48/79

SUPREME COURT OF VICTORIA

STEELE v FOWLER

Brooking J

24 July 1979

CRIMINAL LAW – SUMMARY OFFENCE – WILFUL DAMAGE – WHETHER TENANT OF PREMISES IS A "PERSON" WITHIN THE MEANING OF THE SECTION – WHETHER TENANT COMMITTED AN OFFENCE – FINDING BY MAGISTRATE THAT TENANT COMMITTED THE OFFENCE OF WILFUL DAMAGE – WHETHER MAGISTRATE IN ERROR: *SUMMARY OFFENCES ACT* 1966, S9(1).

HELD: Order nisi absolute. Conviction and fine set aside. Information dismissed.
As the damage to the house occurred whilst the house was in the possession of a tenant of the defendant, this meant that the defendant did not commit the offence of wilful damage.
***R v O'Brien: ex parte Davidson* (1874) 5 AJR 16, considered and followed.**

BROOKING J: This is the return of an order nisi granted by Master Brett on 14th November 1978 (application having been made for that order four days previously) to review a decision of the Magistrates' Court at Lilydale given on 10th October 1978, whereby the defendant was convicted of an offence against s9(1) of the *Summary Offences Act* 1966. The information alleged that the defendant had wilfully damaged property belonging to Nancy Margaret Bailey, "the value of such damage being under $500".

Section 9(1) is as follows:-

"Any person who—
(a) destroys damages pollutes or obstructs any aqueduct dam sluice pipe pump water-course pond pool or fountain;

(b) being an artificer workman journeyman or apprentice wilfully damages spoils or destroys any goods wares work or material committed to his care or charge;

(c) wilfully injures or damages any property (whether private or public) the injury done being under, the value of $500; or

(d) wilfully trespasses in any place and neglects or refuses to leave that place after being warned to do so by the owner occupier or a person authorised. by or on behalf of the owner or occupier-.
shall be guilty of an offence. Penalty: $500 or imprisonment for six months."

The paragraph relied upon by the informant was para (c). From the evidence led on the hearing of the information it is clear that the defendant was a tenant of Mrs Bailey and it is implicit in what the stipendiary magistrate said in convicting the defendant that he so found. The nature of the tenancy was not disclosed by the evidence. The evidence showed that Mrs Bailey and her husband (who had died on some unspecified date before the hearing of the information) were joint owners of a house at 53 Glen Park Road, Bayswater, that from about the month of September 1977 until the month of June 1978 the defendant and her husband had held that property as tenants of Mr and Mrs Bailey or as tenants of Mrs Bailey alone if her husband died before the tenancy came to an end in June 1978. Rent was payable by the defendant and her husband, but the nature of the tenancy did not appear, although it was presumably a periodic tenancy of some kind. There was evidence that the defendant had, while she and her husband were still in possession of the premises, damaged a wall of the house, the stove, tiles in the bathroom and shelves in a bedroom. The evidence showed that at the time of the doing of this damage the tenancy was still in existence and the defendant and her husband were still in possession of the house. At the conclusion of the evidence it was submitted on behalf of the defendant that, as she was a tenant in possession of the premises at the time of the alleged offence and as the offence was alleged to have been constituted by the damaging of the premises, no offence had been committed,

and reliance was placed on the decision of the Full Court in *R v O'Brien ex parte Davidson* (1874) 5 AJR 16. Other arguments in support of the defendant's contention were put to the stipendiary magistrate.

The order nisi was granted on the application of the defendant upon three grounds, but the only one to which it is necessary to refer is Ground 1:

> "That the Magistrate having found that the defendant was a tenant of property situate at 53 Glen Park Road Bayswater, he was wrong in law in holding that she was a 'person' within the meaning of s9(1)(c) of No.7405 *Summary Offences Act* 1966."

