MINISTRY OF HEALTH v BISTO DHANESH

2009 MBG 134

CN 7021/08

IN THE DISTRICT COURT OF GRAND PORT

In the matter of:-

Ministry of Health

v

Dhanesh Bisto

Judgment

CHARGE: FAILURE TO COMPLY WITH SANITARY NOTICE

The accused party is charged in two counts of the information of failure to comply with sanitary notice in breach of sections 29 and 32 of the Public Health Act and regulation 3 of GN 57 of 2005 made under section 96 of Environment Protection Act 2002. The particulars of the charge are namely that on May 19, 2008 at Grand Port Road, Nouvelle France, he failed to comply to a sanitary notice dated April 30, 2008 whereby he was required within 1 week to remove nuisance namely objectionable keeping of dog near window of premises of complainant giving rise to fly and foul smell nuisances liable to be injurious to health. He pleaded not guilty to the charge and was represented by counsel in the conduct of his defence.

The prosecution evidence

The defence statement of the accused party is on record.

Health Inspector Boodhoo deponed to the effect that following a complaint from the complainant, he carried out an inspection at the accused's premises at Sookdeo Bissoondoyal St, Nouvelle France in company of another colleague. There he observed that the accused party had kept a large dog in his courtyard in a fenced enclosure and this enclosure was close to the bedroom window of the complainant. The enclosure was found some 5 feet away from the window and there was a

problem of bad smell and mosquitoes coming from the dog. He issued a sanitary notice reference no M 14/08 on the accused and left it with the accused party's grandmother. He requested the accused party to shift his dog to another place within a delay of 1 week.

In cross examination the following issues surfaced namely:

- The source of the nuisance is the dog by the fact that the dog was defecating, passing urine which gave rise to flies and bad smell.
- He stated also that the dog is close to the window.
- He explained that some one can be prevented from keeping his dog on his property if it gave rise to flies and bad smell.
- He visited the accused's house.
- They also carried out a visit of the complainant's premises, in his bedroom and courtyard.
- The accused party told him that the dog had been kept in the courtyard for around 1 year but he did not remember clearly.
- The complainant stated that the dog had just been kept in that place.
- He did not agree that the problem would have been solved had he asked for the place where the dog was kept to be maintained in an acceptable and bearable condition.
- He stated that he had the power to tell an owner to shift the dog on his property.

The Principal Health Inspector stated that he accompanied Inspector Boodhoo to do an inspection at the accused's place on April 30, 2008. On May 19, 2008 at 11.45 hrs, he controlled the notice wherein it was stated that the dog keeping should be shifted to another site approved by the Sanitary Authority. He observed that the notice had still not been complied with and he then contravened the accused party for same.

In cross examination, he stated that he attended the accused's place on April 30, 2007 and he examined the rear of the accused's house, and especially a place adjacent to the complainant's house in which the dog in question was being kept. The enclosure had concrete floor and was about 10 feet by 11 feet in size. In a corner of that enclosure there was kennel of 4 feet by 4 feet in size. They inspected the complainant's premises in the yard itself as they had no permission to go inside the latter's house. He stated that the nuisance was a mixture of both the condition in which the dog was being kept and the dog in itself as the dog is being kept in a place where it is segregated and when it passes urine or defecates, this gives rise to flies

and bad smell. He did not agree that a regular maintenance of the enclosure would solve the problem as he explained that as soon as the animal would start to urinate or defecate, this would again give rise to flies and bad smell nuisances. He agreed that it is natural for the dog to urinate and defecate but then it is giving rise to sanitary problem as there is a concrete platform and the urine and faeces are staying on that and at the same time the platform is for the roaming of the dog.

In reexamination, he explained that the mixture of the problem is the keeping of the dog itself as being a problem. He agreed that he had the right to enter the complainant's house with the latter's permission.

The complainant deponed to the effect that he made a complaint to the sanitary office on April 28, 2008 whereby the accused party, his neighbour was keeping a dog of high breed close to his window found at a distance of 2 to 3 feet from his house. He could not open his window due to the bad smell and presence of mosquitoes. He complained to the neighbour first for him to remove the kennel of the dog and put it somewhere else before complaining to the sanitary authority but to no avail. He does not have any problem with anybody in the neighbourhood and he has lived there for more than 25 years. He identified the accused party as the neighbour. He stated that the problem is still prevailing and that he can not open his window and also produced photos of the kennel taken on the eve of the case.

