BEFORE

1973
Nov. 9

LORD JUSTICE ROSKILL, LORD JUSTICE JAMES AND MR. JUSTICE TALBOT

DAVID RAYMOND SMITH

Criminal Damage—Destruction of or Damage to Property Belonging to Another—Honest but Mistaken Belief that Property was Defendant's Own—No Offence Committed—Criminal Damage Act 1971 (*c.* 48), *ss.* 1 (1), 5 (2).

Certificate—Grant Appropriate only where Question of Fact or Question of Mixed Law and Fact Involved—Criminal Appeal Act 1968 (*c.* 19), *s.* 1 (2).

A person who destroys or causes damage to property belonging to another in the honest though mistaken belief that the property is his own does not commit the offence of criminal damage, contrary to section 1 (1) of the Criminal Damage Act 1971. Provided that the belief is honestly held, it is irrelevant to consider whether or not it is a justifiable belief.

A certificate for appeal under section 1 (2) of the Criminal Appeal Act 1968 should not be granted on a ground involving a question of law alone, but should be confined to cases where the ground on which the certificate is sought is a question of fact or of mixed law and fact.

Appeal against conviction.

The appellant was convicted at Woodford Crown Court on June 28, 1973, of criminal damage and was sentenced by Deputy Circuit Judge A. H. Tibber, Esq., to a conditional discharge for twelve months and ordered to pay £40 compensation.

The following statement of facts is taken from the judgment.

In 1970 the appellant became the tenant of a ground-floor flat at 209, Freemasons Road, E.16. The letting included a conservatory. In the conservatory the appellant and his brother, who lived with him, installed some electric wiring for use with stereo equipment. Also, with the landlord's permission, they put

up roofing material and asbestos wall panels and laid floor boards. There is no dispute that the roofing, wall panels and floor boards became part of the house and, in law, the property of the landlord. Then in 1972 the appellant gave notice to quit and asked the landlord to allow the appellant's brother to remain as tenant of the flat. On September 18, 1972, the landlord informed the appellant that his brother could not remain. On the next day the appellant damaged the roofing, wall panels and floor boards which he had installed in order—according to the appellant and his brother—to gain access to and remove the wiring. The extent of the damage was £130. When interviewed by the police, the appellant said "Look, how can I be done for smashing my own property? I put the flooring and that in, so if I want to pull it down it's a matter for me."

J. Rylance for the appellant.
L. Gerber for the Crown.
The arguments appear fully from the judgment.

JAMES L.J.: On June 28, 1973, at Woodford Crown Court, David Raymond Smith was convicted of an offence of causing criminal damage, contrary to section 1 (1) of the Criminal Damage Act 1971. He appeals against that conviction upon a question of law.

At the conclusion of the trial the deputy Circuit judge purported to grant a certificate under section 1 (2) of the Criminal Appeal Act 1968. The certificate reads: "I certify that the case is a fit case for appeal on the ground that I directed the jury that honest belief by the defendant that the property damaged was his own and that he was therefore entitled to do the damage he did could not, as a matter of law, be 'lawful excuse' notwithstanding the provisions of section 5 of the Criminal Damage Act 1971. It seems to me that the law is not clear."

That certificate, on the face of it, sets out a question of law as the ground on which it is granted. Section 1 of the Criminal Appeal Act 1968 provides for an appeal against conviction on indictment, and subsection (2) of that section reads: "(2) The

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appeal may be—(*a*) on any ground which involves a question of law alone; and (*b*) with the leave of the Court of Appeal, on any ground which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal; but if the judge of the court of trial grants a certificate that the case is fit for appeal on a ground which involves a question of fact, or a question of mixed law and fact, an appeal lies under this section without the leave of the Court of Appeal." The jurisdiction of the judge of the court of trial in relation to the grant of a certificate under that section extends only to grounds which are questions of fact or mixed law and fact. A convicted person has a right of appeal upon questions of law alone. The purported certificate in the present case is a nullity being granted in excess of jurisdiction. The present appeal is yet another instance of a number of cases, which have recently come before this Court, in which the judge of the trial court has purported to grant a certificate on grounds involving questions of law alone. We wish to draw attention, as we did in the immediately preceding case of AUKER-HOWLETT, to the need to ensure, when considering the grant of a certificate under section 1 (2) of the Criminal Appeal Act 1968, that the ground upon which the certificate is sought is a question of fact or a question of mixed law and fact.

