25/10

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

M.235/83

Reported at 1 CRNZ 392

1277

No Special Consideration

BETWEEN DUREY

Appellant

A N D POLICE

Respondent

Hearing : 13th June 1984 (at Rotorua)
20th August 1984 (at Auckland)

Counsel : J.M. Priestley for Appellant
P.J. Savage for Respondent

Judgment : 23 October 1984
Delivered

T.J. McGRORY
Deputy Registrar

JUDGMENT OF BARKER, J.

This is an appeal against conviction and sentence. The appellant was convicted in the District Court at Tauranga on 16th July 1983 after a three-day hearing. He was charged under the provisions of Section 54(1)(b) of the Historic Places Act 1980 ("the Act") with wilful modification of an archaeological site. The prosecution is believed to have been the first under this particular Act. On conviction, he was ordered to pay witnesses' expenses of $2,500, Court costs $20 and prosecution solicitor's fee $1,200. The hearing in the District Court saw much technical evidence, including evidence from a marine archaeologist.

Under Section 56 of the Act, the time for laying informations is within 12 months of the alleged offence. The information alleged that, on 17th January 1982 at sea, some 5 miles north-east of Waihi Beach, the appellant wilfully "modified" an archaeological site, namely, the wreck of the "S.S. Taupo". The information was laid on 11th January 1983, a few days within the limitation period.

The learned District Court Judge correctly stated in his decision that there were four issues which required determination:

(a) Whether the wreck in question was the wreck of the "S.S. Taupo", which sand on 29 April 1881;

(b) Whether, if the wreck was the wreck of the "S.S. Taupo", it fell inside the definition of "archaeological site" as defined in the Historic Places Act 1980 (ss.2 and 54(1)(b));

(c) Whether the prosecution had established beyond reasonable doubt that the alleged modification to the wreck of the "S.S. Taupo" (s.54(1)(b)) had been carried out by the appellant;

(d) Whether the prosecution had established beyond reasonable doubt that any such modification carried out by the defendant had been carried out wilfully.

On appeal, the appellant accepted the findings of the District Court Judge that the wreck in question was the wreck of the "S.S. Taupo" and that the wreck was covered by the definition of "archaeological site" in the Act. Accordingly, one need mention only in summary, the relevant matters of history found in the judgment under appeal.

On 18th February 1879, the "S.S. Taupo" struck a rock near the entrance of Tauranga Harbour and sank. The vessel remained on the seabed until 29th April 1881 when she was refloated and left Tauranga for Auckland in the tow of the steamer "Staffer" which tow was transferred off Karewa Island to the steamer "S.S. Wellington". On the evening of 29th April 1881, the "S.S. Taupo", whilst under tow, sprang a leak and sank in an area described at the time as some 11 miles off Karewa Island at a depth of 38 fathoms. The evidence showed that whilst it had been known locally for many years that there was a wreck in the area immediately to the east of the Katikati River, there was some uncertainty as to the identity of the wreck. However, in 1979, as a result of enquiries undertaken by members of underwater clubs, the wreck became referred to in most local circles as the "Taupo".

An officer of the Royal New Zealand Navy in charge of the operational diving team, Lieutenant Coller, inspected the wreck in January 1983; his evidence left the District Court Judge in no doubt that the wreck was indeed the "S.S. Taupo".

Under Section 2 of the Act, "archaeological site" includes "... the site of a wreck of any vessel where at any material time that wreck occurred more than 100 years before that time and which is, or may be able through investigation by archaeological techniques to provide scientific, cultural or historical evidence as to the exploration, occupation, settlement or development of New Zealand".

The District Court Judge found as a fact from the historical evidence given, that the "S.S. Taupo" sank on 29th April 1881; accordingly, at the time when the offence was alleged to have occurred in January 1982, the wreck was deemed to be an "archaeological site" within the meaning of the Act - but only by some 9 months.

