Director of Public Prosecutions v Angela Ditchfield

Court
Divisional Court

Judgment Date
12 January 2021

No. CO/475/2020

High Court of Justice Queen's Bench Division Administrative Court

[2021] EWHC 1090 (Admin), 2021 WL 01759038

Before: President of the Queen'S Bench Division and Mr Justice Chamberlain

Tuesday, 12 January 2021

Representation

Mr J. Boyd appeared on behalf of the Applicant.
Mr T. Wainwright appeared on behalf of the Respondent.

Judgment

The President:

1. This is the judgment of the court to which both members have contributed. On 30 October 2019 the respondent, Angela Ditchfield, appeared at Cambridgeshire Magistrates' Court. She had been charged with criminal damage. She relied on the statutory defence under section 5(2) of the Criminal Damage Act 1971 ("the 1971 Act") . After a trial, the justices held that the defence was made out and acquitted her. The Director of Public Prosecutions applied to the justices to state a case. They did so on 31 December 2019. The issue for us is whether, on the evidence before them, they were entitled to find that the statutory defence was made out. If not, it is common ground that the acquittal must be quashed and a verdict of guilty substituted.

2. The prosecution arose from an incident on 15 December 2018 in which the respondent participated in an Extinction Rebellion protest in Cambridge. As part of a group of protestors she walked through the City to the offices of Cambridgeshire County Council at Castle Hill. The group carried a large black coffin-shaped box. On reaching Castle Hill members of the group made speeches and then buried the box, planting a tree on top of it. About five minutes later the respondent was seen to run towards the main entrance doors of the Council and spray paint the area to the right and left of them. On the right she painted the Extinction Rebellion logo. On the left she painted the letters "RIP??" The Council estimated that it would cost £800 to clean off the paint.

3. Section 1(1) of the 1971 Act makes it an offence, without lawful excuse, to destroy or damage 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. The absence of a lawful excuse is an essential element on the offence which must be proved by the prosecution to the criminal standard. See *Unsworth v DPP [2010] EWHC 3037 (Admin) [4] (Sir James Munby)* .

4. Section 5(2) of the 1971 Act provides:

> "(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 Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse -
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> …
>
> (b) if he destroyed or damaged or threatened to destroy or damage the property in question or, in the case of a charge of an offence under section 3 above, intended to use or cause or permit the use of something to destroy or damage it 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 defence he believed -
>
> (i) that the property, right or interest was in immediate need of protection; and
>
> (ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances."

Section 5(3) of the 1971 Act provides that for the purposes of section 5 , "it is immaterial whether a belief is justified or not if it is honestly held".

5. The case stated records that there was no dispute between the parties as to the facts of the incident. It was common ground that the property to which the respondent applied paint was not her own and that she intended to do so. Because of her brain injury caused by illness some years ago, the respondent was assisted by an intermediary. Her evidence is summarised in the case stated as follows.

> "Her evidence was that the environmental crisis was real and immediate, stating it was her belief that the damage was happening now, citing Micronesia as saying that the do not have 12 years left in which matters can be sorted as islands are being submerged and homes destroyed. She stated that Jakarta is falling into the sea and is becoming submerged. Her understanding is that people's homes will be destroyed and that hundreds of millions of people will need somewhere new to live. She stated that Bangladesh is only one metre above sea level and so is especially vulnerable to flooding and that she had had direct contact with a friend in Dakar who had been adversely impacted upon by flooding. She gave evidence about changes she had made to her home lifestyle, such as becoming vegetarian and restricting the times she would fly to Uganda to visit family so as to reduce her own harmful impact on the environment. She felt that in Cambridge in particular there was political inertia about the issue, citing the example of key Council documents being silent as to green issues, only to then be revised later on after Westminster had declared a climate emergency. She stated that having attended a reading group to assess if XR were a group suitable to become involved with, she concluded that it was and started supporting them in October 2018. She stated that she had felt some regret after the spraying and knew that not everyone in her group had felt that it was the best thing to do, but that she acted choosing the motif that she did in fact to ask the Council not to bury our children. She also stated that the Council would be able to get the paint off. She stated that she had not planned the spraying (she had paint in her bag as it had been used earlier to decorate a coffin prop used in the demonstration) but had been stirred by moving speeches at the demonstration and felt she had to take immediate action to protect the environment. She stated that in her mind

> the action was done not just to get attention but in fact to get something done to protect people's property, crops and the world."

6. The respondent was not cross-examined. The justices' attention was drawn to three cases: *R v Hunt [1977] 66 Cr App R 105* , *R v Hill [1989] Cr App R 74* and *R v Jones [2004] EWCA Crim* .

7. The advocates agreed that the effect of the latter authority was that the "in order to protect property" test had both an objective and a subjective component. The justices made plain that they considered that the respondent's action "could be said to have been taken to protect property". They concluded as follows.