The question of law in this appeal arises in this way.

[The learned Lord Justice stated the facts and continued.]

The offence for which he was indicted is in these terms: "Damaging property, contrary to section 1 (1) of the Criminal Damage Act 1971. *Particulars of Offence*: David Raymond Smith and Steven John Smith, on September 19, 1972, in Greater London, without lawful excuse, damaged a conservatory at 209, Freemasons Road, E.16. the property of Peter Frank Frand, intending to damage such property or being reckless as to whether such property would be damaged." The Steven John Smith jointly charged is the appellant's brother. He was acquitted. The appellant's defence was that he honestly believed that the damage he did was to his own property, that he believed

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that he was entitled to damage his own property and therefore he had a lawful excuse for his actions causing the damage.

In the course of his summing-up the deputy judge directed the jury in these terms: "Now, in order to make the offence complete, the person who is charged with it must destroy or damage that property belonging to another, 'without lawful excuse,' and that is something that one has got to look at a little more, members of the jury, because you have heard here that, so far as each defendant was concerned, it never occurred to them, and, you may think, quite naturally never occurred to either of them, that these various additions to the house were anything but their own property.... But members of the jury, the Act is quite specific, and so far as the defendant David Smith is concerned lawful excuse is the only defence which has been raised. It is said that he had a lawful excuse by reason of his belief, his honest and genuinely held belief, that he was destroying property which he had a right to destroy if he wanted to. But, members of the jury, I must direct you as a matter of law, and you must, therefore, accept it from me, that belief by the defendant David Smith that he had the right to do what he did is not lawful excuse within the meaning of the Act. Members of the jury, it is an excuse, it may even be a reasonable excuse, but it is not, members of the jury, a lawful excuse, because, in law, he had no right to do what he did. Members of the jury, as a matter of law, the evidence, in fact, discloses, so far as David Smith is concerned, no lawful excuse at all, because, as I say, the only defence which he has raised is the defence that he thought he had the right to do what he did. I have directed you that that is not a lawful excuse, and, members of the jury, it follows from that that so far as David Smith is concerned, I am bound to direct you as a matter of law that you must find him guilty of this offence with which he is charged." It is contended for the appellant that that is a misdirection in law, and that, as a result of the misdirection, the entire defence of the appellant was wrongly withdrawn from the jury.

The Criminal Damage Act 1971, s. 1 (1), reads: "A person who without lawful excuse destroys or damages any property

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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, shall be guilty of an offence." The offence created includes the elements of intention or recklessness and the absence of lawful excuse. There is in section 5 of the Act a partial "definition" of lawful excuse. Section 5 applies to offences under section 1 (1) and, not relevant for present purposes, to offences under sections 2 and 3 with certain exceptions.

Section 5 (2), so far as it is relevant, reads: "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—(*a*) if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances; . . ." Section 5 (3) reads: "For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held." Section 5 (5) reads: "This section shall not be construed as casting doubt on any defence recognised by law as a defence to criminal charges."

It is argued for the appellant that an honest, albeit erroneous, belief that the act causing damage or destruction was done to the defendant's own property provides a defence to a charge brought under section 1 (1). The argument is put in three ways. First, that the offence charged includes the act causing the damage or destruction and the element of *mens rea*. The element of *mens rea* relates to all the circumstances of the criminal act. The criminal act in the offence is causing damage to or destruction of "property belonging to another" and the element of *mens rea*, therefore, must relate to "property belonging to another." Honest belief, whether justifiable or not, that the property is the defendant's own negatives the element of *mens rea*. Secondly, it is argued that by the terms of section 5, in particular the words of subsection (2), "whether or not he

would be treated for the purposes of this Act as having a lawful excuse apart from this subsection," and the words in subsection (5), the appellant had a lawful excuse in that he honestly believed he was entitled to do as he did to property he believed to be his own. This it seems is the way in which the argument was put at the trial. Thirdly, it is argued, with understandable diffidence, that, if a defendant honestly believes that he is damaging his own property, he has a lawful excuse for so doing because impliedly he believes that he is the person entitled to give consent to the damage being done and that he has consented: thus the case falls within section 5 (2) (*a*) of the Act.

