[2001–02 Gib LR 1]

RAMOS and FORTUNATO v. ATTORNEY-GENERAL

SUPREME COURT (Schofield, C.J.): February 9th, 2001

Road Traffic—tampering with vehicles—reasonable cause—court to decide whether reasonable cause for tampering—unreasonable if tampering (e.g. interference with electrical system) exceeds risks notified to and accepted by driver (e.g. clamping or towing away)—offender's honest belief in reasonableness is mitigating factor

The appellants were charged in the magistrate's court with tampering with a motor vehicle contrary to s.41(2) of the Traffic Ordinance.

The appellants were security guards employed to take measures against those parking unlawfully at a supermarket car park. An employee of the supermarket unlawfully parked his car there for a week. He did this in the face of two notices in the car park warning that action would be taken against the unauthorized parking of vehicles. One notice stated "Unauthorized vehicles will be immobilized and/or towed away" and showed a picture of a vehicle being towed away. The other notice warned that clamping would occur in the event of unlawful parking.

Employees of the security company clamped the car. The clamp was later removed and the appellants immobilized it by disconnecting the battery and other electrical equipment.

The appellants were charged with, and convicted of, tampering with a motor vehicle contrary to s.41(2) of the Traffic Ordinance and each was fined £80.

On appeal, they submitted that (a) they had reasonable cause to tamper with the vehicle as the employee consented to, or willingly assumed, the risk of his car being immobilized; and (b) that because they genuinely thought that they had reasonable cause to immobilize the vehicle, they were entitled to an acquittal.

Held, dismissing the appeal:

(1) The appellants were guilty as charged because their actions had exceeded the risk to which the employee had consented. As the nature of the immobilization which would occur was not made clear in the notices, the respondent was taken to have consented only to the risk of his vehicle being clamped or towed away. The presence of the notices, which were posted at the entrance to the supermarket car park where they were bound to be seen, indicated that the vehicle driver must have had knowledge of and appreciated the warning (para. 7; paras. 12–13).

(2) Moreover, it was for the court to decide whether there was "reasonable cause" within the meaning of s.41(2) for the appellants to immobilize the vehicle in the way that they did. Here there was not, but their honest belief that they had reasonable cause could be regarded as a mitigating factor. An absolute discharge for each appellant would therefore be substituted for the fines imposed, which were to be repaid (paras. 14–16).

Case cited:
(1) *Vine* v. *Waltham Forest London Borough Council*, [2000] 1 W.L.R. 2383; [2000] 4 All E.R. 169; [2000] R.T.R. 270, *dicta* of Roch, L.J. applied.

Legislation construed:
Traffic Ordinance (1984 Edition), s.41(2): The relevant terms of this sub-section are set out at para. 4.

R. Pilley for the appellants;
K. Colombo for the Crown.

1 **SCHOFIELD, C.J.:** The appellants are security guards with a company commonly known as Group 5 Security, which from the evidence seems to be the name under which Detectives & Security (International) Ltd. trades. The company is employed to take measures against those parking unlawfully at the Checkout car park at Marina Bay.

2 An employee of Checkout Supermarket, Jason Barcelo, parked his motor vehicle, number G 82074, at the Checkout car park on May 20th, 2000 and went on leave for a week. He did this in the face of notices in the car park warning vehicle owners that action would be taken against vehicles parked without authority. I shall return to the exact terms of the notices.

3 Employees of Group 5 Security clamped Mr. Barcelo's vehicle. Some time later the clamp was removed and the vehicle was immobilized. The appellant Ramos was responsible for disconnecting a battery terminal and the appellant Fortunato disconnected an electrical connector. Although damage was done to the vehicle during the week it was parked at the car park, and indeed cassettes were taken from the vehicle, it is accepted by the prosecution that the appellants did not damage the vehicle or take the cassettes. They merely immobilized the vehicle.

4 The appellants were charged with, and convicted of, tampering with a motor vehicle contrary to s.41(2) of the Traffic Ordinance and each was fined £80. They appeal against the convictions and sentences. Section 41(2) of the Traffic Ordinance reads:

> "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."

5 Although in his skeleton arguments Mr. Pilley indicated that he would be seeking to persuade the court that the Checkout car park was not a "parking place" within the meaning of s.41(2), in argument before me, quite rightly in my view, he confined his arguments to the question of whether it was proved that the appellants did not have lawful authority or reasonable cause to tamper with the vehicle.

6 Mr. Barcelo's parking of his car in the Checkout car park for a week without authority was undoubtedly a trespass. However, the actions of the appellants in tampering with the vehicle in the way they did amounted to a trespass on the motor car unless they had the consent of Mr. Barcelo to do so, or Mr. Barcelo had willingly assumed the risk of his car being tampered with in the manner described.

