

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. FO41 of 1977

BETWEEN	BASIL FULLER	PLAINTIFF
A N D	THE ATTORNEY GENERAL	DEFENDANT

A. J. Nicholson, L McFarlane and W. J. Vassell instructed by Dunn, Cox and Orrett for the Plaintiff.

N. Fraser instructed by the Director of State Proceedings for the Defendant.

Heard on: March 16, 17 and 18, May 21 and June 18, 1981.

~~JUDGMENT~~

CAMPBELL J.

The plaintiff is the registered owner of property situate at Berrydale in the parish of Portland. The southern boundary of this property is the Rio Grande River. Between the Rio Grande River and a parochial road to the north is a stretch of beach land.

The plaintiff complains that the defendant by his servants and agents has trespassed on his beach land and has constructed thereon a tall mound about fifteen feet high called a <sup>groyn</sup> ~~groin~~. He accordingly claims damages for this act as constituting trespass and or nuisance.

The defendant admits, having through his servants and agents, erected a "Fish net Bund" twelve feet high along the beach of the river. His action is defended on the ground of discharging a statutory duty under the Main Roads Act to prevent erosion of the main road caused from frequent flooding of the river and that such undertaking was of urgent necessity.

The plaintiff under cross-examination says that he has lived in Berrydale for 84 years since 16th July, 1897. To his knowledge the Rio Grande was in spate on 27th November, 1937. It overflowed its bank from source to mouth. Every now and then it gets into spate but not as in 1937. There is flooding when rain falls. This creates problems for people and property because rain falls quite often in Portland.

In the same vein is the evidence of Mr. Hugh Murray a Consultant Engineer to the works division of the Ministry of Construction. He had knowledge that the Rio Grande area of Berrydale was prone to being flooded whenever the Rio Grande came down to any extent. In 1969 he carried out a survey specifically in this area and recommended the construction of a "Fish net Bund" for the protection of life, property and the main road. Construction started in 1976 and the project as a whole was not yet completed. The Bund at present extends for a length of 1300 ft. It runs parallel to a main road for a distance eastward of 300 ft. from the eastern boundary of the plaintiff's land. From this eastern boundary of the plaintiff's land the Bund also runs westward parallel to the parochial road which is down-stream from the main road. The entire length of the plaintiff's land from east to west is cut and traversed by this parochial road below and parallel to which for a distance of 500 ft. the Bund is constructed. The said Bund continues parallel with the parochial road westwards beyond the plaintiff's land.

The parochial road which traverses the plaintiff's land is about 80 ft. from the edge of the Rio Grande.

The plaintiff at the start of the hearing sought and obtained certain admissions. I am not sure whether the defendant's Attorney had adverted his mind to the consequence of one of these admissions because if he had, he would have realised that the effect of this admission, namely that the Rio Grande/<sup>River</sup> is navigable, was to remove the foundation on which the statutory defence under the Main Roads Act rested.

The defendant in pleading the Main Roads Act as statutory authority for the admitted entry and construction of the Fish net Bund on the plaintiff's land, no doubt had in mind section 21(b) and section 22(1). It is to stultify this defence that the plaintiff wrested admissions from the defendant that notice of entry was not given as also that the Rio Grande River is navigable.

Section 21(b) is to the following effect:

" 21. The Director or any person authorized by him, may do any or all of the following things in the execution of the works -

- " (a) .....
- (b) He may, when he deems it necessary, for the preservation of a main road, alter or regulate the course of any river, stream or water course not being navigable".

Section 22 authorizes entry on land for the purposes, among others, of section 21(b), without previous notice so long as the following pre-conditions are satisfied namely:-

- (a) The land on which entry is made is within a mile distant from the boundary of the main road measured in a straight line;
- (b) the land is not one on which there is a house, yard or garden.

If the land is one on which there is a house, yard or garden, entry thereon is only lawful for a temporary purpose in cases of urgent necessity occasioned by the laying out, repairing, widening or altering of a main road. There is power in such a case to enter upon the land without notice for the making of a temporary road thereon to be used by the public.

