

32/12; [2012] VSC 381

SUPREME COURT OF VICTORIA

POWELL v OLSEN

Robson J

16 August, 5 September 2012

CRIMINAL LAW – ACCUSED CHARGED WITH INTENTIONALLY DESTROYING AN ELECTRIC FENCE THE PROPERTY OF HIS NEIGHBOUR – PROSECUTION UNABLE TO PROVE THE LAND ON WHICH THE FENCE ERECTED WAS NOT OWNED BY THE ACCUSED – DEFENCE RAISED THAT THE FENCE WAS A FIXTURE ON THE LAND – WHETHER MAGISTRATE ERRED IN NOT FINDING THAT THE PROSECUTION BORE ONUS OF PROVING THAT THE FENCE WAS NOT A FIXTURE – WHETHER MAGISTRATE WAS SATISFIED BEYOND REASONABLE DOUBT THAT THE ACCUSED DID NOT BELIEVE IT WAS HIS PROPERTY – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT 1958*, SS197, 201.

P. and W. were neighbours. W. built an electric fence on land that he knew was claimed to be owned by P. P. pulled the fence down and cut up the wire and later was charged with intentionally and without lawful excuse destroying the fence belonging to W. The Magistrate found the charge proved and imposed a fine on P. Upon appeal—

HELD: Appeal allowed. Magistrate's order quashed. Not remitted to the Magistrates' Court for hearing and determination according to law.

1. In the present case in order to prove a charge of intentionally damaging property under the *Crimes Act 1958* it was necessary for the prosecution to prove beyond reasonable doubt:

- (a) that the property belonged to another person or to the accused and another person; and
- (b) that the accused did so without lawful excuse.

2. In relation to element (a) the Magistrate erred in law in failing to find that the prosecution was obliged to prove that the electric fence was not a fixture, and in not finding that the prosecution had failed to do so.

3. In relation to element (b) the prosecution was required to prove beyond reasonable doubt that the accused had no lawful excuse for destroying the property. It was for the accused to elicit or point to evidence that could give rise to a “lawful excuse.” The onus then lay on the prosecution to negative or rebut that excuse.

4. The Magistrate did not identify the issue of element (b) correctly. Rather, he found that P. honestly believed that he owned the land where the fence was located and that W. was a trespasser. He held, however, that he was not satisfied that when P. destroyed the fence he honestly believed it was his property. That was not the question that he was required to address and the Magistrate thereby erred in law. Rather, the question was whether he was satisfied beyond reasonable doubt that P. did not believe it was his property.

ROBSON J:

Introduction

1. Mr Powell owns and conducts a farm on the southern side of the Glenelg River, near Balmoral. Mr Weaver owns and conducts a farm opposite Mr Powell’s farm on the northern side of the Glenelg River. Mr Weaver claims that he holds a licence from the Department of Sustainability and Environment entitling him to farm land on Mr Powell’s side of the river. Mr Powell claims he owns that land and disputes Mr Weaver’s right to farm that land.

2. Mr Weaver constructed an electric fence on the disputed land. Mr Powell pulled the fence out and cut up the wire. Mr Powell was charged and found guilty of intentionally and without lawful excuse destroying the electric fence belonging to Mr Weaver and fined \$1,000 without conviction and ordered to pay Mr Weaver restitution of \$200 with a stay of 2 months.

3. Mr Powell appeals against the order, claiming that the Magistrate erred in law in finding him guilty.^[1]

4. In his defence, Mr Powell contended that he owned the disputed land, that the fence was a fixture upon that land and that entitled him to remove the fence.^[2] Mr Powell also contended that if the fence was the property of Mr Weaver, then he had a lawful excuse for his conduct.

5. Mr Powell contended that the prosecution had to establish beyond reasonable doubt that Mr Powell did not own the disputed land or, if the prosecution was unable to do so, that the fence was not a fixture. The Magistrate found that he was unable to determine whether the disputed land was owned by Mr Powell or was subject to the licence. Thus the prosecution had not established the land did not belong to Mr Powell.

