14/10; [2010] VSC 193

SUPREME COURT OF VICTORIA

HOUGHTON v BOND

Cavanough J

8 April 2010 (*Ex tempore*. Revised reasons published 11 May 2010)

CRIMINAL LAW – ALLEGED CONTRAVENTION OF PLANNING SCHEME – REMOVAL OF NATIVE VEGETATION WITHOUT A PERMIT – EXEMPTION WHERE REMOVAL TO THE MINIMUM EXTENT NECESSARY FOR CONSTRUCTION, OPERATION OR MAINTENANCE OF A FARM STRUCTURE, INCLUDING A FENCE – ACCUSED POINTED TO EVIDENCE OF APPLICABILITY OF EXEMPTION – INFORMANT FAILED TO SATISFY MAGISTRATE BEYOND REASONABLE DOUBT THAT EXEMPTION DID NOT APPLY – CHARGES DISMISSED BY MAGISTRATE – INTERPRETATION OF EXEMPTION – MEANING OF "FOR" – WHETHER MAGISTRATE'S FINDING OPEN ON THE EVIDENCE: *MAGISTRATES' COURT ACT* 1989, S92; *PLANNING AND ENVIRONMENT ACT* 1987, S126(1); *WELLINGTON PLANNING SCHEME*, CL 52-17-6.

B. a property owner, removed without a permit a number of mature gum trees from the road reserve adjacent to his property. He was later charged with two offences of removing native vegetation and with removing native vegetation without a permit. At the hearing of the charges, B. contended that his removal of the trees represented the "removal, destruction or lopping of native vegetation to the minimum extent necessary" for the construction and maintenance of a new fence to replace an old fence on the border between a certain dairy property and the road reserve. The charges were dismissed by the Magistrate on the basis that the "Rural activities" exemption in clause 52.17-6 of the *Wellington Planning Scheme* ('Scheme') did not apply. Upon appeal—

HELD: Appeal dismissed.

1. The informant's onus of proof included an obligation to prove, beyond reasonable doubt, that the exemption in clause 52.17-6 of the Scheme did not apply.

2. The "Rural activities" exemption in clause 52.17-6 of the Scheme does not apply only in relation to existing farm structures and is not so confined insofar as it refers to the "construction" of farm structures. The clause applies to removal etc "for" the construction, operation or maintenance of a farm structure. The word "for" is purposive. In its context here, it looks to the future. As long as the farm structure in question was genuinely proposed it may fall within the "Rural activities" exemption even if it does not presently exist. The Magistrate did not err in this regard.

3. The very notion of maintaining a farm structure includes taking action to protect it against both immediate and non-immediate risks to its integrity. To maintain something is "to keep something in existence in a state which enables it to serve the purpose for which it exists". Hence, maintaining a machine has been said to involve "the obligation to prevent foreign matter from reaching any place where it can interfere with the proper working of the machine". Accordingly, it was open to the Magistrate to take the view that removing large trees in order to prevent them or their heavy limbs from falling onto a proposed cattle fence constituted action taken for the maintenance of a farm structure, namely the proposed fence, within the meaning of the "Rural activities" exemption in clause 52.17-6.

4. The informant called no expert or other evidence to the effect that any one or more of the trees did not need to be removed for the purpose of constructing or maintaining the proposed new fence. B. on the other hand, did call "necessity" evidence in that he gave evidence himself and called the former manager of the cattle property to give evidence on his behalf. Each of them had had considerable relevant experience. Both gave evidence supporting the proposition that each and every one of the trees removed had been sufficiently close to the boundary to require removal either for the construction of the new fence or for its maintenance.

5. In relation to the point that some of the trees were at a substantial distance from boundary, including one some 19 metres away, it was not sufficient to establish that the Magistrate was obliged to reject the evidence of B. and his former manager to be satisfied beyond reasonable doubt that one or more of the trees did not need to be removed. The trees removed were said to be quite tall and there was evidence that some were leaning towards the fence and dropping branches. Accordingly, there was no legal error in the reasoning of the magistrate.

CAVANOUGH J:

1. This is an appeal under the former s92 of the *Magistrates' Court Act* 1989 against an order made by the Magistrates' Court at Sale in case number XO-3280173 on 27 July 2009. The learned magistrate dismissed two charges that had been laid in the alternative under s126(1) of the *Planning and Environment Act* 1987 by the informant/appellant, Robert Clifford Houghton, an officer of the Wellington Shire Council, against the present respondent, Murray Charles Bond.

