

[1980–87 Gib LR 522]

WRIGHT v. WATKINS

SUPREME COURT (Alcantara, A.J.), October 15th, 1987

Road Traffic—tampering with vehicles—getting on vehicle—no reasonable excuse for pedestrian to climb over vehicle obstructing pavement (and causing damage to it) if alternative route available

The respondent was charged in the magistrates' court with three offences, two of getting on to a vehicle without lawful authority or reasonable cause, contrary to the Traffic Ordinance, s.41(2) and one of causing criminal damage contrary to the Criminal Offences Ordinance, s.159(1).

On two separate occasions, the respondent, whilst walking along the same stretch of pavement, came across cars parked across the pavement. Instead of walking round them, he climbed over them and in the process of doing so allegedly damaged one of the cars.

In the magistrates' court, the magistrate ruled that there was no case for the respondent to answer. At the prosecution's request, he stated a case for the opinion of the Supreme Court, as follows:

“(a) Whether, on November 26th, 1986, in law, the defendant had lawful authority or reasonable excuse to get on to the motor vehicle, G46000;

(b) Whether, on November 26th, 1986, in law, the defendant had lawful excuse to cause damage to the motor vehicle, G46000;

(c) Whether on November 27th, 1986, in law, the defendant had lawful excuse to get on to the motor vehicle, G42749;

(d) Whether, in law, I was correct in holding that Stuart Watkins had no case to answer.”

The appellant submitted that the magistrate had erred in ruling that there was no case for the respondent to answer as (a) the respondent could easily have walked around the cars; and (b) a private individual was not entitled to abate a nuisance on a public highway unless it caused him special injury (which this obstruction had not) and could only interfere with the nuisance in so far as it was necessary for him to pass along the highway.

The respondent submitted that (a) the cars had been parked illegally in a manner which obstructed his lawful right of way; (b) he had a lawful excuse under the Criminal Offences Ordinance, s.162, for climbing over the cars as to walk around them would have caused him danger; and (c)

the cars were a nuisance and in climbing over them he had been making use of his civil right of abatement.

Held, remitting the case to the Stipendiary Magistrate for reconsideration:

(1) The case would be remitted to the magistrates' court for the continuation of the hearing as the Stipendiary Magistrate had erred in ruling that there was no case for the respondent to answer. Although there were circumstances in which a person might have reasonable cause to climb on to another's car, this was not one. The parked cars had not prevented him from passing and he would not have been endangered had he simply walked around them (para. 10; para. 13; para. 16).

(2) Nor could it be said that, in clambering over them, the respondent had been exercising his civil right of abatement of a nuisance. A private individual had no special right to abate a public nuisance unless it caused him special injury and even if this were the case, he would only be acting lawfully if he removed the obstruction to the extent that it enabled him to pass (which did not appear to have been the case here). If, however, the individual went for the sole purpose of removing the obstruction as a public service to the locality, his action would be unlawful and he would therefore be open to various penalties (paras. 11–12; para. 15).

Cases cited:

- (1) *Dimes v. Petley* (1850), 15 Q.B. 276; 117 E.R. 462, considered.
 (2) *Lewis, Ex p.* (1888), 21 Q.B.D. 191, considered.

Legislation construed:

Criminal Offences Ordinance (1984 Edition), s.159(1): "A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged is guilty of an offence."

s.162: The relevant terms of this section are set out at para. 5.

Traffic Ordinance (1984 Edition), s.41(2):

"If while a motor vehicle is on a road or on a parking place any person otherwise than with lawful authority or reasonable cause gets on to or tampers with the vehicle or any part thereof, he is guilty of an offence."

D. Robinson for the appellant;

M. Isola for the respondent.

1 **ALCANTARA, A.J.:** What I have to decide in this appeal is whether a pedestrian walking along a pavement has the right to trample over a motor vehicle which obstructs his way along the pavement. The common-sense

answer is “No.” Whether common sense is coterminous with the criminal law is what this appeal is all about.

2 The facts as set out in the case stated are that the respondent was walking along the pavement on the south side of Cloister Ramp. It is a narrow pavement. On his way forward, on two different days, he met a car which was mounted on the pavement. There was no room for him to pass between the front of the cars and the wall of the building so he simply stepped on to and over the cars and continued his journey. One of the cars is alleged to have been damaged. There was room for him to have made his way along the road had he so desired.

3 The respondent was charged with three offences. Two were of getting on to a motor vehicle without lawful authority or reasonable cause, contrary to the Traffic Ordinance, s.41(2). One charge was in respect of motor vehicle, G46000 and the other in respect of motor vehicle, G42749 and the remaining charge was for causing damage, contrary to the Criminal Offences Ordinance, s.159(1). The particulars of that offence are that:

“Stuart Watkins, on November 26th, 1986, without lawful excuse, damaged the bonnet of motor car, G46000, the property of Joseph Gabay, intending to damage such property, or being reckless as to whether such property would be damaged.”

4 The charges were heard in the magistrates’ court on March 23rd and March 25th, 1987, and the learned Stipendiary Magistrate ruled on April 3rd, 1987, that there was no case to answer and gave written reasons for his decision. In the case stated, the learned Stipendiary Magistrate poses the following questions for the opinion of this appellate court:

“(a) Whether, on November 26th, 1986, in law, the defendant had lawful authority or reasonable excuse to get on to the motor vehicle, G46000;

(b) Whether, on November 26th, 1986, in law, the defendant had lawful excuse to cause damage to the motor vehicle, G46000;

(c) Whether on November 27th, 1986, in law, the defendant had lawful excuse to get on to the motor vehicle, G42749;

(d) Whether, in law, I was correct in holding that Stuart Watkins had no case to answer.”

