[2012] JMCA Crim 26

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 29/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

ANDRE RICHARDS
KAYTON GAYLE
KADIAN BIGGS v R
COREY GREEN

Ewan Thompson for the appellants

Mrs Caroline Hay and Mrs Denise Samuels-Dingwall for the Crown

3 May and 29 June 2012

DUKHARAN JA

[1] The appellants were charged on an indictment containing one count for having unlawfully and maliciously damaged one 3 inch galvanized water supply pipeline the property of Alpart Jamaica Limited (Alpart). They were tried and convicted on 20 May 2011 by Her Honour Mrs Sonya Wint-Blair in the Santa Cruz Resident Magistrate's Court. Having had the benefit of social enquiry reports, the learned Resident Magistrate on 22 July 2011 sentenced each appellant to 12 months imprisonment suspended for 18 months. Each appellant was also ordered to pay the sum of $26,000.00 as restitution to Alpart.

Prosecution's Case

[2] The prosecution's case was centred around Joseph Caine, an inspector of police stationed at Nain Police Station in the parish of St Elizabeth. He stated in evidence, that on 30 March 2010 at about 1:30 am he and another officer were on patrol in a marked police vehicle along the Myersville main road in the said parish. As he reached an area known as Fellowship, he saw from the brow of a hill, sparks lighting up the night like "the fireworks of New York". He proceeded in the direction of the sparks and stopped his vehicle where he saw a group of men and a black Nissan pickup. He made observations. He saw a light bulb attached to a wire from a generator on the back of the Nissan pickup. It was illuminating the area behind the vehicle. He enquired of the men what their mission was and what was happening. He did not get an immediate response. He made further observations. He observed two 3 inch water supply pipelines, one of which was partially cut and was adjacent to the back of the pickup. The pipe appeared to have been freshly cut. He observed tools and equipment such as a welding plant, pickaxe, shovel, welding rods, welding shield, chipping hammer, machete and two pairs of gloves.

[3] Inspector Caine enquired as to the ownership of the pickup. The appellant Corey Green said he had borrowed it from his uncle. The appellant Kayton Gayle was sitting beside the pipe with a grinder in his hand. The grinder is an electrically powered apparatus used for cutting or grinding metal and was connected to the generator in the back of the pick-up. He admitted to borrowing the welding plant and the generator. He was not seen cutting the pipe. Inspector Caine also saw the appellants Kadian Biggs

and Andre Richards standing beside where the cutting was being done. Each was holding "some form of equipment or tool." The inspector took a return valve from one of them but was unable to recall whether it was from Biggs or Richards. Not satisfied with the non-responsiveness of the appellants, Inspector Caine warned them for prosecution and took the pickup and the tools to the Nain Police Station. After further investigations, the appellants were subsequently charged for malicious destruction of property.

[4] The security manager at Alpart, David Woolcock, gave evidence that Alpart had an agreement with the surrounding communities to distribute water to them as they had requested. He said Alpart had laid these pipes from which the communities would derive a supply of water. Alpart controlled the flow of water through these pipes as the plant had to pay the electricity bills for the pumps which took water from its wells. He said Alpart had the only water lines within the Myersville area and these lines were numbered and marked. Mr Woolcock said that he had not directed any work to be done on the pipeline which was damaged. He testified that any such work would require his approval. He directed that the damaged line be repaired. The cost of the repairs was $26,000.00.

Defence

[5] The appellants gave unsworn statements to the effect that they were members of the community effecting repairs to a pipeline which had been given to the community of Myersville by Alpart.

[6] The appellant Andre Richards said that at the time in question he and a friend had gone to a section of the community where he saw community members. He said a section of the community pipeline was exposed and he saw a workman carrying out work with some of the community members. He made observations and asked questions and was informed that they were going to install a non-return valve in the pipeline which, to his understanding, would divert water to Myersville and surrounding communities. He saw a welding plant with a power supply and other tools to do the work that was intended.

[7] The appellant Kayton Gayle said he was asked by members from the Myersville community to help to install a non-return valve in the community pipeline. He said that the welding plant and grinder belonged to him and when he went on the scene he saw members from the community there. The pipe was being cut when the police arrived.

[8] The appellant Kadian Biggs told the court that he followed members of the Myersville community to where he saw the men working on the community pipeline. He said he was sitting on a van talking to friends when the police came and told him to go to by the police station. He denied doing anything to the community pipeline.

[9] The appellant Corey Green said he was asked to assist to take some equipment in his uncle's pickup by the New Building main road where he left the pickup and the equipment. He returned and saw community members working on the community pipeline. He was there talking when the police arrived. He denied being involved with the work on the pipeline.

Grounds of Appeal

[10] Mr Thompson for the appellants abandoned ground three of the original grounds and sought and was granted leave to argue supplemental grounds of appeal.

