciously" which appeared in an earlier statute. In my opinion, at least after 1912 s18 of the *Police Offences Act*, and its successors, played a similar role to s52 of the *Malicious Damage Act* and its successor. In each case the expression is to be contrasted with "unlawfully and maliciously" appearing in each of the indictable offences.

Furthermore it would seem consistent with both schemes, i.e., that of the Victorian and United Kingdom Acts, if the word "wilfully" were to be given a similar meaning, notwithstanding the difficulties of interpretation which occurred in Victoria before the word "wilfully" was inserted. To that end one may look at a number of authorities on s52 of the *Malicious Damage Act* (regrettably not cited in argument), which explain the significance of the words "wilfully or maliciously" as contrasted with the expression "unlawfully and maliciously". The purpose of the sections is analysed especially in the judgment of Blackburn J in *White v Feast* (1872) LR 7 QB 353 at pp358-360, with which may be contrasted *Gardner v Mansbridge* (1887) 19 QBD 217, which has been criticized in *Russell on Crime* (12th ed.) **[12]** vol 2 p1320 and *Kenny's Outlines of Criminal Law* (16th ed.) p188.

Neither of those cases provided any assistance for the present purpose but in two later cases decided in 1898 this issue was considered. The first, *Gayford v Chouler* (1898) 1 QB 316 a Divisional Court held that a trespasser who walked across a field of long grass, doing damage to that grass to the value of sixpence, had been properly convicted under s52 of the *Malicious Damage Act*. In a very brief judgment concurred in by Lawrance J, Day J upheld the conviction using these terms (at pp317-318):

> "The Justices found as a fact that actual damage was done to the grass by the appellant, and they also found, and in my opinion rightly, that his act was wilful and malicious. The grass was deep, and it was inevitable that if a person walked across it some damage would be done. Yet the appellant persisted in walking across it. A man must be taken to intend the natural consequences of his act."

The latter expression can no longer be accepted as a satisfactory statement of the law. Nevertheless it is the foreseeability of damage in the context where no other inference could reasonably be drawn which justified the conviction. More satisfactory is the decision later that year in *Roper v Knott* (1898) 1 QB 868, which was a case stated to a Divisional Court of seven judges in respect of a charge of wilfully damaging milk by adding water to it, although it was said that the accused had no intention of injuring his employer. Lord Russell of Killowen CJ expressed the opinion, concurred in by the other members of the Court (at pp871-872):

> "It seems to me, in construing the section, that a man must be held to do a thing wilfully when he does it either intending to cause damage, or knowing that the act that he commits will cause **[13]** damage to the property on which it is committed."

In agreeing Wills J said (at p873):

> "In my opinion, the act meant by the Act of Parliament is a wilful doing of something which the man doing it knows must damage property. If it could be shown that he did not know that any damage to property would result from his act, then I think he could not be convicted under this section."

It is the latter statement which in my opinion indicated clearly that to satisfy the test of "wilfully" damaging property one must show either direct intention to cause damage or recklessness on the part of the accused as to the consequence of his acts. See also *Eley v Lytle* (1885) 50 JP 308 and *Hamilton v Bone* (1888) 52 JP 726.

In the only Australian decision on a similar section, s43 of the *Police Offences Act* 1953-1979 of South Australia, Wells J in *Taylor v Pope* (1979) 21 SASR 468 approved a passage from a judgment of Frost J in a Papua New Guinea case (*Pukari-Flabu v Hambakon-Sma* (1966) 9 FLR 180). In the passage approved as expressed by Wells J (at p470) it was said:

> "[I)n order to prove the offence, it was necessary for the prosecution to show that the defendant intended to do the particular type of harm in fact done, or that, foreseeing that such harm was likely to be done, he recklessly took the risk that it would be done."

Wells J upheld a conviction of a lady who had thrown a brick at a group of preachers which broke a window, but who alleged that she had no intention of breaking the window. Thus it was held that proof only of indifference to the harm likely to be caused could not take the conduct out of the meaning of the section.

[14] Although the offence presently contained in s9(1)(c) is only a summary offence, its language is sufficiently clear to require proof of more than objective evidence of damage caused by an accused from which the Court might infer that a reasonable person could foresee the consequences of his acts. Nothing in the authorities which I have discussed would deny the significance of the word "wilfully" as requiring, in general terms, an intention to cause damage. That intention may, however, be proved directly or indirectly by inferences of the requisite kind, but it cannot be satisfied by asking merely whether a reasonable person could foresee the consequences of the proved acts. That would enable a case to be established against a person who had been merely negligent causing the damage. However, as upon any criminal charge, it is permissible to allow a case to be made out by showing that the accused was reckless as to the consequences of his acts and, in this kind of case reckless as to whether he caused damage or not. Direct or indirect evidence may likewise be adduced to this end, but the question must always be whether the accused had the necessary intent either to cause the specific damage or to do an act or acts reckless or indifferent as to whether thereby damage will be caused.

In the present case, however, the learned Magistrate has used language consistent with his imposing a test based on negligence. In my opinion the word "wilfully" required the Magistrate to be satisfied either that the accused intended to damage Mr Tullo's car or was reckless as to the consequence whether that car would be **[15]** damaged or not. What was essential to be proved was

what was in the mind of the accused and not merely that of a reasonable person. An inference might have been drawn, but only if there was no other reasonable inference which could have been drawn to the contrary. It does not appear that the learned Magistrate imposed such a test and he did not enquire whether the accused was reckless as to the consequences of his action. The language of his reasoning is oblique and I am obliged to draw all inferences in favour of upholding the Magistrate's finding, if that is practicable and reasonable. However, by using the language he did the Magistrate appears to me to have ignored the necessity of determining whether the accused was a person who could not but have foreseen that the consequences of his acts would be damage to the other car. Merely because a reasonable person might have foreseen those consequences was not sufficient: it was necessary for a finding of "wilfully damaging" property for the Magistrate to have concluded either that there was direct intention or recklessness or indifference as to the consequences of what he did. On the facts before the Court it is possible that such a conclusion could have been reached, as the version of evidence before me is very brief and much ought have depended upon an assessment of the witnesses, especially the accused. It was not evidence, however, which must have led to a finding of guilt.

Although I am satisfied that the learned Magistrate misdirected himself as the relevant test of liability, there is some difficulty as to what should now be done with the information. If the case against the **[16]** accused was to be made out, it must have depended, on the evidence before me, on an assessment by the Magistrate of what the accused himself said. On the sparse material before this Court the case could not have been made out on the informant's evidence. That might induce a Court on review to quash the finding of guilt absolutely and I was inclined to take that course.

However, the version of the evidence was so bare that it is by no means impossible that, upon hearing it in full, a Magistrate may be able to infer, upon the required standard of proof, that the applicant's acts were consistent only with his being reckless or indifferent as to causing damage to Mr Tullo's car. This is not a case where an essential ingredient is lacking from the informant's case in the usual sense, rather it is impossible for this Court, upon the procedure adopted upon an order for review, to draw any necessary inferences against the applicant upon the evidence as presented in affidavit form. That very same evidence, when heard again, may enable a Magistrate to draw all necessary inferences, although I am not suggesting that he necessarily should. With some reluctance, therefore, it is necessary to remit the matter for rehearing. It is therefore necessary to make the order absolute, to quash the orders made by the Melbourne Magistrates' Court on 21st October 1988 and to remit the matter to be dealt with according to law and in accordance with my reasons.

Solicitors for the applicant: Melasecca, Zayler. Solicitor for the respondent: Victorian Government Solicitor.