In cross examination, the following issues were covered:

- he stated that he had three dogs in the past and one of them died leaving him with two dogs.
- He kept his dogs in his garage and they urinated in his courtyard.
- He agreed that he cannot control where they go to urinate but then his yard is fenced.
- He agreed that nobody has the right to tell him where to keep his dogs so long as they are not disturbing anybody.
- He has a dog since a very long time and the accused party has got a dog since last year.
- He did not agree that proper maintenance of the enclosure will solve the problem of nuisance as he stated that it can be solved only if the dog is removed from his window and being given the fact that it is a humid place, when they clean the place the water comes close to his fencing and the problem is not solved.

At the close of the case for the prosecution, the defence did not adduce any evidence and closed its case.

Defence counsel submitted that the sanitary authority does not have the power to dictate to the accused party where to keep his dog for two reasons:

1. He went on the interpretation of sections 29 and 32 of the Public Health Act. He submitted that at the time that the accused party is served with the notice, the accused party should be informed of the place where the nuisance exists and describe the nuisance and what should be done by the accused party to abate the nuisance. The notice in the present case is incomplete as it is not mentioned in the notice to which place he has to transfer the dog. He submitted that the accused party can not be prosecuted for failing to comply to a sanitary notice which is incomplete.
2. He also submitted that the notice is void because the sanitary authority have requested him to do an act which they do not have the right to ask. He referred the Court to the definition of nuisance under the Public Health Act and submitted that the nuisance is not the animal but the condition in which the animal was kept so that the health authorities can only request the accused party to keep the animal in a bearable condition and not tell him to bring the dog to another place.
3. Whether the notice does not infringe the accused party's right to the enjoyment of his property? He submitted that the way that the accused party was requested to abate the nuisance is not reasonably justifiable in a democratic society.

On a later occasion, defence Counsel further submitted that the notice is defective and that the accused party can not be charged as per the information of failure to comply with a defective notice especially that the notice has been particularised as " objectionable keeping of dog near window of premises of....likely to be injurious to health".

He also submitted that under section 29(2) of the Public Health Act, the notice should also mention the work that the accused party has to perform in order to abate the nuisance and a time limit is also provided for the work to be done.

The State Law officer replied as follows to the points :

He submitted that there was no deprivation of property warranting intervention of the Supreme Court and there was no question of constitutionality or interpretation of section 8 of the Constitution.

On the question of defective notice, he stated that according to the recent decision of **DPP v Gorahbye [2008 SCJ 160]**, the accused party should seek to challenge that notice by other means and that this Court should only be satisfied as to whether the prosecution has proved that a sanitary notice was served and that the accused party

failed to comply with it. The issue as to whether the notice was proper or not does not affect the present charge. Defence counsel replied by demarcating Gorahbye with the present case in that he was not contesting the information but rather that the notice served on the accused party was defective. In Gorahbye, the Court had to consider whether the information was wrong and not the notice. The Court did not have to consider the point as to whether the notice was invalid. The Judge also did not consider whether not rearing cattle would be an infringement of his right to property and this issue was never raised before the Supreme Court. He then detailed his submissions in relation to what he meant by defective notice and also referred to the cases of **Queen v Whiteley [1 QBD 1885] , Mac Gillivray v Stevenson [1950 KBD]** and the principles enunciated by these cases.

After considering the evidence on record and the weighty submissions of Counsels, the Court has the following observations to make :

A. Is the present notice defective or not ?

The Court has carefully the authorities forwarded by defence Counsel in the following case and finds that they may have a certain application in that the provisions considered by the Court bear a certain similarity with the relevant provisions of the Public Health Act. The case of **Queen v Wheatley [1885 QBD 34**] concerned an order of justices made under section 96 of the Public Health Act 1875 upon the complaint of a local authority required the owner of premises to abate within a specified time a nuisance arising from untrapped drains and to "execute such works and do such things as may be necessary for that purpose, so that the same shall no longer be a nuisance or injurious to health". It was held that the order was bad because it did not specify the works and things the owner should execute and do for the purpose of abating the nuisance.