> "We find that you have a very strong and honestly held belief that we are facing a climate emergency and that you acted on the spur of the moment to protect property under threat from climate change, believing that immediate protection was necessary and that the action could be said to have been taken to protect property and that you believed the action was reasonable in all the circumstances. "

8. The respondent is represented before us by Mr Tom Wainwright, who did not appear below. He submits that the case stated omits material parts of the evidence and invites us to remit it to the justices under section 28A(2) of the Senior Courts Act 1981 .

9. We have carefully considered the amendments which the justices were invited to make. The first was that the respondent had referred to two exhibits which the respondent had adduced in evidence by agreement with the prosecution, a letter from her general practitioner addressing her medical history, and confirming that she suffered from "serious cognitive and mental deficit secondary to brain tumour" and that "I suspect she did not fully understand the consequences of participating in civil disobedience" and an excerpt from the Extinction Rebellion website demonstrating her understanding that at the time she committed the damage, damage to property was currently happening across the world as a direct and immediate result of the climate emergency.

10. The justice were also invited to add to the case stated the following: (a) that the prosecution had relied on the respondent's prepared statements in which she had said that "humanity is criminally damaging the world"; (b) that the respondent had referred to a Welsh village which had to be abandoned as a result of rising sea levels damaging people's homes and expressed concerns about crop damage from the climate emergency in the United Kingdom; (c) that the respondent had said that the Council had been actively encouraging climate change by destroying local hedgerows and parks; (d) that its 2018/2019 business plan did not refer to climate change; and that the respondent had exhausted other democratic means of prompting the local authority into action; and (e) that the respondent had noted that Extinction Rebellion's actions in Cambridge had been cited by the Council in a press release saying it was now going to take action.

11. We are prepared to assume for the purposes of this appeal the correctness of the amendments which the justices were invited to make, without a ruling on the merits of the application. We therefore proceed on the basis that the respondent honestly believed that climate change was currently damaging people's property both in the United Kingdom and abroad and that she acted as she did not just to get attention but to prompt the Council to act to protect property, believing that she had

exhausted other democratic means of prompting such action. The question for us is whether, on those facts, the justices could rationally conclude that the defence under section 5(2) of the 1971 Act was made out.

12. In *R v Hunt [1978] Cr App R 105* the appellant had set fire to an isolated guest room in an old people's home. On his case he did so in order to draw attention to the defective fire alarm system there which he claimed the Council had negligently failed to repair. The question whether the appellant was entitled to rely on the defence in section 5(2) depended on the meaning of the words "in order to protect property belonging to another". It was argued for the appellant that these words were "subjective in concept". Roskill LJ, giving the judgment of the court, said this at p.108:

> "The question whether or not a particular act of destruction or damage or threat of destruction or damage was done or made in order to protect the property belonging to another must be, on the true construction of the statute, an objective test. Therefore, we have to ask ourselves whether, whatever the state of this man's mind and assuming an honest belief, that which he admittedly did was done in order to protect this particular property, namely the old people's home in Hertfordshire."

13. The answer was that this particular act had not been done in order to protect property; rather it had been done "in order to draw attention to the defective state of a fire alarm". The act was not one which "in itself did protect or was capable of protecting property".

14. In *R v Hill* the appellants had been charged with possessing a hacksaw blade intended to be used to cut part of the fence of a United States naval facility. Their defence was that they were acting as part of a campaign designed to force the United Kingdom to abandon nuclear weapons, thereby saving their own and other's property from destruction. The trial judge directed the jury to convict. Lord Justice Lane CJ, sitting with McCulloch and Kennedy JJ held that the trial judge had been correct to conclude that the proposed act was "far too remote from the eventual aim at which the appellant was targeting her actions to satisfy the test" and that it was necessary to ask whether there was evidence that the defendant believed that immediate action had to be taken to do something which would otherwise be a crime in order to prevent the risk of something worse happening. The Court of Appeal held that the trial judge was right to conclude that there had been no such evidence.

15. Finally, in *R v Jones (Margaret) [2005] QB 259 [2005] QB 259* defendants were charged on an indictment containing various counts relating to criminal damage at an air base. They relied on a number of defences, including that under section 5(2) of the 1971 Act . As to that, Latham LJ, giving the judgment of the court, held at [44] relying on *Hunt* that the court had to ask three questions. First, could the act be said to be done in order to protect property? Second, at the time he acted did the defendant believe that property was in immediate need of protection? Third, did the defendant believe that the means adopted or proposed would be reasonable, having regard to all the circumstances? In answering the second and third of these questions it was immaterial whether the belief was justified. At [45] the court held that the only objective element was whether, on the facts as believed by the defendant, the criminal damage alleged could amount to something done to protect another's property.

16. At this stage we should record that we were invited, before the hearing in written submissions, to adjourn the hearing of this appeal pending judgment in a case currently before the Criminal Division of the Court of Appeal (*R v Thacker*). On the basis of the information provided by the respondent, this was an appeal by 15 individuals convicted of various offences at Stansted Airport while trying to prevent the departure of an aeroplane on which people were to be deported. The charges included criminal damage. The defences relied on were section 3 of the Criminal Law Act 1967 and the common law defence

of necessity or duress of circumstance. The issues before the Court of Appeal are said to centre on "the interplay between the subjective and objective element in so called justification defences".

