LEOTA (LESITALA) v POLICE

Supreme Court Apia
7, 14 August 1978
Nicholson CJ

CRIMINAL LAW (Offences) - Wilful damage, s 113 Crimes Ordinance 1961 - Meaning of "wilful" - Review of authorities - Defendant who threw a piece of concrete which broke a large window found guilty, although it was accepted he had aimed the concrete at a dog - Decision of Magistrate that he was reckless as to the result of his action and ought to have known the probable result, in effect applying the test in R v Cunningham (1957) 41 Cr App R 155, held correct.

GENERAL APPEAL against conviction of wilful damage.
Appeal dismissed.

Va'ai for appellant.
Cruickshank for respondent.

Cur adv vult

NICHOLSON CJ. This is an appeal against conviction for wilful damage entered against the appellant in the Magistrate's Court at Apia on the 18th July, 1978. The brief facts as shown by the prosecution witnesses are that on the 7th May, 1978 at Lalovaea a large window of the Apia Automatic Telephone Exchange facing on to the road was broken by a piece of concrete being thrown through it at about mid-day. The accused was found in the vicinity in an intoxicated condition. He later admitted that he was responsible for the breaking of the window with this piece of concrete, but explained that he had thrown it at a dog. There was no evidence to contradict the explanation given by the accused. The short point for decision on this appeal is whether or not it can be said that under these circumstances he wilfully damaged the window.

The Crimes Ordinance 1961 does not define the term "wilful", and while there has been a considerable volume of judicial decision as to the meaning of the word, care must be taken in examining such authorities to distinguish the types of context in which the word is used in various statutory provisions in deciding the true meaning of "wilful" in a particular case. In particular, Mr Va'ai for the appellant referred me to a New Zealand decision relating to the meaning of "wilful obstruction". Bearing in mind the different nature of the intent involved in a charge of obstruction when compared with a charge of wilful damage, I consider that the decision as to the meaning of the word "wilful" in an obstruction charge is not necessarily likely to be of assistance in the present case.

Prendergast C.J. in Ryan v. Stanford (1897) 15 N.Z.L.R. 390 at page 399 observed in relation to a charge of wilful trespass, "I do not think the word 'wilfully' does imply mens rea." And at page 400, "I think the word 'wilfully' means only 'intentionally'." In R v. Cunningham (1957) 41 Cr. App. R. 155, the English Court of Criminal

Appeal held that the expression "malicious" in a charge of causing a noxious substance to be taken, requires proof either (1) of an actual intention to do the particular kind of harm that in fact was done, or (2) recklessness as to whether such harm should occur or not, i.e., that the accused person must have foreseen that the particular kind of harm might be done and yet gone on to take the risk of it. It is neither likely to nor does it indeed require any ill will towards the person injured. This view appears to have been followed in an Irish case, Re Borrowes [1900] 1.R. 593, in relation to a charge of malicious damage to property. On the other hand in R v. Senior [1899] 1 Q.B. 283 it was held that the expression "wilfully damaging property" means deliberately and intentionally, not by accident or inadvertence. Again, in a New Zealand case of Matui Pouto v. Florence (1905) 8 G.L.R. 445, it was held in relation to a charge of wilfully setting fire to scrub that mere negligence in lighting a fire that afterwards spread out and destroyed scrub and flax is not ground sufficient to support a conviction on that charge. In Rice v. Connolly [1966] 2 All E.R. 649 at page 651 Lord Parker C.J. in dealing with a charge of wilful obstruction of a constable observed, "'Wilful' in this context, in my judgment means not only 'intentional', but also connotes something which is done without lawful excuse, ..."

In the Canadian case of Coldwell v. Canadian National Railways [1940] 3 W.W.R. 247, Bence D.C.J. observed, "I find it very hard to believe that one who leaves open so important a gate as that leading to a right of way, where it is obvious that the leaving of that gate open may lead to very serious consequences, had not left it open wilfully. So here, one who would leave such a gate open, while perhaps not leaving it open maliciously, must, if he is a person of ordinary intelligence, and that person I must consider, in leaving it open have a wanton disregard for the rights of those who may be affected thereby. That causes me to conclude with, as I said before, some hesitation, that the gate was not only opened wilfully, but left open wilfully, by some person for whom the Railway Company is not responsible."

Finally, I refer to the view of Bramwell L.J. in Lewis v. The Great Western Railway Company [1877] 3 Q.B.D. 195 at page 206, who, in dealing with a definition of wilful misconduct said:-

> "Wilful misconduct" means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct, must be wilful. It has been said, and, I think correctly, that, perhaps one definition of "wilful misconduct" must be that the person guilty of it should know that mischief will result from it. But to my mind there might be other "wilful misconduct." I think it would be wilful misconduct if a man did an act not knowing whether misconduct would or would not result from it. I do not mean when in a state of ignorance, but after being told, "Now this may or may not be a right thing to do." He might say, "Well, I do not know which is right, and I do not care. I will do this." I am much inclined to think that that would be "wilful misconduct", because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not.

The last view appears to accord with the view expressed in Cunningham's case as to the meaning of "maliciously". While Cunningham's case is not dealing precisely with the meaning of the word wilfully, I conclude on the authorities that if for a word as strong as "malicious", there can be a reckless form of intent, as found in Cunningham's case, then surely the less strong term "wilfully" would also embrace that form. I hold that there are two possible forms of wilfulness involved in a charge of wilful damage, one being a deliberate act designed to do precisely the damage in fact done, and the other an act done which causes damage which ought to have been foreseeable by the person committing the act. I think that that is particularly so when the act is in itself an unlawful one, such as in

the present case, namely, the throwing of a piece of concrete at a dog. This was either an attempt to wilfully damage the dog, being the property of some person unknown, or if the dog was a stray one, at least it was an attempt to terrify or injure the dog contrary to the terms of section 6 of the Police Offences Ordinance 1961.

I apply the test of reasonable forseeability of the consequences of the act to the present case. I consider that the evidence is a little sketchy, but it appears that the window which was broken was a large one facing on to the roadway, that the act was done in broad daylight, and that on the face of the evidence adduced, one could only reasonably infer that the appellant, in throwing a piece of concrete at the dog, ought to have foreseen that the consequences of this throwing could be that the window was going to be damaged.

Now the evidence in this case suggests that the appellant was considerably affected by alcohol at the time, but the appellant has not raised intoxication as a defence, and I do not feel obliged, therefore, to consider it as a matter affecting the issue on appeal.

The learned Magistrate held that in law the defendant, in throwing the piece of concrete, was reckless as to the result of his action and that he ought to have known the probable result of his action would be that the window would be broken, and that in law he must be deemed to have caused the damage wilfully. In effect, he was applying the test in Cunningham's case and, I hold, was correct in doing so. The appeal is dismissed.