2. The first charge was that between 1 June 2008 and 31 July 2008 at Valencia Creek the defendant did develop land, namely road reserve adjacent to 170 Dows Road, Valencia Creek, in contravention of the Wellington Planning Scheme, contrary to s126(1) of the *Planning and Environment Act* 1987:

> "Particulars: You did remove native vegetation in contravention of clause 52.17 of the scheme."

3. The second (or alternative) charge was that between 1 June 2008 and 31 July 2008 at Valencia Creek the defendant did develop land, namely road reserve adjacent to 170 Dows Road, Valencia Creek and did fail to comply with the Wellington Planning Scheme in contravention of s126(1) of the *Planning and Environment Act* 1987:

> "Particulars: You did fail to comply with clause 52.17 of the Scheme in that you did not have a planning permit to remove native vegetation."

4. So far as relevant, s126(1) of the *Planning and Environment Act* 1987 provides:

> "(1) Any person who uses or develops land in contravention of or fails to comply with a planning scheme, or a permit, … is guilty of an offence."

5. At the time of the alleged offences clause 52.17 of the *Wellington Planning Scheme* provided, so far as presently relevant:

> "**52.17 NATIVE VEGETATION**
> **Purpose**
> To protect and conserve native vegetation to reduce the impact of land and water degradation and provide habitat for plants and animals.
> To achieve the following objectives:
> • To avoid the removal of native vegetation.
> • If the removal of native vegetation cannot be avoided, to minimise the removal of native vegetation through appropriate planning and design.
> • To appropriately offset the loss of native vegetation.
> To provide for the management and removal of native vegetation in accordance with a native vegetation precinct plan or property vegetation plan.
> To manage vegetation near buildings to reduce the threat to life and property from wildfire.
>
> **52.17-1 Permit requirement**
> A permit is required to remove, destroy or lop native vegetation. This does not apply:
> • If the table to Clause 52.17-6 specifically states that a permit is not required.
> • … • … • …
>
> **52.17-6 Table of exemptions**
> No permit is required to remove, destroy or lop native vegetation if any of the following apply:
> • …
> • Emergency works. The native vegetation presents an immediate risk of personal injury or damage to property.
> • … • …
> Rural activities
> • To the removal, destruction or lopping to the minimum extent of native vegetation necessary for the construction, operation or maintenance of a farm structure, including a dam (other than on a stream), tracks, bores, windmills, tankstands, fences, stockyards, loading ramps, sheds and the like. … ." [1]

6. It was common ground below, and it remains common ground, that the defendant removed a number of mature gum trees from the road reserve adjacent to 170 Dows Road, Valencia Creek during the period in question; that either 39 or 40 such trees were removed; that the trees constituted native vegetation within the meaning of clause 52-17; and that the defendant had neither applied for nor obtained a permit to remove the trees under clause 52-17.

7. The accused's defence was that the "Rural Activities" exemption in clause 52.17-6 applied. In particular, he contended that his removal of the trees represented the "removal, destruction or lopping of native vegetation to the minimum extent necessary" for the construction and maintenance of a new fence to replace an old fence on the border between a certain dairy property and the road reserve.

8. The charges were dismissed by the Magistrate on the basis that the informant had failed to prove beyond reasonable doubt that the "Rural activities" exemption in clause 52.17-6 did not so apply.

9. The Magistrate gave his reasons orally. They were recorded and transcribed. So far as presently relevant, the Magistrate said:

> "These are by their nature criminal charges and they carry criminal sanctions. The prosecution carries the criminal burden of proof. The issue which must be proven by the prosecution is whether the work done was beyond 'minimal'. Mr Bond is a farmer of 40 years' experience. He gave evidence of his own observations of the scene, of his determination that some of the trees along the fence line – and I include specifically those beyond the 'four-metre' strip to which he was working – were affected by white ants. He also referred to a number of dead branches hanging over the potential fence line.
>
> He gave evidence that trees were growing through the fence line and he made the comment that there is no way that you would build a fence without removing the trees. Some of the photographs which were tendered show a fence in a fairly dilapidated state and trees growing through the line of the fence. Some of the trees were up to nine metres. My recollection is that there was one of 19 metres from the fence line. This was specifically put to the defendant and his evidence was that the tree itself on that particular occasion, and the others which were outside the 'four-metre' line were potentially dangerous and likely to jeopardise the integrity of the fence; therefore their removal comes under the heading of Maintaining of Fences as admitted by 52/17-5 [sic].[2]
>
> The proposed use of the property is also relevant. A dairy property requires fencing which will be able to keep cattle within the property and an owner or contractor would be derelict in the duty if he or she did not remove potential hazards such as the more remote trees, which on his evidence produced a risk to the fence. What Mr Bond thought about permits, the need to get one, the need to contact DSE, the need to make other inquiries or the fact that there may be some intrinsic [sic] in those trees lying on his property[3] are not relevant.
>
> The whole issue is minimal extent, as referred to in the paragraph that I have now quoted on multiple occasions. Based on the criminal standard applying to these proceedings and in the absence of specific and expert evidence as to what specific trees could or could not have been removed I cannot be satisfied that the charges have been proven. The charges are dismissed."

