NEW SOUTH WALES UNREPORTED JUDGMENTS

DIRECTOR OF PUBLIC PROSECUTIONS v KERRIE ANN FRASER
DIRECTOR OF PUBLIC PROSECUTIONS v TERRENCE PATRICK O'DONNELL

2007/16257; 2007/16259, 2008 NSWSC 244

Supreme Court of New South Wales -- Common Law Division

BC200803020

18 April 2008, heard

2 May 2008, delivered

CATCHWORDS: CRIMINAL LAW - Appeals against order dismissing charge of malicious damages to property - appeal on question of law - notices of contention - whether proceedings be remitted to the Local Court due to error of law - error of law established - extent of power of court to make finding of facts available to magistrate - what constitutes damage - interference with functionality alone insufficient - physical interference or alteration to the property - appeals dismissed - notice of contention upheld.

HEADNOTES: (NSW) Crimes (Appeal and Review) Act 2001

(NSW) Crimes Act 1900

Henderson v Battley (unreported) 29 November 1984, English Court of Appeal, Criminal Division

Cox v Riley (1986) 83 CR. APP.R.54

Morphitis v Salmon [1990] Crim LR 48

R v Fisher (1855) LR 1 CCR 7

Samuels v Stubbs (1972) 4 SASR 200

R v Zischke [1983] Qd R 240

Hardman v the Chief Constable of Avon and Summerset Constabulary [1986] Crim LR 330

Rowe v Kingerlee [1986] Crim LR 735

R v Tacey [1821] Russ and Ry 458; 168 ER 893

Ranicar v Frigmobile Pty Ltd [1983] Tas R 113, cited

JUDGES: Simpson J

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[1] Pursuant to s 56(1)(c) of the Crimes (Appeal and Review) Act 2001 ("the Appeal and Review Act"), the Director of Public Prosecutions (NSW) ("the DPP") appeals against orders made on 24 September 2007 by a magistrate in the Local Court dismissing a single charge (of causing malicious damage to property) against each of the defendants.

[2] S 56(1) permits an appeal to be to be brought solely on a ground that involves a question of law alone. There was no dispute in the present case that the appeals do involve such a ground, but the limitation is significant for another reason, which will appear below; nor, indeed, was there any dispute that the appeals ought, in relation to the grounds raised by the DPP, succeed. However, each defendant has filed a Notice of Contention, (subsequently amended) asserting that the order made ought to be affirmed on other grounds, and each appeal dismissed.

[3] The case raises interesting, and, perhaps, novel questions.

Background

[4] On 24 September 2007 each defendant appeared in the Local Court at Newcastle charged with an offence against s 195(1) of the Crimes Act 1900, of maliciously damaging property. The background facts were not in dispute. Each defendant is what might be called an environmental activist associated with the movement well known as "Greenpeace". On 21 February 2007, with others, they scaled a mesh fence and entered the site of a coal loader in or near Newcastle operated by a corporation called Port Waratah Coal Services ("Port Waratah"). They activated a safety isolation switch on a conveyor belt, rendering the conveyor inoperable. They then chained themselves to the underside of the conveyor belt, using heavy metal chain and steel clamps. As a consequence, the conveyor was out of operation for almost 2 hours, at a cost to the proprietor of approximately $ 27,000.

[5] Police attended and asked the defendants to produce a key to unlock the devices, which they declined to do, saying that they did not have the key and did not know where it was. The police used their own equipment to release the defendants. They were arrested and charged under s 195(1) with maliciously damaging property. That was an offence created by s 195 of the Crimes Act, which relevantly then provided as follows:

> 195. Maliciously destroying or damaging property
>
> (1) a person who maliciously destroys or damages property belonging to another or to that person and another is liable:
>
> (a) to imprisonment for 5 years, ...

(The section has since been amended, in a way that does not impact upon the present proceedings.)