5 A number of submissions were made to the learned Stipendiary Magistrate which have been repeated before me. The first one relates to the charge of criminal damage. The respondent’s argument was, and still is, that in doing what he did, he had a lawful excuse. He relied on the Criminal Offences Ordinance, s.162. The relevant part of that section reads:

“(1) This section applies to any offence under section 159(1) . . .

(2) A person charged with an offence to which this section applies shall, whether or not he would be treated for the purposes of this Part as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse—

...

(b) if he destroyed or damaged or threatened to destroy or damage the property in question . . . in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed—

...

(ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.

(3) For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held.

(4) For the purposes of subsection (2) a right or interest in property includes any right or privilege in or over land, whether created by grant, licence or otherwise.

(5) This section shall not be construed as casting doubt on any defence recognised by law or a defence to criminal charges.”

6 The respondent’s argument is this: at common law, a citizen has a right of passage over a highway for the purpose of passing and re-passing (*Ex p. Lewis* (2))—Cloister Ramp is a highway. Two, an obstruction on the highway is a nuisance—the car on the pavement was an obstruction. Three, in removing the obstruction (by walking over the cars), he was simply making use of his civil right of abatement and in doing so, he was protecting his rights and interests under the Criminal Offences Ordinance, s.162(2)(b). This submission was quite rightly rejected by the learned Stipendiary Magistrate. In his ruling he said, “In my view, s.162 deals with private, not public, rights and therefore does not help the defendant.”

7 I will shy off the dichotomy of private and public rights and reach the same conclusion by saying that s.162 of the Criminal Offences Ordinance is concerned with the defence of property. The right to pass or trespass on a highway is not a property right or interest. It is just a right as is the right of speech.

8 The respondent’s submission, under s.162 was, with all due respect, a red herring dressed in grey. Consequently difficult to trap. The answer to

the second question posed by the learned magistrate in the case stated is “No.” The defendant had no lawful excuse to cause damage on the facts as found so far. Consequently, the learned Stipendiary Magistrate was wrong in ruling that, on that particular charge, he had no case to answer.

9 I now turn to the other two charges of getting on to a motor vehicle without lawful authority or reasonable cause. The respondent has not argued that he had lawful authority. In fact, there is a finding by the learned Stipendiary Magistrate that no one had permission to get on to the cars. The respondent’s contention, however, is that he had reasonable cause. His argument is that, on the day in question, he was acting lawfully in being on the pavement and as his right of way on the pavement was obstructed, he did only what was necessary to avoid the obstruction, he walked over it.

10 There might be certain circumstances in which a person might have reasonable cause to walk over a car, for example if a car blocks the front door of my house to such an extent that I am imprisoned. In such circumstances, I would be entitled to walk over it. In this appeal, however, on the facts as stated by the learned Stipendiary Magistrate, the whole of Cloister Ramp was available to the respondent other than that part of the pavement.

11 Counsel for the appellant has provided the court with a very useful publication entitled *The Law of Footpaths & Bridleways*, 4th ed., at 37 (1974), under the heading “Removing Obstructions,” there is a quotation from the case of *Dimes v. Petley* (1) as follows (15 Q.B. at 283; 117 E.R. at 465):

“. . . [I]f there be a nuisance in a public highway, a private individual cannot of his own authority abate it unless it does him a special injury, and he can only interfere with it as far as is necessary to exercise his right of passing along the highway . . . we clearly think that he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience.”

12 I refer to para. 5 of the ruling of the learned Stipendiary Magistrate which reads as follows:

“It seems to me that, although the defendant’s immediate path forward on the footpath was obstructed by the two cars involved in these charges, the remainder of the road was available for him to pass by. I am not impressed with the submission that Mr. Watkins would have been endangered.”

13 On that finding, and on the authority of *Dimes v. Petley* (1), I come to the conclusion that there was a case to answer. Consequently, the opinion of this court is that, on the facts as disclosed by the case stated, the

respondent did not have lawful or reasonable cause to get on to the motor vehicles G46000 or G42749.

14 Mr. Isola, for the respondent, has invited me not to remit this case to the magistrates' court for continuation of the hearing, saying that I have powers to take such a course and referring me to the Criminal Procedure Ordinance, s.298. He pleads that this was a test case which aroused public interest and that his client is now out of pocket and in debt to his solicitors. He also pleads that, in any case, the motor cars were illegally parked on the pavement and that, since the hearing of this case, the pavement has been kept clear.

15 I think the proper thing for me to do is to remit the case to the Stipendiary Magistrate. It might well be that the respondent has a valid defence. This case was dismissed on a submission of no case to answer. Before concluding, I will quote again from *The Law of Footpaths & Bridleways* (*op. cit.*, at 37):

“The position of a private individual who removes an obstruction to a public footpath would appear to be this: if he does so whilst on a *bona fide* journey from A to B and only to such an extent as to enable him to pass on that particular occasion, then his action is lawful. If, however, he goes for the sole purpose of removing the obstruction as a public service to the locality, then his action is unlawful. The enthusiast who goes too far acts unlawfully and lays himself open to various penalties.”

16 I am pleased to say that the criminal law in this sphere is coterminous with common sense and the case shall be remitted to magistrates' court for the continuation of the hearing.

Order accordingly.