If the land, albeit not one on which there is a house, yard or garden, is enclosed or cultivated land, not less than fifteen days prior notice in writing must be given to the occupier before entry can lawfully be made except of course in the case of urgent necessity as previously mentioned.

The land on which the defendant entered being well within the one mile limit, notice was required to be given only if the land was one on which there is a house, yard or garden or alternatively it is enclosed or cultivated land as defined in the Act.

The expressions "cultivated", "uncultivated" and "ruinate" when used in connection with the word "land" applies to the actual state or condition of each particular portion of any land entered upon without reference to any other portion of the same land whether separated or not therefrom by any boundary or fence - see section 2 of the Act.

The evidence of the plaintiff is that the southern portion of his land stretching to the river's edge is separated from the

northern portion by a parochial road. His house is in the north-eastern portion of his land. His evidence as to the character of his entire land is that it consists of arable, grazing and beach lands. His beach land is situated between the river and the parochial road. From this part he used to sell sand and stone. He says that on several dates from about 5th April, 1976, servants and agents of the crown entered upon this beach land and erected a mound thereon.

It is clear from this evidence that the land on which the defendant entered was not that part of the land on which the plaintiff's house was, nor was it enclosed or cultivated land. No notice of intended entry on the land was accordingly required to be given. The fact that the defendant admitted that no written notice was served on the plaintiff is therefore innocuous and does not stultify the statutory defence if otherwise capable of being raised.

It is to the admission by the defendant that the Rio Grande River is navigable that I now turn.

Learned Attorney for the plaintiff invites me to act on this admission as binding on the defendant at least for the purposes of this case. I cannot understand the thinking of the defendant's Attorney-at-Law in having placed on the record a statement by him, albeit not an admission as that concept is understood, that the Rio Grande River is navigable, since to do so is to abandon the statutory defence under the Main Roads Act which is predicated on the Rio Grande River being a non-navigable river.

In Murphy v. Ryan (1868) 16 W.R. 678 at page 680 O'Hagan J. in delivering the judgment of the Court said and I quote:-

" The test of a navigable river is its navigability and the flux and reflux of the sea ..... navigable and "tidal" as applied to a river are synonymous in law though the former has a popular as well as a legal meaning. I adopt the statement of Chancellor Kent (3 Kent Comm. 11th edition 520) which will be found to be supported by authority. In the Common Law sense of the term those (rivers) only were deemed navigable in which the tide ebbed and flowed".

There is thus a legal meaning of navigable river, I am not sure, in fact I am extremely doubtful whether the Rio Grande can be

classified as a navigable river within this legal meaning. However even if the purported admission is ignored, evidence would be required as to the characteristic features of the river in order to enable me to say whether it is navigable or otherwise. There being no such evidence the defence based on statutory authority fails.

The defence pleaded that the undertaking i.e. the construction of the "Fish net Bund" was of urgent necessity.

In the final addresses, Learned Attorney for the defendant submitted that one of the reasons for entering on the land and constructing the Bund was the urgent necessity due to flooding and the plaintiff himself admits periodic flooding.

He referred to Cope v. Sharpe (2) (1912) 1KB 496.

Mr. Vassell in his reply submitted that the defence of necessity does not arise on the pleadings nor on a fair assessment of the presentation of the case. He submitted that there is, in any case, no evidence of urgent necessity, therefore, even if there is still the Common Law Defence of necessity, there is no evidence of it in the case under consideration.

Firstly, does the defence of necessity arise on the pleadings? The expression used is "urgent necessity".

This is an expression used in relation to the entry on land under the Main Roads Act. However the pleading stated that the entry on the land was to build the fish net bund to prevent erosion of the main road caused from frequent flooding of the river and that the undertaking was of urgent necessity. If the purpose of constructing the bund was solely in exercise of the statutory authority under section 21(b) of the Main Roads Act, there would be no need to refer to urgent necessity. The reference to urgent necessity, could not be to justify entry without notice, because the circumstances of the entry did not require notice. The pleader in my view must have intended "urgent necessity" in relation to the problems posed by the periodic flooding of the river. If there is ambiguity as to whether the defendant was, in addition to the statutory defence, also pleading the Common Law Defence

of necessity, it could have been cleared by asking for further and better particulars of this reference to urgent necessity.