The evidence of Lieutenant Collier showed that a steam condenser had recently been removed from the wreck by means of an explosive. The condenser was produced in evidence; whoever removed this condenser from the wreck did in fact "modify" the archaeological site, namely, the wreck of the "Taupo"; therefore, whoever did so prima facie came within the purview of Section 54(1) of the Act which creates the following offences:

> "54. Offences - (1) Every person commits an offence and is liable on summary conviction to a fine not exceeding $25,000 and to a further fine not exceeding $500 for every day during which the offence continues who -
>
> (a) Wilfully destroys, damages, or modifies, or causes to be destroyed, damaged, or modified any historic place, property, or thing vested in or under the control of the Trust without the authority of the Trust or any person or body authorised by the Trust in that behalf:

(b) Wilfully destroys, damages, or modifies, or causes to be destroyed, damaged, or modified any archaeological site or demolishes, alters, or extends or causes to be demolished, altered, or extended any building subject to a protection notice, without the authority of the Trust or any person or body authorised by the Trust in that behalf or by the Tribunal pursuant to section 38 of this Act:

(c) Is in breach of any condition imposed by the Trust under section 44 or section 46 of this Act."

Mr Pristley first submitted that there was not sufficient proof that the appellant was the person who had modified the wreck. The evidence showed that, on 16th and 17th January 1982, a vessel called the "Harold Hardie" was seen in position near the remains of the wreck. Two witnesses on the shore noted 3 persons diving into the wreck area. They saw a number of dead fish in the locality; the "Harold Hardie" had an A-frame over its stern with a lift bag in position. The appellant had made enquiries in the relevant township as to the availability of a lift bag. One witness, a commercial fisherman, considered that the dead fish that he saw in the vicinity of the wreck on the day in question had been dead for no longer than 24 hours.

The evidence established that the appellant was in command of the "Harold Hardie". A winch line on the boat was tied onto the condenser which a salvage expert stated would yield the most profitable metal. There was sufficient evidence from which the District Court Judge was able to infer that some of the material from the "Taupo" had been removed from the bed of the sea and placed on board the "Harold Hardie" when it was in the command of the appellant.

The appellant made statements to the Police in which he denied removing material from the wreck. The District Court Judge seems to have accepted one aspect of his statement; that the appellant told a Police Officer that he was unable to dive because he had hurt his leg. However, there is justification for the District Court Judge's finding that the appellant was a party to the modification of the wreck even although he himself may not have been the person who dived and

actually removed the material. He was in charge of a vessel equipped to service the diver and, to the extent permitted by law, the District Court Judge was entitled to take into account the failure of the appellant to give evidence.

The extent to which a District Court Judge, sitting in summary jurisdiction, can comment on the failure of an accused to give evidence is a principle known as the principle of Dolling v. Bird, (1924) NZLR 545, namely, that where the prosecution has succeeded by its own evidence in establishing a case which calls for an answer, then the failure of an accused person to answer it may be taken into account in determining whether the prima facie case amounts to proof.

I have read the consideration of this matter in the judgment of Chilwell, J. in Belton v. Registrar of Companies (M.707/77, Auckland Registry, Judgment 28th July 1980) which sets out the various authorities on the principle of Dolling v. Bird which seems to have been accepted by the Court of Appeal in R v. Marec (No. 3), (1946) NZLR 660, 674-7. In all the circumstances of the case, I think the District Court Judge was entitled to infer that the appellant was at least a guilty party to the modification of the wreck.

The most recent statement on this topic is found in the Court of Appeal's judgment in Trompert v. Police (21st August 1984) in a passage from the oral judgment of Richardson, J.:

> "In Purdie v Maxwell F.B. Adams J held first that where a sufficient prima facie case is made out the Court is entitled, in determining what weight should be given to the evidence, to take into account the failure of the accused to give, by his own evidence or otherwise, the explanations which he might naturally be expected to give if he were innocent (p604); and second, that s.67(5) of the Summary Proceedings Act 1957 which provides that the informant may not comment adversely on the failure of the defendant to give evidence did not preclude or militate against that approach (p602). Referring to the suggestion which had been made by Henry J in Hall v Dunlop (1959) NZLR 1031, 1037 that an accused person has a "right to assert a privilege of silence without comment by using his silence as a ground to support inculpation" F.B. Adams J went on to say:

> "I have never previously come across the suggestion that an accused person has a general privilege of silence which protects him from such inferences as will naturally be drawn from his silence in the face of proved facts which call for explanation on his part. In the face of such facts, an accused person preserves silence at his peril, except where some particular rule of law protects him. In my experience, but subject always to those particular rules, the silence of an accused person has always been regarded as a major indication of guilt in cases where he might be expected to speak if he were innocent. Even where a statute prohibits comment on failure to testify, there is no privilege of silence, as no law has ever purported to prohibit the tribunal of fact, be it jury, Judge or Magistrate, from drawing such inferences as must inevitably be drawn from silence on the part of the accused. If ever such a statute were passed, it would be, in my humble opinion, a grievous, unnecessary and unjustifiable weakening of the arm of the law."
>
> We are satisfied that F.B. Adams J's conclusions are sound in principle and amply supported by authority."

I turn to the more difficult submission, namely, whether the prosecution had to disprove mens rea in the circumstances of this case. The learned District Court Judge said:

> "I come now to the question of dealing with the word "wilfully". It has been suggested to me by Mr Priestly that the standard of mens rea required, having regard to the wording of the statute, is of the highest order. It has been suggested to me in evidence, most recently by Mr Walker, that the wreck that was known to be off Waihi and which I have previously held to be the "S.S. Taupo" was known as "the Barge". Mr Parkinson, however, said that certainly from 1981 it was widely known as the "Taupo". I am also satisfied from the photographs that have been produced and the descriptions that I have received from Lt. Collier, the Ogiers and Mr Glendale-Hunt that a visual inspection of this wreck would have made it quite clear to any person, that it was not a barge but were the remains of a fairly substantial coastal vessel. I must also have regard to the fact that the defendant is not a person, as far as salvaging vessels are concerned, that is to be regarded as a "weekend scuba diver" seeking possible memorabilia

> or relics of a weekend dive. Evidence has been given of extensive work that he undertook in salvaging the vessel the "Sea Ranger" and it is also quite apparent from that evidence that the defendant was, or should have been, well aware of the rights and obligations attaching to any person who undertakes salvage in the coastal waters around this country. It is not necessary for me to comment further, other than to say that the ignorance of the law is no excuse and once the defendant made an inspection of the wreck it should have become apparent to him that it was more than a simple barge. It would not have been difficult for him to obtain further information as to what this vessel could possibly be; reference to Ingram's book and reference to the Nautical Museum at Greenwich; reference to the library in Dunedin and indeed reference to the Register of Wrecks would have given him some indication as to what this particular boat could have been. On the local scene inquiries from any of the underwater clubs or the local fisherman would have provided him with some information. I find it impossible to accept the inference in cross examination that the defendant was not aware that the vessel that he wasinspecting on 17 January and from which he removed certain items was not the wreck which was the Taupo. Again it was open to the defendant to have given evidence on this particular point which he has elected not to do. I accept that it is necessary for mens rea to be established and I am also satisfied onthe totality of the evidence presented to me, that this has been done and that the defendant knew that he was interfering with the vessel the "S.S. Taupo"."

Whilst the topic of mens rea is capable of endless discussion (see Adams, Criminal Law and Practice in New Zealand, 2nd Edition, Para. 374), the use of the word "wilfully" in the statute indicates that the Legislature did not intend to create an offence of absolute or strict liability. The word "wilfully" commonly is interpreted to mean intentional or deliberate; it has occasionally been interpreted as encompassing recklessness, consistent with a general trend in the criminal law to define the mental element of a crime as including recklessness as to the consequence of an act. See Smith & Hogan, Criminal Law, 58-60; Taylor v. Pope (1979), 21 S.A.S.R. 468, 470; R v. Littlewood, ex parte Attorney-General, (1981) Qd.R. 209; Iannella v. French (1968), 41 A.L.J.R. 389, 393.

Assuming that recklessness is all that needs to be proved, the prosecution in this case was required to show beyond reasonable doubt either that the appellant intended to modify

the wreck knowing it to be an archaeological site, or that he was reckless as to its status. If he believed that the wreck was not an archaeological site, then mens rea would be negatived unless the belief was reckless.

This is not the same thing as ignorance of the law which the District Court Judge mentioned. A mistake of law may negative mens rea, particularly when the distinction between fact and law is not clear. See Adams, para. 487 and Smith & Hogan P.71. In this case, a wreck can be a wreck literally on one day and an archaeological site the next because of the legal definition of an "archaeological site" having to be 100 years old.