6. Mr Powell contended that in those circumstances, the prosecution had to prove that the fence was not a fixture on the disputed land. Mr Powell contends that the Magistrate erred in law in not finding that the prosecution had to so prove, and in failing to find that the prosecution had not done so.

7. The prosecution contends that given the definition of property in the *Crimes Act* 1958, the Magistrate was not required to explore the issue of whether the fence was a chattel or a fixture. The prosecution says that whether a chattel or a fixture, the fence was the “property” of Mr Weaver within the meaning of the *Crimes Act* 1958. The prosecution, also contends, that if there is error on the part of the Magistrate, the case should be remitted to the Magistrate for rehearing.^[3]

8. The Magistrate found that Mr Powell did not have a lawful excuse for his conduct in destroying the fence. The Magistrate found that he was not satisfied that when Mr Powell destroyed the fence that he honestly believed that the fence was his property. Mr Powell contends that the Magistrate erred in finding that Mr Powell had to establish a lawful excuse. The prosecution contends that the Magistrate was correct to find that the appellant did not have a lawful excuse.

9. Thus, the issues are:

- (a) Did the Magistrate err in failing to find that the prosecution was bound to prove that the fence was not a fixture on the disputed land and whether the prosecution had done so?
- (b) Did the Magistrate err in law in finding that Mr Powell had to establish a lawful excuse?
- (c) If the Magistrate did err in law, should the matter be remitted to the Magistrate?

Relevant provisions of the Crimes Act 1958 and the elements of the offence

10. The *Crimes Act* 1958 relevantly provides:^[4]

A person who intentionally and without lawful excuse destroys or damages any property belonging to another or to himself and another shall be guilty of an indictable offence ...

11. Property is relevantly defined in the *Crimes Act* 1958 as:

(1) ...
property means property of a tangible nature, whether real or personal, including money and including wild creatures which have been tamed or are ordinarily kept in captivity and any other wild creatures or their carcasses if, but only if, they have been reduced into possession which has not been lost or abandoned or are in the course of being reduced into possession.

(2) For the purposes of this subdivision property shall be treated as belonging to any person—

- (a) having the custody or control of it;
- (b) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest); ...

12. The *Crimes Act* 1958 also contains provisions prescribing whether or not a person charged with intentionally damaging property will be treated as having a lawful excuse.^[5]

13. Thus, in order to prove a charge of intentionally damaging property under the *Crimes Act* 1958 it is necessary for the prosecution to prove beyond reasonable doubt:^[6]

- (a) that the accused destroyed or damaged property;
- (b) that the property belonged to another person or to the accused and another person;
- (c) that the accused did so intentionally;
- (d) that the accused did so without lawful excuse.

Did the Magistrate err in failing to find that the prosecution was bound to prove that the fence was not a fixture on the disputed land and whether the prosecution had done so?

14. At the trial, only elements (b) and (d) of the offence were in issue. The learned Magistrate found that the Mr Powell honestly believed that his land extended to the banks of the Glenelg River and that the electric fence had been wrongly constructed on his land. The Magistrate found, however, that he was not satisfied that Mr Powell believed that Mr Weaver's fence was Mr Powell's. The Magistrate found that Mr Powell's actions in destroying Mr Weaver's fence were in retaliation for Mr Weaver removing a mesh fence that Mr Powell had erected on the disputed land.

15. In the circumstances, where it was argued by the defence that the fence was a fixture and the prosecution had not proved the land was not Mr Powell's, Mr Powell contends that the prosecution bore the onus of proving that the fence was not a fixture.

16. The prosecution contends, however, that given the definition of property in the *Crimes Act* 1958, the Magistrate was not required to explore the issue of whether the fence was a chattel or a fixture. The prosecution says that whether a chattel or a fixture, the fence was the property of Mr Weaver within the meaning of the *Crimes Act*. In particular, the prosecution say that the fence should be treated as belonging to Mr Weaver as he had (a) custody or control of the fence, or (b) he had a proprietary right or interest in the fence.