We can dispose of the third way in which it is put immediately and briefly. Mr. Gerber for the Crown argues that to apply section 5 (2) (*a*) to a case in which a defendant believes that he is causing damage to his own property involves a tortuous and unjustifiable construction of the wording. We agree. In our judgment, to hold that those words of section 5 (2) (*a*) are apt to cover a case of a person damaging the property of another in the belief that it is his own would be to strain the language of the section to an unwarranted degree. Moreover, in our judgment, it is quite unnecessary to have recourse to such a construction.

Mr. Gerber invited our attention to CAMBRIDGESHIRE AND ISLE OF ELY COUNTY COUNCIL AND ANOTHER *v.* RUST [1972] 3 All E.R. 232, a case under the Highways Act 1959, s. 127, concerning the pitching of a stall on a highway without lawful excuse. The case is cited as authority for the proposition that in order to establish a lawful excuse as a defence it must be shown that the defendant honestly but mistakenly believed on reasonable grounds that the facts were of a certain order, and that if those facts were of that order his conduct would have been lawful. Applying that proposition to the facts of the present case, Mr. Gerber argues that the appellant cannot be said to have had a lawful excuse because in law the damaged property was part of the house and owned by the landlord. We have no doubt as to the correctness of the decision in the case cited. The proposition is argued here in relation to the appellant's con-

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tention that he had a lawful excuse and does not touch the argument based on absence of *mens rea*.

It is conceded by Mr. Gerber that there is force in the argument that the element of *mens rea* extends to "property belonging to another." But, it is argued, the section creates a new statutory offence and that it is open to the construction that the mental element in the offence relates only to causing damage to or destroying property; that if in fact the property damaged or destroyed is shown to be another's property the offence is committed, although the defendant did not intend or foresee damage to another person's property.

We are informed that, so far as research has revealed, this is the first occasion on which this Court has had to consider the question which arises in this appeal.

It is not without interest to observe that under the law in force before the passing of the Criminal Damage Act 1971, it was clear that no offence was committed by a person who destroyed or damaged property belonging to another in the honest but mistaken belief that the property was his own or that he had a legal right to do the damage. In TWOSE (1879) 14 Cox C.C. 327, the prisoner was indicted for setting fire to furze on a common. Persons living near the common had occasionally burned the furze in order to improve the growth of grass but without the right to do so. The prisoner denied setting fire to the furze and it was submitted that, even if it were proved that she did, she could not be found guilty if she bona fide believed she had a right to do so whether the right were a good one or not. Lopes J. ruled that, if she set fire to the furze thinking she had a right to do so, that would not be a criminal offence. Upon the facts of the present appeal the charge, if brought before the 1971 Act came into force, would have been laid under section 13 of the Malicious Damage Act 1861, alleging damage by a tenant to a building. It was a defence to a charge under that section that the tenant acted under a claim of right to do the damage.

If the direction given by the Deputy Judge in the present case is correct, then the offence created by section 1 (1) of the 1971 Act involves a considerable extension of the law in a sur-

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prising direction. Whether or not this is so depends upon the construction of the section. Construing the language of section 1 (1), we have no doubt that the *actus reus* is "destroying or damaging any property belonging to another." It is not possible to exclude the words "belonging to another" which describe the "property." Applying the ordinary principles of *mens rea*, the intention and recklessness and the absence of lawful excuse required to constitute the offence have reference to property belonging to another. It follows that, in our judgment, no offence is committed under this section if a person destroys or causes damage to property belonging to another if he does so in the honest though mistaken belief that the property is his own, and provided that the belief is honestly held it is irrelevant to consider whether or not it is a justifiable belief.

In our judgment, the direction given to the jury was a fundamental misdirection in law. The consequence was that the jury were precluded from considering facts capable of being a defence to the charge and were directed to convict.

For these reasons on November 5 at the conclusion of argument we allowed the appeal and ordered that the conviction be quashed.

Conviction quashed.

Solicitors: The Solicitor, Metropolitan Police, for the Crown.