Mr Larkins, who appeared for the defendant to move the order absolute, submits that a lessee in possession of the property let to him cannot be guilty of an offence by force of para. (c) of s9(1) if he wilfully injures or damages the property let to him, whether he is the sole tenant or one of two or more tenants. His argument relied in part upon the heading which immediately precedes s9 ("Destroying Damaging or Injuring Property – Trespass"), but his principal submission was that *O'Brien's case, supra*, concluded the matter in his favour so far as I was concerned. The whole of the report of that case occupies only about three column inches in the Australian Jurist Reports. According to the report, Davidson was the tenant of some property at South Yarra. He cut down the fence and for this he was summoned by the landlord under para. (vii) of the *Police Offences Statute* 1865 for wilful destruction of the property.
The decision of the Full Court (Barry ACJ, Williams and Fellows JJ) is reported as follows:

> "The Court held that he had committed no offence against the statute and that the landlord's remedy was by a civil action for the injury to the property."

The reference to the "landlord's remedy" is explicable by the circumstance that the section then in force made provision for the payment by the defendant on conviction of compensation to the person aggrieved.

Twenty-three years later Hand J was asked to apply *O'Brien's case* in *Eyers v Bourke* [1898] VicLawRp 59; (1898) 23 VLR 320. There the defendant was a caretaker employed by the informant. He was charged under para (vii) of s17 of the *Police Offences Act* 1890 with wilfully damaging the informant's property. Para (vii) of s17 of the Act of 1890 corresponded to the provision in question in *O'Brien's case*. Counsel moving the order absolute relied on *O'Brien's case* and submitted that the defendant was a tenant at will. Hood J discharged the order nisi, holding that it was unnecessary to consider whether *O'Brien's case* did decide that a tenant could not be prosecuted for the offence in question. His Honour sent for the papers in *O'Brien's case* and then said: "I am inclined to think that the case really did decide that a tenant could not be prosecuted under this section. This is only a surmise, judging from the papers." The observations of Hood J on what it was that the Full Court decided were *obiter dicta*.

I myself sent for the file in *O'Brien's case* and from it the following facts emerge:-

> The defendant, Davidson, was charged on an information alleging that he did wilfully commit injury to a certain fence the property of the informant to the extent of £2. He was the tenant of the informant, Thompson, in respect of the premises upon which the fence was erected, and he was Thompson's tenant for some time both before and after the date on which he injured the fence. He paid rent to Thompson for the premises. The nature of the tenancy is not disclosed. Before the justices, the defendant's attorney submitted that they had no jurisdiction, as the property injured was in the defendant's possession and so the section did not apply. On 3rd March 1874 Barry J granted an order nisi for statutory prohibition under s136 of the *Justices of the Peace Statute* 1865 "on the ground that the said justices had no jurisdiction to hear the same or inflict a fine or order damages to be paid for such alleged injury, the said fence being in the possession (as tenant) of the said Robert Davidson and upon the further grounds disclosed in the said affidavits sworn and filed herein." The affidavits are two affidavits of the defendant, one of which is formal. There is nothing in either of these affidavits to suggest the existence of any ground other than the ground set forth in terms in the order nisi. The practice of stating grounds specifically and concluding with a general reference to the other grounds disclosed by the affidavits was considered in *R v Attorney-General: Ex parte Gillick* [1885] VicLawRp 99; (1885) 11 VLR 508 and in *Ex parte Connell* (1898) 14 WN (NSW) 103. I assume in favour of the present informant that in *O'Brien's case* it was open to the defendant to rely on the general reference to other grounds. I can find no other ground in the applicant's affidavits. The brief to counsel for the applicant on the return of the order nisi is on the file, it presumably having been

> required for the settling of the order absolute. The observations to counsel in this brief state as the point to be argued "that this section does not apply to a tenant in possession". This is said in the brief to be the view of Mr Stephen of the firm of Stephen & Cameron, who acted for the defendant. Mr Cameron added the following observation to the brief:- "Mr Stephen is particularly anxious to win this case as he and Mr O'Brien (one of the adjudicating justices) disagreed on the law and this prohibition was applied for to teach him law. I merely follow my senior partner's instructions in the matter". (emphasis in original).