Where a person acts under a mistake of law which precludes him from having the requisite mental element for a particular offence, he cannot be guilty of that offence. This is so so long as the mistake was honestly entertained whether or not it was reasonable to have made it.

Assuming that all the prosecution must show is recklessness, I cannot see how the District Court Judge was entitled, on the evidence, to say that the appellant was reckless as to the identity of the "Taupo" and, more importantly, that he was reckless as to whether it was an archaeological site.

Admittedly, there was evidence that he had undertaken salvaging work, but this does not give rise to the only inference that he knew that this wreck was 100 years old. It is no answer to say, as did the District Court Judge, that he should have read books or gone to various museums or made any enquiries of local fishermen. It is not enough to say that he did not give evidence on this point. The learned District Court Judge did not make any finding on the appellant's statement to the Police which tended to show that he was not aware that this was the archaeological site of the ship "Taupo". The District Court Judge did not say that he disbelieved this statement. Had he done so, of course, he would have had to give himself the usual directions as to lies.

The situation is not unlike that disclosed in some of the

cases cited by Mr Priestley. In Willmott v. Atack, (1976) 3 All E.R. 794, the Divisional Court held, on a charge of wilfully obstructing a constable in the execution of his duty, that it was not sufficient for the prosecution to prove merely that the defendant had deliberately done an act which had resulted in the obstruction of a police officer. What it also had to show was that he had done the act with the intention of obstructing the officer in the sense of making it difficult for him to carry out his duties.

Perhaps a more pertinent case is R v. Phekoo, (1981) 3 All E.R. 84; the Court of Appeal (Criminal Division) held that proof of mens rea was required on a charge of doing acts calculated to interfere with the peace and comfort of residential occupiers of a house with intent to cause them, as residential occupiers, to give up their occupation. The intent required was an intent to do acts in relation to the residential occupier; accordingly, where the issue of the defendant's belief as to the status of the person harrassed was raised, the Crown was required to prove an intent to harrass someone whom the defendant knew to be a residential occupier and that his belief that the person was not a residential occupier was not an honest belief. It was not sufficient for the Crown to prove merely that the person harrassed was a residential occupier.

To similar effect is another recent decision in the Court of Appeal in R v. Taffe, (1983) 2 All E.R. 625. The defendant was enlisted by a person in Holland to carry a substance which he believed to be currency through the customs into England, thereby fraudulently evading what he thought was a prohibition on the importation of currency. When searched on entry, it was discovered that the substance was in fact cannabis. The appellant was charged with being knowingly concerned in the fraudulent evasion of the prohibition of the importation of cannabis. The Court of Appeal (Criminal Division) held that the requisite mental element to be proved was actual knowledge, not merely a belief which might or might not have been right, that the goods he was importing were goods subject to a prohibition. Consequently, his mistaken belief that he was

importing currency and that by so doing, he was committing a lesser criminal offence, did not turn his actions into the criminal offence of knowingly being concerned in the importation of prohibited drugs.

Applying that principle to the present case, the prosecution had to prove that the appellant modified the wreck which he believed was an archaeological site.

The cases cited by Mr Savage show a greater emphasis on the recklessness approach. In my view, they are distinguishable. In O'Sullivan v. Harford, (1956) S.A.S.R. 109, the appellant was charged with having wilfully obstructed a member of the Police force acting under gaming legislation, from entering a house. The evidence showed that on a public holiday, when horse races were being run in various parts of South Australia and other states, police officers went to the respondent's house with a warrant authorising entry. They found all doors and windows closed and some blinds down. Whilst waiting outside the house, they heard a telephone ringing and apparently being answered. They knocked several times without answer. One of the police officers looked through a letter slot and saw the respondent enter and leave a room. The officer called out loudly through the slot demanding admittance; they eventually broke into the house. In the dining room was a fire with ashes consistent with those from paper burning in the fire place. Over the mantlepiece were some slips of paper ruled up, as for the keeping of accounts. On the table was a newspaper; the flex in the telephone had been pulled from the instrument. When the telephone was repaired by the police officer, it rang several times. The Full Court held that the evidence was sufficient to make out a case for answering by the appellant. At p.115, the Chief Justice said as to the words "knowingly" and "willingly":

> "It seems to us that we must distinguish between "knowingly" and "wilfully". Both words import scienter or intention, but, whilst "knowingly" will generally import knowledge of the attendant circumstances which make the act unlawful, we think that, in this context, the natural meaning

> of "wilfully" can be satisfied either by knowledge or by a state of mind which adverts to the possibility of the existence of the attendant circumstances, but forbears to make inquiry, and wills to do the act whether or no."