[6] Some light is cast on the meaning of the word "damages" by s 194(4), which provides, for the purposes of that Division of the Crimes Act in which both sections appear, as follows:

> 194. Interpretation
>
> (4) For the purposes of this Division, damaging property includes removing, obliterating, defacing or altering the unique identifier of the property. The unique identifier is any number, letter or symbols that are marked or attached to the property as a permanent record so as to enable the property to be distinguished from similar property.

The Crimes Act contains no other definition of "damages" or "damaging".

[7] Each defendant was also charged with an offence of trespass and entered a plea of guilty to that charge. Each pleaded not guilty to the s 195 charge.

[8] On the hearing, no oral evidence was given. The DPP put before the magistrate an agreed statement of facts, and statements made by two police officers and two employees, in managerial positions of Port Waratah. Also in evidence was a letter on Greenpeace letterhead dated 21 February 2007, addressed to "Port Waratah Coal Services Ltd" and copied to the Waratah Police Station, and photographs of the events. The letter set out in detail what the activists, including the defendants, had done. It said that "locking devices" had been placed around one roller of each of four conveyors, and warned against restarting or moving the conveyors before the locking devices had been removed (because the defendants were chained to one of the conveyors).

[9] At the commencement of the hearing, counsel who appeared for the defendants stated that he wished, briefly, to cross-examine two of the police officer witnesses. He said that there was little dispute about the facts and identified the issue for determination as:

... whether or not the actions of the defendants in this case ... amount to malicious damage ... within the definition of the [Crimes] Act.

[10] After some discussion and, as I read the transcript, on the prompting of the magistrate, counsel stated that he was "comfortable" for the matter to be dealt with "on the papers ".

[11] The prosecutor then said:

while we say that there is no damage as such, physical, sustained to the coal loader itself, the present matters do, irrespective of what's been, what would be suggested, there is an actual physical interference with the property, where the two accused attached heavy metal chains to the conveyor belt, making it temporarily inoperable.

[12] The prosecutor and counsel for the defendants then made submissions, generally concerning the meaning of "damages", as the word appeared in s 195, and whether the evidence of what the defendants did to the conveyor belt did (in fact) constitute damage within the meaning of that section. (No separate argument was addressed to whether the evidence was capable of supporting a finding of guilt on that basis.)

[13] The magistrate gave judgment. The transcript records the following:

The police rely on a phrase, the various cases of which have been tendered, 'temporary functional derangement of property'.

However, when one looks at this objectively the police prosecutor is referring to damages, but at law there are always two sorts of damages: there's physical damage to property and there's monetary damages which are awarded by way of compensation by courts. In this particular matter the police to my mind have taken it upon themselves to in effect take over the role of the civil courts in seeking to apply a criminal charge to what I think is a civil activity.

True it is that some people may strongly disapprove of the actions of the defendant (sic) and the delay that they caused, but the bottom line is that if the Port Waratah Coal Loader is saying that they lost 1 1/2 hours of production, the appropriate thing, I would have thought, would be to sue these two people civilly to recover the cost of damages caused by the delay in production. To bring about a criminal charge simply on the basis of perceived mischief and seek to bend the cases and the definition to fit around the factual situation now before the Court, to my mind, is inappropriate.

There is no doubt that the Port Waratah Coal Loader had a very strong civil case against these two defendants, but in relation to the police charge, it is my view that the appropriate damages are monetary. To try and extend this into the criminal arena is inappropriate and I decline to do so.

He proceeded to dismiss each charge.

[14] The DPP contends that this decision is infected by error of law and seeks an order that the proceedings be remitted to the Local Court at Newcastle for hearing and determination according to law. The error of law identified concerns the proper construction and application of s 195(1) of the Crimes Act.

[15] As I have indicated above, it was conceded on behalf of the defendants that a decision was infected by error, although I am not sure that the parties are at one as to the nature of the error. The defendants, as I understand it, concede that the rigid delineation between acts constituting criminal behaviour and conduct justifying an award of damages under the civil law, could not be sustained. In my opinion this concession is properly made. There are many cases in which the civil law and the criminal law overlap, and the same conduct can give rise to criminal liability as well as civil liability. The magistrate seems to have drawn a strict disjunction between the two.