10. An appeal can only be brought under the former s92 of the *Magistrates' Court Act* 1989 on a question or questions of law. Whether a significant finding of fact was open to a court or tribunal will generally constitute a question of law for the purposes of a statutory appeal confined to questions of law.[4]

11. The notice of appeal sets out four questions stated to be questions of law on which the appeal is brought, as follows:

> "(a) Whether it was open to the learned Magistrate to determine or conclude that the Informant had failed to prove that the removal of the native vegetation (that is, each and all of the 40 trees) was not '[to] the minimum extent … necessary for the construction, operation or maintenance of a … fence' for the purposes of the exemption within clause 52.17 of the Wellington Planning Scheme.
> (b) Whether, on the true construction of the exemption within clause 52.17 of the Wellington Planning Scheme, it was open to the learned Magistrate to determine or conclude that the Informant had failed to prove that the removal of the native vegetation (that is, each and all of the 40 trees) was not '[to] the minimum extent … necessary for the construction, operation or maintenance of a … fence'.
>
> (c) Whether the decision of the learned Magistrate in determining or concluding that the Informant had failed to prove that the removal of the native vegetation (that is, each and all of the 40 trees) was not '[to] the minimum extent … necessary for the construction, operation or maintenance of a … fence' for the purposes of the exemption within clause 52.17 of the Wellington Planning Scheme was so unreasonable that no reasonable Magistrate could have made such a determination.

> (d) Whether there was evidence upon which the learned Magistrate could determine or conclude that the Informant had failed to prove that the removal of the native vegetation (that is, each and all of the 40 trees) was not '[to] the minimum extent ... necessary for the construction, operation or maintenance of a ... fence' for the purposes of the exemption within clause 52.17 of the Wellington Planning Scheme."

12. Only one ground of appeal is stated, namely:

> "(i) The learned Magistrate erred in determining or concluding that the Informant had failed to prove that the removal of the native vegetation (that is, each and all of the 40 trees) was not '[to] the minimum extent ... necessary for the construction, operation or maintenance of the fence' for the purposes of the exemption within clause 52.17 of the Wellington Planning Scheme."

13. The stated questions and the ground of appeal assume that, ultimately at least, the informant's onus of proof included an obligation to prove, beyond reasonable doubt, that the exemption in clause 52.17-6 did not apply. Mr Holdenson QC, who appeared with Ms Collingwood for the appellant/informant, acknowledged as much before me.[5]

14. It is not alleged in the stated questions or in the solitary ground of appeal that the Magistrate misconstrued the Act or the planning scheme or any other relevant enactment. Nevertheless the appellant made lengthy submissions about the proper interpretation of clause 52.17 of the planning scheme and especially about the construction of the "Rural activities" exemption in subclause 52.17-6 thereof. In essence, the appellant submitted that the exemption should be construed very strictly and narrowly and, in particular, that the expression "the minimum extent ... necessary" imported a requirement of indispensability or essentiality. Reliance was placed on the judgment of the English Court of Appeal in *Perrin v Northampton Borough Council*[6]. However, Mr Holdenson conceded[7] that the appellant could not and did not contend that the Magistrate had erred in his construction of any of the relevant provisions of the Act or of the planning scheme. That is to say, Mr Holdenson conceded that he could not show that the Magistrate did not adopt the very strict and narrow construction of the expression "the minimum extent ... necessary" urged by the appellant. Accordingly, it is not necessary for me to rule on the correctness of the appellant's submission as to the true construction of that expression and I do not do so.

15. The appellant further submitted that the word "maintenance" in the "Rural activities" exemption in clause 52.17-6 could refer only to the maintenance of something that was actually in existence at the time of the removal, destruction or lopping of native vegetation complained of. It was common ground below that some of the trees had been removed not because they stood immediately in the way of the construction of the proposed new fence but because, according to the accused, they gave rise to a risk to the integrity of the proposed new fence in that they were likely to fall onto it or to drop heavy limbs onto it and thus breach it and enable cattle to escape. In my view, the appellant's submission in this regard was not within the notice of appeal, especially in the light of Mr Holdenson's concession that no attack was made on the Magistrate's construction or interpretation of any of the relevant provisions. In any event, I would not accept the submission. I do not read the "Rural activities" exemption in clause 52.17-6 as being applicable only in relation to existing farm structures. Obviously the exemption is not so confined insofar as it refers to the "construction" of farm structures. The clause applies to removal etc "for" the construction, operation or maintenance of a farm structure. The word "for" is purposive. In its context here, it looks to the future. In my opinion, as long as the farm structure in question is genuinely proposed it may fall within the "Rural activities" exemption even if it does not presently exist. The Magistrate did not err in this regard.