17. In our judgment, it was not appropriate to adjourn this appeal pending judgment in *R v Thacker.* There were two reasons for this. First, on the information put before us by the respondent, the appellants in that case did not rely on any defence under section 5(2)(b) of the 1971 Act . It follows that the Court of Appeal's judgment when given will not be directly relevant to the interpretation of that provision. Second, and in any event, the scope and elements of the defence under section 5(2)(b) are already the subject of authority from the Court of Appeal. As was observed in *Hill* , the decision in *Hunt* is binding, even on the Court of Appeal. It is certainly binding on us, as are the judgments in *Hill* and *Jones* , subject to an issue that has been raised that we mention below.

18. That being so, the principal question is whether, on the basis that the respondent's beliefs were as she claimed, the criminal damage alleged could amount in law to something done to protect another's property, as that phrase has been interpreted and applied in the three authorities we have mentioned.

19. The answer in our view is that it could not. The subjective belief required in section 5(2)(b)(ii) is that "the property … was in immediate need of protection" with an emphasis given to the word "immediate". This suggests to us that for an act to have been done "in order to protect property" it must of a kind capable of conferring immediate protection on the property concerned. An act whose purpose is to put pressure on a public authority to take protective action is, on any natural reading of the word, not capable of conferring immediate protection in the sense required by the statute. If the act at issue here can be said to give rise to protection at all, several steps would be involved. The act would demonstrate the depth of public feeling about climate change; that demonstration may then, over weeks or months or even years, prompt public officials to formulate and implement policies which, when taken together with the policies of other officials in this and other countries, may go some way to conferring the protection desired. We are certain that this is not the kind of act Parliament had in mind when enacting the defence in section 5(2)(b) . This is consistent with the reasoning and outcome in *Hunt,* where an act done in order to draw the council's attention to the need to take action to protect property did not satisfy the test. It is also consistent with *Hill* where campaigning activities designed to achieve a shift in government policy were held too remote to satisfy the test. Both cases would have been wrongly decided if the acts charged in the present case were capable of having been done "in order to protect property".

20. Mr Wainwright relies on the decision of *R v Wang [2005] UKHL 9, [2005] 1 WLR 661, at [14]* , as disapproving the course taken in *Hill* of directing the jury to convict and of showing that the proximity of the connection between the act and the protection sought to be conferred is a question of fact.

21. *R v Wang* was concerned, however, with the constitutional role of a jury in a trial on indictment, rather than the limits of what a decision-maker and, in particular in this case, a bench of magistrates can rationally conclude. As Mr Wainwright was bound to accept, if the decision in this case is one that no reasonable magistrate could have reached on the facts found, then this appeal must succeed.

22. We do not read *R v Wang* as casting any doubt on the conclusion in *Hill,* that on the facts of that case, no defence under section 5(2)(b) of the 1971 Act was available. That is no doubt why Mr Wainwright advanced his alternative submission that *Hunt* , *Hill* and *Jones* were indeed wrongly decided in so far as they import any objective element into the defence in section 5(2)(b) . As Mr Wainwright accepts, we are bound to reject the submission, but even if we were not so bound, we would have rejected it as inconsistent with the plain language of section 5(2)(b) read as a whole.

23. We have, in reaching our conclusions, noted the discussion about section 5 of the 1971 Act in *Smith, Hogan and Ormerod's Criminal Law* 15th Ed. 2005. It seems to us, however, that Mr Wainwright's argument would have the effect of providing a defence to a potentially large number of individuals who damage the property of another in the honest belief that by doing so they will put pressure on a public body of official to take action to prevent or mitigate the damage caused by climate change. The defence would also presumably apply wherever public protective measures are honestly considered necessary to avert or mitigate damage with other immediate causes, whether environmental or otherwise. This would give *carte blanche* to the pursuit of politics by means of damage to public or private property, which Parliament cannot, in our view, have intended.

24. *R v Jones* went to the House of Lords. Although the construction of section 5(2)(b) was not among the points considered there, Lord Hoffmann made this point, at [89], which is as apposite here as it was in that case.

> "…civil disobedience on conscientious grounds as a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the lawbreakers on one side and the law-enforcers on the other. The protestors behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch for the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protestors into account…"

25. On the facts accepted by the justices, the acts for which the respondent faced trial could be said to form part of the tradition to which Lord Hoffmann referred, but they were, nonetheless, unlawful. They were not taken "in order to protect property" in the sense in which those words were used in section 5(2)(b) of the 1971 Act . The contrary conclusion was not rationally open to the justices. It follows that the acquittal will be quashed and a verdict of guilty substituted under section 28A(3) of the 1981 Act . The matter will be remitted to the justices to determine the appropriate sentence.