That case is distinguishable in my view. The evidence there very clearly gave rise to a suspicion of guilt; nothing like the same suspicion was aroused in the present case.

Likewise, the other South Australian case of Davies v. O'Sullivan, (1949) S.A.S.R. 208; the Court had to determine what had to be proved on a charge of wilfully receiving rent which the statute had said was irrecoverable. At p.210, Napier, C.J. said:

> "The second objection to the conviction is that it has not been proved that the moneys received as rent were received "wilfully", in the sense intended by s.27(2). Here, again, I think that it is unnecessary to traverse the reasoning of the learned Judge, or to quote from the authorities to which he has referred. In its natural meaning the word "wilfully" is probably a weaker word than "knowingly" which is used in s.27(3), but the meaning of any word like this must necessarily be coloured by its context. The function of the word "wilfully" in s.27(2) is to impose upon the prosecution the onus of proving something in the nature of mens rea. The natural meaning in this context is that the act was done intentionally, not by accident or inadvertence, but so that the mind or will of the actor goes with the act. When the prosecution has proved that the money was received as rent and that it was irrecoverable under the Act, I think that the mens rea required is proof that the money was so received intentionally and without any honest belief in a state of facts which would have made the receipt innocent."

Finally, Walker v. Crawshaw, (1924) N.Z.L.R. 93; the appellant was charged with an offence of wilfully doing a grossly indecent act in a public place. The facts disclosed that the appellant was seen having sexual intercourse in a back seat of a car by a policeman who flashed his electric torch into the rear portion of the car. He was charged with wilfully committing an indecent act within view of a public place.

Sim, J. rejected an argument that the appellant was justified in thinking that his actions could not be seen

and that they were detected through the misdirected zeal of a prying policeman. He held that there was a reasonable probability of the appellant being detected and he deliberately and intentionally accepted that risk. That fact situation is different.

Accordingly, I am of the view that the prosecution failed to prove mens rea beyond a reasonable doubt and the conviction must be quashed.

I note that, had I formed the view that the conviction should be sustained, I should certainly have reduced the penalty imposed on the appellant. The District Court Judge noted that the maximum penalty was $25,000 and that the witnesses' expenses amounted to $4,800 including the costs of bringing from Perth, Western Australia, the only marine archaeologist in this part of the world.

Clearly, the Legislature intended the Courts to punish with financial severity those who wilfully destroy our national heritage for commercial gain; however, this particular wreck is hardly in the class of, say, the Waitangi Treatyhouse as a focal historic place (such as archaeological sites are deemed to be); in fact, it had been deemed an archaeological site by only a few months.

In this test case, the appellant had visited on him an excessive penalty for a less serious offence of its kind.

Under the Costs in Criminal Cases Regulations 1970, the amount awarded for the prosecution's solicitors' costs was quite unjustified. Witnesses' expenses had to be awarded in terms of the relevant regulations (i.e. the Witnesses and Interpreters' Fees Regulations 1974).

I do not think it was fair for the appellant to be penalised by the District Court Judge by having to pay costs of bringing an expert witness from Perth. To have done so would put too high a price on the appellant's constitutional right to defend. As it turned out, the evidence accepted by the District Court Judge

on the identity of the wreck was that of the naval officer. Had I had to consider the appeal against sentence, I should have reduced the amount payable by the appellant by something like two-thirds.

The appeal is allowed; the conviction is quashed. I make no order as to costs here or in the Court below.

R. J. Barker J.

SOLICITORS:
Oliphant, Bell & Ross, Auckland, for Appellant.
Crown Solicitor, Rotorua, for Respondent.