7 In *Vine* v. *Waltham Forest London Borough Council* (1), the claimant, feeling unwell, parked her vehicle on privately-owned land. When she returned to her vehicle she found it had been clamped by contractors employed by the owner of the land. She had not seen a notice warning that any vehicle left unattended would be liable to be towed away or clamped and would be recoverable on payment of a fine. The clamp was removed when she paid the sum specified in the notice. She then brought an action against the owner of the land for wrongfully immobilizing and detaining her car. Roch, L.J., in the Court of Appeal, had this to say ([2000] 4 All E.R. at 175):

> "The act of clamping the wheel of another person's car, even when that car is trespassing, is an act of trespass to that other person's property unless it can be shown that the owner of the car has consented to, or willingly assumed, the risk of his car being clamped. To show that the car owner consented or willingly assumed the risk of his car being clamped, it has to be established that the car owner was aware of the consequences of his parking his car so that it trespassed on the land of another. That will be done by establishing that the car owner saw and understood the significance of a warning notice or notices that cars in that place without permission were liable to be clamped. Normally the presence of notices which are posted where they are bound to be seen, for example at the entrance to a private car park, which are of a type which the car driver would be bound to have read, will lead to a finding that the car driver had knowledge of and appreciated the warning."

8 Mr. Pilley argues that the appellants had reasonable cause to take steps in respect of Mr. Barcelo's trespass because Mr. Barcelo consented

to, or willingly assumed, the risk of his car being immobilized, there being notices warning that vehicles parked in the car park without authority would be immobilized or towed away.

9 Mr. Barcelo testified that he did not see the notices which were displayed in the car park. His friend, Mr. Wadkins, testified that he saw Mr. Barcelo's car clamped and helped Mr. Barcelo to try to start the vehicle on his return from leave. Mr. Wadkins' recorded evidence is that the signs were not up when the car was clamped. From the learned Magistrate's short reasons for his decision it seems he must have found that the prosecution had not proved that the notices were not in place when Mr. Barcelo parked his car, for he based his decision to convict on the terms of the notices. If, indeed, the notices were in place it is inconceivable that Mr. Barcelo, an employee of Checkout, had not read them.

10 We have to look at the notices to ascertain what risk Mr. Barcelo consented to or assumed. The following is the wording of the notice at the entrance to the car park, which is underneath a picture of a vehicle being towed away:

> "UNAUTHORISED VEHICLES WILL BE IMMOBILISED AND/OR TOWED AWAY AND NOT RELEASED OR RETURNED UNTIL THE FEE OF £40 AND £5 PER DAY IS PAID TO OUR AGENTS, DETECTIVES & SECURITY INTERNATIONAL LTD. TEL. 77130 OR 73377.
>
> BY ORDER OF THE OWNER / OCCUPIER"

11 However, photographs were produced to me of the full notice at the entrance. I am uncertain whether these were before the learned Magistrate. They do show that there is a further notice under the main notice of warning which reads: "**Customer Parking Area:** Maximum parking of hrs or clamps." There is a further picture of a vehicle being towed away on this notice.

12 In my judgment, reading the two notices together, Mr. Barcelo, if he read the notices, could be taken to have consented to or have undertaken the risk of his car being towed away or clamped. He could rightly assume that clamping was the immobilization referred to in the one notice and I do not consider he could be taken to consent to or undertake the risk of any other form of immobilization of the vehicle. For the appellants to avoid committing a trespass on Mr. Barcelo's vehicle by immobilizing the vehicle as they did the notices needed to be clearer.

13 It follows from the above that I hold that the learned Magistrate's decision was correct. The prosecution proved that the appellants had neither the lawful authority nor a reasonable cause to tamper with Mr. Barcelo's vehicle as they did.

14 Mr. Pilley argues that because the appellants genuinely thought that they had reasonable cause to immobilize the vehicle they are entitled to an acquittal. In my judgment, it is for the court to decide whether there was reasonable cause on all the facts of the case. I can find support for this view in a passage from Archbold, *Criminal Pleading, Evidence & Practice* (2000 ed.), para. 3–30a, at 221, on reasonable cause for failure to answer bail. It reads:

> "In *Laidlaw v. Atkinson, The Times*, August 2, 1986, DC, it was held that there was no reasonable cause for failure to surrender to custody where the defendant, because he handed his charge sheet to his solicitor without making any note of the date on which he was to surrender, mistakenly formed the opinion that he was to surrender on a later date. McCowan J. said that it was not suggested that the failure was deliberate. The reasons outlined played a part in the defendant's confusion and could be said to amount to mitigation, but there was no question of anything having arisen to prevent his attendance. The error was his responsibility. Whether a mistake by a solicitor (giving the defendant the wrong date) amounted to a reasonable excuse was a question of fact to be decided in all the circumstances of the particular case: *R. v. Liverpool City JJ., ex p. Santos, The Times*, January 23, 1997, DC."

15 The appellants were properly convicted.

16 They were each fined £80. It is certain that the appellants genuinely thought they had the authority to take the action they did against a trespasser. I cannot think that the legislature, when it enacted s.41 of the Traffic Ordinance, had this type of conduct, which is essentially a civil wrong, in mind. I substitute for the fine of £80 an absolute discharge for each appellant and order the return of the fines to the appellants if they have been paid.

Appeal dismissed; sentence varied.