[16] I am satisfied that an error of law has been demonstrated.

[17] It is therefore necessary to consider the Amended Notices of Contention.

[18] Part 51B r 18 of the Supreme Court Rules (which continue to apply in respect of proceedings brought under the Appeal and Review Act) permits a Notice of Contention to be filed. The rule provides:

Notice of Contention

18 Where a defendant wishes to contend that the decision of the tribunal below should be affirmed on grounds other than those relied upon by the tribunal below but does not seek a discharge or variation of any part of the decision of the tribunal below, the defendant need not file a notice of cross-appeal but, within the time limited by rule 17(2) the defendant must:

(a) file notice of that contention stating, briefly but specifically, the grounds relied upon in support of contention; ...

[19] The defendants' contention is that the magistrate's decision to dismiss the charges was correct and should be affirmed because their actions did not "damage" any property.

[20] During argument a further question emerged, concerning the extent of matters able to be raised in a Notice of Contention filed under SCR 51B

Rule 18.

[21] Senior counsel who appeared for the defendants argued that it was open to this Court to proceed to make any finding of fact that it was open to the magistrate in the Local Court to make. (On that basis, he argued that, on the evidence, I ought to find that, as a matter of fact, that the DPP had, in the Local Court, failed to prove beyond reasonable doubt that the defendants had caused any damage to the conveyor.) Counsel who appeared for the DPP contended otherwise: that the appeal is confined to a question of law, and that the capacity to defend the order by the Notice of Contention procedure should be seen as equally so limited. On that basis, I ought only to uphold the Notices of Contention if satisfied that the evidence adduced in the Local Court, as a matter of law, was incapable of supporting a finding (of fact) that the defendants had caused any damage to the conveyor.

[22] No authority was cited by either party. This may be because there is none or, more likely, because the question arose during the course of argument.

[23] In my opinion, the position adopted on behalf of the DPP is correct. It is quite clear from s 59(1) of the Appeal and Review Act that the intention of the legislature was that first instance decisions would be reviewed by this Court only where a ground of law is involved. The present is not a good case to test the point: that is because all of the evidence was given in documentary form, there was no oral evidence given, and no issues of credit or, indeed, disputed issues of fact, other than the extent of any damage done by the defendants to the property of the coal loader arose. Accordingly, I am in as good a position as the magistrate to make any necessary findings of fact. But that is a rare case: it would not ordinarily be possible for this Court to proceed to make findings of fact upon evidence before the Local Court, where those findings depend upon an assessment of the credibility of witnesses. There is no reason to make an exception in the present case, merely because, as it happened, no oral evidence was given. The extent of the jurisdiction of this Court does not and cannot depend upon the manner in which the evidence is given in the first instance tribunal.

[24] I am of the view that, it being correctly conceded that error of law has been demonstrated, the appropriate course is to remit the matter to the Local Court for further hearing according to law, unless it can be shown that, as a matter of law, it would not have been open to that court to make a finding of fact adverse to the defendants on the issue of damage. In that case, practicality and justice would require that the appeal be dismissed.

[25] The issue concerns the interpretation of the word "damages" as it appears in s 195. I have already referred to the evidence concerning what the defendants did, and to what was said by the prosecutor in argument to the magistrate. There was no lasting physical damage to any property of Port Waratah.

[26] I was referred to a number of cases, both civil and criminal, in which the concept of "damage" (as a noun) or "damage/s/d" (as a verb) has been considered.

[27] What, to my mind, emerges from the authorities cited are these propositions:

(1) Whether the accused is shown to have damaged the item of property is a question of fact and degree and, therefore, for the tribunal of fact: *Henderson v Battley* (unreported 29 November 1984, English Court of Appeal, Criminal Division), cited in *Cox v*

Riley (1986) 83 CR. APP.R.54 at 54; *Morphitis v Salmon* [1990] Crim LR 48.