In the case of **Mac Gillivray v Stevenson [1950 AER 942]**, the respondent was the occupier of premises where he kept pigs in such a manner as to be a statutory nuisance. The local authority served on him an abatement notice under s. 93 of the Public Health Act, 1936, requiring him to abate the nuisance and " for that purpose to remove the whole of the pigs from the premises, clean up the effect of their past presence, and cease for the future to allow the premises to be used for pig keeping at all." the respondent, failing to comply with the notice, was summoned under s. 94 (1) in terms of the notice. The justices dismissed the summons on the ground that (a) the abatement notice was bad, because it required the respondent to abate the nuisance in a specific manner, by discontinuing the use of the premises as a piggery, and (b) because the summons was in the terms of the notice and required the justices to prohibit the premises from being so used, which they had no power to do.

On appeal,

HELD: (1) the abatement notice was a good notice, since its operative part was the request to abate the nuisance and the steps indicated whereby the abatement might be effected could be regarded as mere surplusage.

(ii) the justices, in making the nuisance order, were not bound to direct the respondent to do exactly what the abatement notice required, but had a complete discretion, if they found that a nuisance existed, to make such order as they saw fit, and , therefore, the case must be remitted to the justices for that purpose.

The Court has also carefully considered the case of DPP v Gorahbye which has also dealt with the powers of the Court to consider the validity of the notice. The Court is of the view that it has no jurisdiction to consider whether the notice is defective or not in application of that decision of the Supreme Court. The decision did touch upon not only whether the information was defective but also whether the Ministry had exceeded its powers in issuing such a notice. The operative part of the judgment which is of relevance to this case is as follows:

'**The learned Magistrate seems to have considered the notice issued under section 29 as being *ultra vires* the powers of the Sanitary Authority whose powers to require the removal of the nuisance only empowered it, in her view, to require the abatement of "fly and bad smell" and not the discontinuance of cow keeping or the shifting of the cowshed to another site.**

The nuisance complained of was a "*cow house ……. which is in such condition as to be injurious to health"*; it therefore appears to us to fall within the definition of nuisance under the Act. [See section 18(f) of the Act]. And there seems to be no warrant for doubting that it was within the powers of the Sanitary Authority to require the shifting of the cow rearing. In any event, had it been the case for the respondent that the Authority had exceeded its powers, it was open to the respondent to challenge such decision by other means but not in the matter before the Court.

In application of the case of Gorahbye, this Court would therefore be precluded from considering whether the notice was defective or not. It is for the accused party to obtain redress in that matter through other means : judicial review. In relation to the present case , the propriety of the notice can not affect the present charge.

B. Has there been deprivation of property in the present case?

As to whether the notice does not infringe the right to enjoyment of his property, the Court reiterates its opinion as contained in ground 1 above that the accused party should seize another forum to contest that right and not in the present case. The Court is also in agreement with the submissions of State Counsel in that there is no question of constitutionality of sections 29, 32 of the Public Health Act in the present case in view of section 8(4) (a) (v) of the Constitution which lays down as follows :

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) –

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of property –

…….

(v) by reason of its being in a dangerous state or injurious to the health of human beings, animals, trees or plants ;…

Section 29 of the Public Health Act fully warrants the sanitary authority to issue a sanitary notice once they find that there is a sanitary nuisance even if it warrants requesting the accused party to shift his dog to protect the health of his neighbour. There is nothing unconstitutional about section 29 of the Public Health Act. There is no deprivation of property in that the accused party is being requested to shift his dog because the sanitary conditions in which the dog is kept close to the window of the complainant is causing nuisance to the latter.

In application of the case of **Mac Gillivray v Stevenson [1950 AER 942],** the Court still retains a discretion once it finds that a nuisance exists to see to it that the accused party abates it to the satisfaction of the sanitary authorities even though it may not be in the manner as specified in the sanitary notice so long as the nuisance is abated.

C. **On the merits**

The Court considers that the prosecution has proved the case beyond reasonable doubt. The Court is fully satisfied of the existence of a sanitary nuisance : the manner in which the dog is kept leading to flies and foul smell nuisances close to the window of the complainant. A sanitary notice has been served on the accused party requiring him to shift the dog and he has not complied with same. For the abatement of the nuisance, it requires that the dog be shifted and kept in hygienic conditions. The prosecution has proved that the accused party failed to comply to the notice within the time limit provided.

For all the reasons as contained in the present judgment, the Court finds the accused party guilty as charged.

P.D.MAUREE

District Magistrate

Delivered this 29th day of July 2009