> "(1) The Learned Resident Magistrate erred in law when she failed to uphold the no case submission made on behalf of the Appellants at the close of the case for the Crown.
>
> (2) The verdict is unreasonable and cannot be supported on the evidence.
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> (3) The Learned Resident Magistrate misconstrued the defence of each defendant and misdirected herself on aspects of the law when she made the following findings:
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> (i) The defence sought to establish that they had a claim of right to the pipeline which was damaged and that they acted in bona fide exercise of that supposed right.
>
> (ii) They each gave unsworn statements which stated that they were members of the community effecting repairs to a pipeline which had been given to the community of Myersville by Alpart.
>
> (iii) They relied upon a joint defence being represented by the same counsel and none departing from the others on the issues joined, the necessary inference was that the Defendants would have to be acting in concert with none being merely present. This raised the need for the defendants to discharge an evidential burden.
>
> (4) The learned Resident Magistrate fell into grave error when she ordered as part of the sentence that each defendant should pay

> restitution of Twenty-six Thousand Dollars ($26,000.00) to Alpart (the total value of the damage done being only Twenty-six Thousand Dollars ($26,000.00). The Magistrate had no such power to impose that sentence under the Malicious Injuries to Property Act (the Act)."

[11] Mr Thompson argued grounds one and two together for convenience. In his oral and written submissions, he submitted that the learned Resident Magistrate in her findings held that the Crown did not have to prove that Alpart was the owner of the pipeline, as the law does not require this in proof of an offence committed contrary to section 42 of the Malicious Injuries to Property Act (the Act). He challenged this finding as being wrong in law. He said the Crown had made a specific averment in the indictment, that the pipeline was the property of Alpart. The Crown, he said, was bound to prove the allegation that the pipeline was owned by Alpart. He relied on the case of ***R v Alan John Gregory*** (1972) 56 Cr App Rep 441. In that case the appellant was charged with handling a stolen starter motor, "the property of W.A.W." At the close of all of the evidence, the trial judge amended the count by striking out the words "the property of W.A.W," which he treated as mere surplussage. It was held that the judge was wrong in treating the words as mere surplussage, as they informed the defendant of the nature of the case which the Crown set out to establish.

[12] Mr Thompson submitted that there was no evidence to establish the basis of the alleged ownership of the pipelines in Alpart. The Crown, he said, did not rely on a statutory protection that allowed Alpart to run pipelines along the main road. He further submitted that in the absence of any evidence that Alpart had a licence, or

permission or an easement to run pipelines along the public main roads, it would be unreasonable to conclude that such pipelines belonged to Alpart.

[13] It was submitted that there was no evidence against the appellants Green and Richards as the evidence of Inspector Caine was that they were not actively engaged in anything. It was further submitted that mere presence at the scene of a crime, without more, was not enough to amount to participation in a crime.

[14] In ground three it was submitted that the learned Resident Magistrate found that the appellants relied upon a joint defence and raised the necessary inference that they were acting in concert. It was further submitted that each appellant gave a different account for his presence at or near the scene, and apart from the appellant Gayle, none admitted to any involvement in the work being done on the pipeline. Counsel referred to the case of ***Mills and Others v R*** [1995] 3 All ER 880.

[15] It was submitted on ground four that the learned Resident Magistrate did not have the power to make an order of restitution under section 42 of the Act as this section did not provide for restitution. The order of restitution was clearly wrong and that aspect of the sentence should be set aside.

[16] Mrs Hay for the Crown, submitted that the learned Resident Magistrate correctly held that there was a case for the appellants to answer and that there was conduct and purposeful voluntary presence on the part of all of them in respect of the offence

charged. She further submitted that the prosecution was not required to prove ownership of the property damaged under section 42 of the Act.

[17] It was the submission of the Crown that Alpart as a company had existed since the 1970s. It had laid the pipes in the relevant communities which distributed water to Myersville and Nain. Alpart maintained the lines. The pipe which was damaged was repaired by Alpart at a cost of $26,000.00.

[18] On the issue of common design it was submitted that there was more than enough evidence to display common design by the conduct of the appellants. The Crown relied on the case of ***R v Dennie Chaplin and Others*** SCCA Nos 3 & 5/1989 delivered on 16 July 1990.

[19] On the issue of joint defence, it was submitted by the Crown that it was open to the learned Resident Magistrate to find that the appellants relied on a joint defence as each one made reference to a community pipeline and placed himself on the scene at the material time.

Analysis

[20] The appellants were indicted under section 42 of the Act which stated that they did unlawfully damage one 3 inch galvanized water supply pipeline, the property of Alpart thereby doing damage exceeding the sum of $10.00. Section 42 of the Act states:

> "**42.** - Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real

> or personal property whatsoever, either of a public or private nature for which no punishment is hereinbefore provided, the damage, injury or spoil being to an amount exceeding ten dollars … and, in case any such offence shall be committed between the hours of nine of the clock in the evening and six of the clock in the next morning, …"

[21] Under section 42 of the Act the prosecution is required to prove (a) that the act was unlawful and malicious (b) that it was deliberate and not accidental and (c) that the damage done was to property, whether real or personal, in excess of $10.00. We agree with the submission of the Crown, that nowhere in the language of section 42 of the Act is there either a direct or implied requirement that the prosecution is required to prove ownership of the property damaged. Section 49 of the Act states:

> "**49**. - On the trial of any offence against this Act it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to injure or defraud (as the case may be)." (Emphasis added)

In our view, the learned Resident Magistrate was correct when she expressed the view in her findings that the Crown was not obliged to prove that Alpart was the owner of the pipeline. The reference to the case of ***R v Alan John Gregory*** does not assist the appellants. That case dealt with handling stolen goods. The decision of the appellate court turned on the fact that the ownership of the stolen starter was integral to the prosecution's case and at a very late stage the judge amended the indictment to remove it. Not only was that not done in this case, but there was evidence from Mr Woolcock that Alpart laid, used and maintained those pipelines and his permission was

required to interfere with them. At page 23 of the record he said, "… it's our property, I am in charge of it."

[22] It is necessary to review the evidence against each appellant. In relation to the appellant Green, he was seen by Inspector Caine at 1:30 am at the scene. He admitted driving the pickup which contained a generator, welding plant etc. He was seen sitting near to where the pipe was being cut. It is therefore quite clear that he was present and assisting to facilitate the damage that was being done to the pipeline.

[23] In relation to the appellant Richards, Inspector Caine said that the appellant Richards was some 15 to 20 inches from where the pipe was cut. He remained silent when asked who had given permission to cut the pipe. Inspector Caine was uncertain as to whether it was the appellant Richards or the appellant Biggs who handed over the non-return valve to him. He did say, however, that each of the persons standing around, was "holding some form of equipment or tool." One gave his name as Kadian Biggs, the other as Andre Richards.

[24] It is quite clear from the evidence that all the appellants were present and within very close proximity while the cutting of the pipeline was being done. It was the finding of the learned Resident Magistrate when she said at page 33 of the transcript:

> "The evidence as led through Inspector Caine proved that damage was committed, and that the damage committed was done wilfully as his enquiries were not met with any explanations nor valid work identification.

> … I accepted the witnesses for the prosecution as witnesses of truth …"

[25] It is clear from the findings of the learned Resident Magistrate that there was evidence to find that the appellants were present and in a joint venture lending support to the unlawful damage of the pipeline.

[26] The following passage from ***R v Coney*** (1882) 8 QBD 534 was referred to in ***R v Clarkson & Others*** (1971) 55 Cr App Rep 445 at page 450:

> "Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power to do, or at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not."

This passage was cited with approval by this court in ***R v Glenford Hewitt and Herbert Hewitt*** SCCA Nos 15 and 16/1984 delivered on 10 April 1987; see also ***R v Dennie Chaplin and Others***.

[27] In our view, the evidence demonstrated that the appellants, far from being accidentally present, were in fact voluntarily and purposely present at the scene at 1:30 am. There was sufficient evidence, in our view, for the learned Resident Magistrate to have found that the appellants were present, aiding and abetting in the act of cutting the pipeline thereby causing damage.

[28] It was the finding of the learned Resident Magistrate that the defence sought to establish that they had a claim of right to the pipeline which was damaged and that they acted in bona fide exercise of that supposed right. The appellants in their unsworn statements stated that it was a community pipeline. However, no evidence was led to establish that the pipeline belonged to the community. The evidence clearly supports the fact that it was Alpart who laid the pipes, albeit for the community. However, Alpart provided the water and maintained the pipes and when the pipe was damaged, it had to be repaired at a cost of $26,000.00 to Alpart. It is therefore clear that the appellants having failed to establish their community ownership, have failed to discharge their evidential burden and therefore have not established their claim of right.

[29] On the issue of joint defence, it was open to the learned Resident Magistrate to find that the appellants relied on a joint defence. Each appellant made reference to a community pipeline. Each one placed himself on the scene at the material time, each one observed the cutting of the pipeline, with none of them condemning the act. They all sought to explain their presence. As each appellant was represented by the same counsel, none of the defences would prejudice the others.

[30] It was the complaint of counsel for the appellants that the order for each appellant to pay restitution of $26,000.00 to Alpart was wrongly imposed by the learned Resident Magistrate. There is merit in this complaint. The appellants were charged under section 42 of the Act. There is no provision in that section for an order

of restitution. The learned Resident Magistrate was therefore wrong in making such an order. Section 53 of the Act allows "convicting Justices" to order each of several offenders to forfeit a sum equivalent to the amount of injury done. That provision does not apply where the Resident Magistrate tries the same case on an indictment.

Conclusion

[31] It was established by the prosecution that Alpart had laid pipes in the relevant communities which distributed water to Myersville and Nain. It controlled the flow of water in the lines. Alpart maintained the pipes; when the pipe was damaged, it was repaired by Alpart. The appellants were seen at 1:30 am being present when the pipeline was damaged. These were findings of fact by the learned Resident Magistrate. The appellants asserted a claim of right with no evidence to substantiate such a claim.

[32] Based on the foregoing, we are of the view that the appeal against conviction should be dismissed. The appeal against sentence is allowed in part and varied to read 12 months imprisonment suspended for 12 months for each appellant.