This not having been done, the defendant is entitled to rely on the generality of his pleading and adduce all such evidence that can properly establish defences fairly open to him on his pleadings. This the defendant has done.

There is uncontradicted evidence that the flooding of the Berrydale area whenever the Rio Grande is in spate to any extent creates problems for people and property and that the construction of the "Fish net Bund" was for the protection of life, property and the main road.

The plaintiff's evidence is that every now and then the Rio Grande gets into spate.

What does the Common Law Defence of necessity consist in? Does it fairly arise on these facts?

In Dewey v. White and others (1827) 173 E.R. 1079. An action was brought for trespass "for forcing and throwing a stack of chimneys upon the roof of the plaintiff's house and damaging and injuring the same".

The facts were that the chimneys were part of a house of one J.C. adjoining a highway in the parish of St. Andrew, Holborn and also adjoining the house of the plaintiff and near to certain other houses. The house of J.C. had recently been damaged and consumed by fire and the said chimneys were by reason of the said fire in a ruinous and dangerous state and in great and immediate danger of falling in and upon the highway and upon the adjoining houses and thereby doing injury to and destroying the lives of H.M. subjects passing along the highway and inhabiting the said dwelling houses. It was necessary for the safety of the said subjects for the chimneys to be removed.

The defendants removed the chimneys which were thrown down on the plaintiff's premises thereby unavoidably causing damage to his house. The defendants were firemen in the employment of the British Fire office.

It was contended that the plea of necessity, even if made out, was no defence to the action.

Best C.J. said:-

" I have no hesitation in declaring my opinion now that the plea if made out is a good answer to the action. In analogy to the doctrine of nuisances and the cases of captains of ships throwing over board cargoes to save the lives of crews, I think it was the duty and right of these defendants to remove these chimneys and to prevent their remaining to endanger the lives of H.M. subjects".

The trial proceeded and the defendants obtained a verdict in which the plaintiff acquiesced. This case was referred to with approval in the later case of Cope v. Sharpe (No. 2) 1912 2KB 496.

In Southport Corporation v. Esso Petroleum Co. 1953 2 All E.R. at 1209 Devlin J said:

" The safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison and the necessity for saving life has at all times been considered a proper ground for inflicting such damages as may be necessary on another's property".

This statement of principle was not repudiated when the case reached the House of Lords. In fact it was expressly approved by Lord Jowitt who said in Esso Petroleum v. Southport Corporation (H.L.) (1955) P. 864 at page 866:

" This action which the respondents brought against the appellants the owners of the SS Liverpool and against Mr. Meakin (the master) was based on trespass, nuisance and negligence. Devlin J. decided that the fact that it was necessary to discharge the oil in the interest of the safety of the crew afforded a sufficient answer to the claim based on trespass or nuisance. I agree with him in this view".

In the light of the statement of principle in these cases there can be no doubt that where the act complained of was done to save lives, especially where it is the lives of members of a whole community that are involved, a defence of necessity can be made out if from a fair, reasonable, and objective standpoint, that which was done was to avoid a real and imminent danger of loss of lives.

Learned Attorney for the plaintiff submitted that there was no imminent danger of flooding so there was no urgent necessity.

When one has to contend with the vagaries of nature which can overnight turn rivers, gully courses and the likes into a deluge with swift and sudden death for persons caught therein, it becomes apparent that to be unprepared is the surest way of causing death instead of saving lives. The known fact of the periodic spating of the Rio Grande which in the words of the plaintiff creates problems for persons and property is sufficient testimony to the need to take corretive measures to contain the river and prevent it from flooding the Berrydale district with resultant loss of life and property.

I find on the evidence that the substantial purpose behind the construction of the fish net bund was to save the lives and property of the residents in the Berrydale area in addition to avoiding erosion of the main road which abutted the estern end of the plaintiff's property.

The defence of necessity has been established and provides the justification for the otherwise wrongful entry by the defendant's servant and agents on the plaintiff's land.

The plaintiff's action is accordingly dismissed, and judgment entered for the defendant with costs to be agreed or taxed.

U. V. CAMPBELL,  
Judge.