16. As a further or alternative submission, the appellant contended that anticipated future damage to property was only able to be taken into account under the "Emergency works" section of clause 52.17-6 (set out above), and then only in accordance with the language of that particular provision, namely where the native vegetation presented an "immediate risk" of personal injury or damage to property. Again, I do not consider that this point is covered by the notice of appeal. In any event, again, I disagree with it. To uphold it would require reading into the "Rural activities" exemption words (of exclusion) that are not there. That should not be done except where clearly required.[8] It is not required by the terms of the "Emergency works" exemption nor by the terms of clause 52.17-6 read as a whole. There is no inconsistency or repugnancy between the two exemptions if each is read literally. The emergency works exemption covers those situations in

which native vegetation presents, in any way, an immediate risk of personal injury of any kind to any person or of damage of any kind to property of any kind belonging to any person. By contrast, the relevant part of the "Rural activities" exemption does not apply to personal injury; and insofar as it applies to property it applies only to property that constitutes a "farm structure" within the meaning of the exemption. Further, the very notion of maintaining a farm structure includes taking action to protect it against both immediate and non-immediate risks to its integrity. To maintain something is "to keep something in existence in a state which enables it to serve the purpose for which it exists".[9] Hence, maintaining a machine has been said to involve "the obligation to prevent foreign matter from reaching any place where it can interfere with the proper working of the machine".[10] Accordingly, in my view, it was open to the Magistrate to take the view that removing large trees in order to prevent them or their heavy limbs from falling onto a proposed cattle fence constitutes action taken for the maintenance of a farm structure, namely the proposed fence, within the meaning of the "Rural activities" exemption in clause 52.17-6.

17. This appeal, then, comes down to one matter. Was the Magistrate's decision open to him on the evidence? In order to succeed the appellant must show not only that the decision below was wrong in the sense that this Court would have come to a different finding on the evidence, but also that the Magistrate was constrained to arrive at that different finding.[11] In *Ericsson Pty Ltd v Popovski*,[12] Brooking JA said:

> "It is a strong thing to reach such a conclusion in a case where the burden of proof lies on the appellant, who is therefore submitting not that an affirmative finding had no evidence to support it, but that the evidence was such as to necessitate an affirmative finding that was not made."

18. That observation was made in connection with a civil proceeding. The difficulty for an appellant is all the greater in a case like the present where the decision below was a decision to dismiss a criminal charge. In this appeal the appellant needs to establish that the Magistrate was constrained to find, on the evidence, that one or other of the charges had been proven beyond reasonable doubt. Further still, because the accused had discharged his evidential onus of proof below, the appellant needs to satisfy this Court that the Magistrate was constrained on the evidence to find (beyond reasonable doubt) that the informant had proved a negative, namely that the accused's conduct did not constitute "the removal, destruction or lopping of the minimum extent of native vegetation necessary for the construction, operation or maintenance of a farm structure [namely, a fence]".

19. The appellant has not been able to overcome these substantial hurdles. Far from it. The state of the evidence below clearly precludes this appeal from succeeding. The informant called no expert or other evidence to the effect that any one or more of the trees did not need to be removed for the purpose of constructing or maintaining the proposed new fence. The accused, on the other hand, did call "necessity" evidence. Mr Bond gave evidence himself and called the former manager of the cattle property, Mr Ryan, to give evidence on his behalf. Each of them had had considerable relevant experience. Both gave evidence supporting the proposition that each and every one of the trees removed had been sufficiently close to the boundary to require removal either for the construction of the new fence or for its maintenance.

20. Mr Holdenson pointed out that some of the trees were at a substantial distance from boundary, including one some 19 metres away. However that is not sufficient to establish that the Magistrate was obliged to reject the evidence of Mr Bond and Mr Ryan and to be satisfied beyond reasonable doubt that one or more of the trees did not need to be removed. The trees removed were said to be quite tall and there was evidence that some were leaning towards the fence and dropping branches.