The suggestion in this observation that it was Mr Stephen himself who appeared before the justices is shown to be correct by the applicant's affidavit. Further, the order nisi was granted on the application of the applicant's attorney, and it is tempting to suppose that Mr Stephen indulged himself to the extent of making that application. There is nothing in the affidavits filed on behalf of the informant to suggest that any point was taken before the justices except the point to which I have referred.

The order of the Full Court made on the return of the order nisi made the order nisi absolute and said nothing about grounds. There is nothing in the file to suggest that the grounds of the order nisi were ever amended.

In my view the inference should be drawn that the applicant succeeded before the Full Court on the ground set out in terms in the order and I regard this as a well-founded inference, and I believe that by "surmise" Hood J did not mean "conjecture".

I must in my view proceed upon the basis that the Full Court decided that the circumstance that the damaged fence was in the possession as tenant of the defendant meant that he did not commit an offence against para (vii) of s17 of the Act of 1865 by injuring the fence. It is fair to say that once the file in *O'Brien's case* had been obtained by me and its contents discussed with counsel, Mr Uren did not contend otherwise. As the magistrate by whom the present information was heard observed, the section has undergone great changes since 1865. These changes include the deletion of the provision for payment of compensation. Moreover, the present defendant was one of two lessees, not the sole lessee.

Mr Uren informed me, however, that notwithstanding the changes which the section has undergone, he could not submit that the present section differed in any material respect from its 1865 forerunner so as to enable *O'Brien's case* to be distinguished, nor did he seek to distinguish the present case from *O'Brien's case* on any ground relating to the facts. In view of this I think that I must treat *O'Brien's case* as binding authority leading to the conclusion that the present defendant ought not to have been convicted, and it would be quite inappropriate for me to express any view on the question raised by the order nisi.

Mr Uren requested me to refer the order to review for hearing and determination by the Full Court pursuant to s88(3) of the *Magistrates' Courts Act* 1971. He recognizes, in asking me to adopt this course, that it follows from his concession that the present provision is indistinguishable from its 1865 counterpart and from his not attempting to distinguish the present case on the facts, that if I were to refer the order to review to the Full Court under s88(3) the question could be decided in his client's favour only by a Full Bench: cf. *R v Bugg* [1978] VicRp 25; (1978) VR 251 at p252, in the addendum.

I have decided that in all the circumstances I should not refer this order to review for hearing and determination by the Full Court, and I therefore refuse Mr Uren's application under s88(3). Ground 1 is not quite apt to express what I take to be the decision in *O'Brien's case*. In my view the ground should be amended so as to make it read as follows:-

> "That the evidence requiring a finding that the property the subject of the information was at the time when it was damaged in the possession of the defendant as one of the tenants of the premises of which the said property formed part, the magistrate should have held that the defendant had not committed an offence against para (c) of s9(1) of the *Summary Offences Act* 1966.".

The order nisi will be made absolute, Ground 1 as so amended having been established, with costs, including the costs reserved by the order of Master Brett made on 14th November 1978, the costs payable by virtue of this order not to exceed $200. The conviction and fine will

be set aside and in lieu thereof there will be an order dismissing the information. Those are the orders which I shall make once the affidavit showing compliance with the order of direction No. 2 in the order Master Brett of 14th November 1978 has been filed, that is to say once the leaving of a copy of the order, affidavit and exhibits for the use of the magistrate has been shown. The time limited by that order was extended by Master Brett on 30th November 1978. Once the affidavit has been filed I will list the matter and pronounce the order in court, but it will not be necessary for counsel on either side to attend.

APPEARANCES: For the Informant/Applicant Steele: Mr JFM Larkins, counsel. RGB Skinner, solicitor. For the Defendant/Respondent Fowler: Mr GR Uren, counsel. The Crown Solicitor.