17. The Magistrate did not consider any issues as to whether or not the prosecution had established the fence was or was not a fixture, or whether (even if it was a fixture) Mr Weaver could have property in it for the reasons now argued by the prosecution. The prosecution did not open that case against Mr Powell during the hearing. Nor was any reference made to this argument by the prosecution in final address or by the Magistrate. No evidence was pointed to that was led during the hearing to suggest that Mr Weaver had "the custody or control" of the fence. The fence was across the river from his property on disputed land. There was no evidence that Mr Weaver was in possession of the land between the fence and the river by running stock on it or farming it in any way. The prosecution did not contend that Mr Weaver otherwise had "any proprietary right or interest" in the fence if it was a fixture.

18. I reject this submission by the prosecution. I find that the Magistrate was required to address the issue of whether the prosecution had proved that the fence was not a fixture. The Magistrate was not required to address the issue now raised by the prosecution for the simple reason it was not raised before him.

19. In his reasons for judgment, the Magistrate described the defence raised by Mr Powell – that the fence was a fixture – as a "legal construct." Without any further consideration of this defence, the Magistrate proceeded to deal with the fourth element of the offence; that is, whether Mr Powell had a lawful excuse. The Magistrate said that the issue for him was whether Mr Powell believed honestly at the time of the conduct that the property in question belonged solely to himself or that he had a right or interest in the property in question which authorised him to engage in that conduct (that is, pulling down the fence as he did). It is clear that in this passage, the learned Magistrate was referring to the test of lawful excuse set out in the *Crimes Act* 1958.

20. It was not suggested on the appeal that evidence was led by the prosecution to establish the fence was not a fixture.

21. Accordingly, I find that the Magistrate erred in law in failing to find that the prosecution was obliged to prove that the electric fence was not a fixture, and in not finding that the prosecution had failed to do so.

Did the Magistrate err in law in finding that Mr Powell had to establish a lawful excuse?

22. The fourth element that the prosecution must prove beyond reasonable doubt is that the accused had no lawful excuse for destroying the property. It is for the accused to elicit or point to evidence that could give rise to a "lawful excuse."^[7] The onus then lies on the prosecution to negative or rebut that excuse.^[8] The Magistrate did not identify this issue correctly. Rather, he found that Mr Powell honestly believed that he owned the land where the fence was located and that Mr Weaver was a trespasser. He held, however, that he was not satisfied that when Mr Powell destroyed the fence he honestly believed it was his property. That was not the question that he

was required to address. Rather, the question was whether he was satisfied beyond reasonable doubt that Mr Powell did not believe it was his property (my emphasis).

23. I find that the Magistrate thereby erred in law.

Should the matter be remitted to the Magistrate?

24. Under the *Criminal Procedure Act* 2009, I may remit the case for rehearing to the Magistrates' Court. I was not referred to any authorities as to how I should exercise my discretion.

25. In these circumstances, and especially having regard to the error in addressing the fixture defence, I have decided not to remit the case for rehearing. Mr Powell honestly believed that the fence was built on his land. Mr Weaver took a risk in building a fence on land that he knew was claimed to be owned by Mr Powell. The appropriate course was to decide the issue of ownership in the civil courts if necessary. I do not think justice would be served by putting Mr Powell through another hearing where there is little to suggest a conviction would be obtained.

Conclusion

26. The appeal is allowed. The order of the Magistrate of 30 November 2011 against Mr Powell is quashed.

^[1] *Criminal Procedure Act* 2009 s272.

^[2] Once a chattel is affixed to land and becomes a fixture, it becomes part of the property of the owner of that land: *North Shore Gas Co Ltd v Commissioner of Stamp Duties (NSW)* [1940] HCA 7; (1940) 63 CLR 52 at 69 per Dixon J, see also *Halsbury's Laws of Australia* [355-2365].

^[3] *Criminal Procedure Act* 2009 s272(9).

^[4] *Crimes Act* 1958 s197(1).

^[5] *Crimes Act* 1958 s201.

^[6] Charge Book: criminal damage, [7.5.4.1.2].

^[7] *Bourke's Criminal Law Victoria* [s197.5].

^[8] *Ibid* [s201.1].

APPEARANCES: For the appellant Powell: JJ Isles, counsel. Stratmann & Co, solicitors. For the respondent Olsen: M Roper, counsel. Office of Public Prosecutions.