(Whether there is evidence *capable of* **establishing** that the accused damaged the item remains a question of law for the judge);

(2) It is not necessary that the damage be permanent or irreparable: *R v Fisher* (1865) LR 1 CCR 7; *Samuels v Stubbs* (1972) 4 SASR 200; *R v Zischke* [1983] Qd R 240; *Hardman v the Chief Constable of Avon & Somerset Constabulary* [1986] Crim LR 330; *Rowe v Kingerlee* [1986] Crim LR 735.

(The last three cases all involved the application of graffiti to walls or a pavement using various substances of varying degrees of solubility and therefore impermanency.)

[28] On behalf of the DPP considerable weight was placed upon a phrase that was used in the decision of the South Australian Supreme Court in *Samuels v Stubbs* . That was a case in which the accused was alleged to have participated in a political demonstration which attracted the attention of the police. A police officer's cap fell to the ground; the accused was alleged to have kicked it and jumped on it with both feet, causing it to be crushed. The cap was removed by somebody else and was not available in evidence. The magistrate dismissed the charge, holding that it had not been proved beyond reasonable doubt that actual damage was done to the cap. On appeal, Walters J held to the contrary and entered a conviction. In doing so, he said:

The word 'damage' in law has more than one meaning and care has to be exercised in examining the context in which the word appears ... It seems to me that it is difficult to lay down any very general and, at the same time, precise and absolute rule as to what constitutes 'damage'. One must be guided in a great degree by the circumstances of each case, the nature of the article and the mode in which it is affected or treated. Moreover, the meaning of the word 'damage' must, as I have already said, be controlled by its context. The word may be used in the sense of 'mischief done to property' as distinct 'from injury done to the person', so that the term 'damage' may not necessarily 'be employed interchangeably with the term 'injury' with reference to mischief wrongfully occasioned to the person' ... It is my view, however, the word 'damages', as it is used in [in the relevant legislation], is sufficiently wide in its meaning to embrace injury, mischief or harm done to property, and that in order to constitute 'damage' it is unnecessary to establish such definite or actual damage as renders the property useless, or prevents it from serving its normal function -- in this case, prevents the cap from being worn. **In my opinion, it is sufficient proof of damage if the evidence proves a temporary functional derangement of the particular article of property.** I think that an offence is committed against the section if there be wilful and unauthorised injury, mischief or harm to property, even though no loss to the owner of the property ensues; that a distinction may be drawn between damage to property and the consequent loss or damage to the owner of it ..." (internal references omitted; emphasis added)

[29] I will come back to a consideration of the emphasised passage. Before doing so, I will deal, briefly, with some of the other authorities to which reference was made. These are essentially by way of illustration of what has, in the past, been found to constitute damage. In *Fisher* the accused plugged a feed-pipe to a steam engine and displaced part of the engine so as to render it temporarily inoperable and even dangerous. Nevertheless, the engine was easily restored to its previous condition. It was held that:

... great injury may be done to a machine by the displacement of its parts; and in this case, until the parts were replaced the machine was useless. Surely the displacement of the parts was a damage ... if done with intent to render the machine useless.

[30] A not dissimilar case was *R v Tacey* [1821] Russ and Ry 452; 168 ER 893. The accused dismantled some manufacturing equipment and removed one part of it. The part was essential to the working of the equipment but it was easily able to be replaced, and was, in fact, often removed for the purposes of cleaning and replacement. It was held that the removal of the part damaged the equipment from making it imperfect and operative. The conviction was upheld.

[31] In *Henderson v Battley* the damage alleged was damage to land that constituted a development site. A large quantity of soil, gravel and mud was dumped by the accused on the land. A significant sum had to be spent to remove the rubbish and restore the land to its pre-existing condition. Cantley J said:

Ultimately whether damage was done to this land was a question of fact and degree for the jury. Damage can be of various kinds. In the Concise Oxford Dictionary 'damage' is defined as 'injury impairing value or usefulness'. That is a definition which would fit in very well with doing something to a cleaned building site which at any rate for the time being impairs its usefulness as such. In addition, as it necessitates work and the expenditure of a large sum of money to restore it to its former state, it reduces its present value as a building site ...