21. I can see no legal error in the reasoning of the magistrate as set out above. It seems to me that the magistrate made a decision that was entirely open to him. He was not favoured with any expert or other cogent evidence, or indeed any relevant evidence at all, from the prosecution to gainsay the applicability of the exemption. At best there was some cross-examination by counsel for the informant designed to challenge Mr Bond's assertions about the necessity, as he saw it, to cut down the trees, but on each occasion Mr Bond answered the questions he was asked in a way that, the magistrate was entitled to accept, dealt with the thrust of the question and appropriately maintained the position that Mr Bond had taken from the beginning.

22. During cross-examination Mr Bond referred to a particular problem that he perceived in some trees[13] that were the furthest from the fence line, namely the existence of hollows which he attributed to white ant infestation. Some complaint was made by Mr Holdenson before me about the failure of counsel for the defendant below to cross-examine the informant's witnesses in relation to that matter, but I see no great significance in that omission. The fact is that the appellant's witnesses did not themselves give any evidence about the health of the trees. I do not see that there was any *Browne v Dunn*[14] obligation to put the matter. Even if there was, that is not sufficient to undermine the decision of the Magistrate in all the circumstances.

23. The appeal should be dismissed. I will hear counsel as to costs.

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[1] Clause 52.17 was significantly amended as from 21 September 2009. It no longer contains a generic "Rural activities" exemption. There is now a specific exemption headed "Fences", but it is quite different from the corresponding part of the former "Rural activities" exemption. All references hereafter to the "Rural activities" exemption are to that exemption as it existed at the time of the alleged offences (June-July 2008).
[2] This was presumably intended to be a reference to clause 52.17-6.
[3] This was a reference to a suggestion made by the prosecution that the accused had cut down at least some of the trees for their intrinsic value or usefulness to him, not, or not entirely, for the sake of the new fence.
[4] See *S v Crimes Compensation Tribunal* [1998] 1 VR 83, esp at 89-93 per JD Phillips JA.
[5] Transcript, p37, 63, 76. In effect, the appellant accepted that the accused had done enough to discharge the evidential onus imposed by the former s130 of the *Magistrates' Court Act* 1989, which was in force at the relevant time. See also *Director-General, Department of Land and Water Conservation v Bailey* [2003] NSWCCA 361; (2003) 136 LGERA 242 (NSWCCA) esp at [8]-[10], [28]-[31] per Shaw J with whom Mason P and Hidden J agreed; cf *Active Tree Services Pty Ltd v Ku-ring-Gai Municipal Council* [2005] NSWLEC 431; (2005) 141 LGERA 199 (NSW Land and Environment Court, Pain J) at [32]; and cf *Peck v De-Saint-Aromain* [1972] VR 230 at 232-234. Compare, in relation to civil proceedings in the Victorian Civil and Administrative Tribunal concerning similar exemptions in planning legislation, *Boroondara City Council v PA & DL Investments Pty Ltd* [2000] VCAT 1063 at [5]; *Australian Retirement Homes Ltd v Maroondah City Council* [2006] VCAT 476 at [26].
[6] [2007] EWCA Civ 1353; [2008] 4 All ER 673; [2008] 1 WLR 1307; [2008] 1 P & CR 454; [2008] BLR 137; [2007] All ER (D) 286; As to the meanings of "necessary", compare *Elcham v Commissioner of Police* [2001] NSWSC 614; (2001) 53 NSWLR 7; 125 A Crim R 162.
[7] Transcript, 50-51.
[8] See Pearce and Geddes *Statutory Interpretation of Australia*, 6th edition, 2006 at [2.28]]-[2.32] and cases there cited.
[9] *Haydon v Kent County Council* [1978] QB 343 at 364; [1978] 2 All ER 97 per Shaw LJ, quoted with approval by Young J in *Greetings Oxford Koala Hotel Pty Ltd v Oxford Square Investments Pty Ltd* (1989) 18 NSWLR 33 at 39.
[10] Per Lord Reid in *Latimer v AEC Limited* [1953] UKHL 3; [1953] AC 643 at 658; [1953] 2 All ER 449. This observation, also, was quoted with approval by Young J in *Greetings Oxford*, *supra*, *loc. cit.*
[11] *Ericsson Pty Ltd v Popovski* [2000] VSCA 52; (2000) 1 VR 260 at 265 per Brooking JA.
[12] [2000] VSCA 52; (2000) 1 VR 260 at 265.
[13] The precise number was unclear, but it was at least two and no more than six.
[14] (1893) 6 R 67.

APPEARANCES: For the appellant Houghton: Mr OP Holdenson QC with Ms N Collingwood, counsel. Maddocks, solicitors. For the respondent Bond: Mr A Larkin, counsel. Sullivan Braham Pty Ltd, solicitors.