[32] A civil case in which 'damage' was considered is *Ranicar v Frigmobile Pty Ltd* [1983] Tas R 113 In this case it was alleged that damage had been caused to a consignment of frozen scallops by incorrect handling by a carrier resulting in excessive temperatures.

[33] Green CJ said:

In my view, the ordinary meaning, and therefore the meaning which I should prima facie give to the phrase 'damage to' when used in relation to goods, is a physical alteration or change, not necessarily permanent or irreparable, which impairs the value of usefulness of the thing said to have been damaged. It follows that not every physical change to goods would amount to damage. What amounts to damage will depend upon the nature of the goods ...

The question which remains is whether in the circumstances of this case that change in temperature amounted to damage in the scallops. In my view, it plainly did. An alteration in temperature undeniably involves a physical change to a substance and in this case that change had the effect of removing one of the primary qualities which the scallops had -- their exportability. As a result, it is plain that their usefulness was impaired and their value reduced ...

It may be that under some circumstances goods could be said to have been damaged notwithstanding that they have not undergone any physical change. For example, it might be arguable that food which was handled in a way which violated the religious dietary laws of the country to which it was being exported could be regarded as having been damaged. Similarly, it might be that goods which were handled contrary to quarantine regulations so as to prevent their importation into a country could be regarded as having been damaged notwithstanding that the handling had no contamination effect upon them.

[34] These passages need to be read in the context of the issues involved in the litigation. The contract of carriage protected the carrier from liability in respect of "damage" caused by it; an insurance policy covered the owner in respect of "damage" to the scallops. In those circumstances, it is readily understandable that Green CJ took what might be termed a liberal view of what was encompassed by "damage"; loss of value could easily be seen, as it was, as damage for the purposes of the two contracts. That sits easily in the concepts of the civil law. In a criminal context, it is not so easy or appropriate to take an expansive view of the meaning of the word.

[35] The Macquarie Dictionary relevantly defines "damage" as:

1. Injury or harm that impairs value or usefulness;

The Shorter Oxford Dictionary gives as definitions:

1. Loss or detriment caused by hurt or injury affecting a state, condition or circumstances (*arch.*)

2. Injury, harm (ME).

[36] To my mind, a common element to all of the authorities (with the possible exception of *Henderson v Battley*) is some physical change or alteration to the property, even though this may be temporary. I exclude from that the hypothetical exceptions mentioned by Green CJ in *Ranicar* because, as I have said, his Honour was there contemplating the notion of damage for the purpose of civil litigation, and in the context of two contractual documents, and not operating in the context of criminal legislation. I have no doubt that damage in the civil sense can be caused without physical injury.

[37] That is not so where the criminal law is concerned. Even *Henderson v Battley* could, in a sense, be seen as involving some physical interference with the land. If it is not to be seen in that light, I would decline to follow that decision.

[38] In my opinion, an essential element of "damage" for the purpose of s 195 is, to use the words (or some of them) of Walters J in *Samuels v Stubbs* , "physical derangement" (though not necessarily permanent, or even lasting) to the property in question. It is the word "functional" that has given rise to the present argument. But I do not read his Honour's conclusion as meaning that temporary functional interference, without a physical interference with the property itself, could be sufficient to establish criminal damage. It is of some significance that in that case the evidence was that the policeman's cap had been jumped upon and crushed. That was ample evidence of physical derangement. In my opinion too much emphasis has been placed upon the word "functional" without it being seen in its complete and proper context. Interference with functionality alone, without "physical derangement" would, in my opinion, be insufficient to establish damage within the meaning of s 195. Interference with functionality could be proved, for example, by proof of the removal of a key to a motor vehicle, or the erection of physical barricades around a vehicle preventing its use. But here, in my opinion, while they might amount to some other offence, such interference would fall short of amounting to (malicious) damage.

[39] It is true that a number of the other cases refer, in one way or another, to functionality. For example, in *Zischke,* one of the graffiti cases, the Court of Criminal Appeal in Queensland said:

What emerges from a review of the decisions is that 'damage' may be held to have been done even though the injury to the article of property is not permanent but is remediable, if only by the expenditure of money. Probably the formula that most nearly embraces all the attempts at definition is that a thing is damaged if it is rendered imperfect or inoperative: see *'A' (a juvenile) v R* [1978] Crim LR 689. This would incidentally also serve to accommodate the decision in *Samuels v Stubbs* ... where a conviction of damaging a policeman's cap was sustained by proof that the respondent had kicked it three times and then jumped on it, thus producing what was described as a 'temporary functional derangement' of the article in question.

[40] I do not read this passage as excluding the need for the prosecution to prove some physical impact upon the property. In *Zischke* the accused had painted political material on buildings, footpaths and walls. The passage quoted was predicated upon the fact that the physical integrity of the property had suffered interference.

[41] Moreover, "temporary functional derangement" could not be taken to express a definition of "damage"; a simple illustration will make the point. Scratching or denting the duco of a motor vehicle would, undoubtedly, amount to "damage"; but it does not render the motor vehicle inoperable and does not interfere with its functionality.

[42] During the course of the hearing of the present proceedings, some debate took place concerning the boundaries of "damage" said to be occasioned to property. It was postulated that for a protestor to sit in front of or on a bulldozer could not amount to damage within s 195. That proposition is correct. In fact, it is not the action of the protestors that affects the operability of the machine; it is the (sensible) decision of the owners not to use it in circumstances where danger could be caused.

[43] On behalf of the DPP it was argued that authority establishes that it is not necessary that there be any alteration in the physical nature of the property. Particular reliance was placed in this respect on *Handerson v Battley* ; *Rowe v Kingerlee* and *Ranicar v Frigmobile* . I cannot accept that. I have already indicated that if *Henderson* does support that proposition, I would not follow it, but, in my opinion, the dumping of large quantities of rubble does physically affect, although temporarily, the surface of the land itself.

[44] I am satisfied that, for a conviction to be made out under s 195, it is necessary that the prosecution establish, even to a limited degree, some physical interference or alteration to the property in question.

[45] That calls for analysis of the evidence of what the defendants did.

[46] In the statement of facts, it was said that they:

... activated a safety isolation dead switch on the conveyor belt rendering the belt inoperable ...

Mr Wayne Carman, a terminal manager of Port Waratah, said that a rope had been attached to a lanyard and that he was told by Ms Fraser that they had "pulled the stop". He said that he told the defendants that that was a control circuit that could be over-ridden and that they were putting themselves in serious danger. (He also said that he had taken steps to ensure that the conveyor was fully isolated and could not be unknowingly started.) He said that to re-start the conveyor belt it was necessary that electricians unlock and de-isolate the conveyor, involving the re-setting of electrical equipment.

[47] Mr Mark Golding described the appearance of the defendants, chained to the conveyor; and said that a piece of rope had been tied around the conveyor framework, holding the emergency stop lanyard down. He said that there was a

significant risk of damage to the conveyor rollers had the conveyor system been re-started while the locks were still in place. (I discount this as being of any relevance to the present determination; I mention it because it was drawn to my attention in address, but, as I remarked at the time, a risk of injury or damage is not sufficient for the purposes of s 195.)

[48] Senior Constable Benjamin Coles gave a description of the chain "wrapped around part of the working mechanism" of one of the conveyor belts.

[49] I have come to the conclusion that the application of the locking mechanism, even though unauthorised, is not capable of being held to be "damage" to the machinery. The evidence called in the Lower Court is not capable of proving any damage to the machinery.

[50] The consequence of that conclusion is that, if I were to remit the matter to the Local Court, the magistrate would be obliged to make the same order as he previously did, for a different reason. There is no point in clogging an already over-burdened legal system with pointless technicalities.

[51] The appropriate course is to dismiss the appeals. In each case, that is the order I make.

Appeals dismissed

Counsel for the plaintiff: I Bourke

Counsel for the defendants: P Strickland SC/G Brady

Solicitors for the plaintiff: Solicitor of Public Prosecutions

Solicitors for the defendants: Maurice Blackburn Pty Ltd