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VALENTINE JOHNSON *v.* VAUGHN MORRIS, ANDREA SILVERA, JANICE TENN, BEVERLEY MIRET AND SUZAN NICHOLS

[COURT OF APPEAL (Rowe, P., Wright and Downer, JJ.A.) July 8, 22; October 6, 1988]

Landlord and Tenant – Rent restriction – Notice to quit – Ground of notice premises required to carry out repairs – Onus on landlord to show hardship greater for him than tenant Interference with trial judge's discretion – Rent Restriction Act, ss. 17, 25(1)(9).

Each of the five appellants was a tenant of one of five similar apartments at premises in Norbrook, St. Andrew. The respondent bought the premises in March 1987 and shortly after taking possession served notices to quit on the appellants. The appellants did not comply with the notice and in May 1987 the respondent sent a draft lease to the appellants offering a 2 year term at a considerably increased rental. The appellants applied to the Rent Board for assessment of the rental under section 19 of the Rent Restriction Act and tendered as rent lower sums than they had been paying. The respondent who was a civil engineer contended that the process involved in the proposed refurbishing of laying a parquet flooring was a delicate and elaborate one which could not be performed while the tenants were in occupation. The Resident Magistrate for St. Andrew on the respondent's application ordered the appellants to quit and deliver up the apartments to the respondent. On appeal,

Held: (i) it is reasonable for a landlord to wish to preserve and enhance the equity of his property by repairing and refurbishing it and there is a distinction between "reasonably required" and merely "required", which is the standard prescribed by section 25(1) of the Rent Restriction Act. Since the work was not of an inconsequential nature or a mere sham to obtain possession but there was evidence that the landlord seriously wished to change the flooring he had satisfied the statutory test of "required for the purpose of being repaired, improved or rebuilt".

(ii) the onus is on the landlord to satisfy the Court that having regard to all the circumstances of the case less hardship would be caused by granting the Order than by refusing to grant it and since the work could, albeit with some inconvenience to the landlord, be executed while the tenants remained he had failed to discharge the burden.

Appeals allowed.

Cases referred to:

(1) *Douglas v. Pereira* (1966) 11 W.I.R. 20.
(2) *Valerie Thomas v. Beverley Walker* (1984) 21 J.L.R. 376.
(3) *Quinlan v. Philip* (1965) 9 W.I.R. 269.
(4) *McIntosh v. Marzouca* (1955) 6 J.L.R. 349.

Appeal against order of Resident Magistrate for St. Andrew ordering defendants to quit and deliver up possession of premises to landlord.

Maurice Tenn for Morris, Silvera, Tenn and Miret.

Dennis Morrison for Nichols.

Dr. Lloyd Barnett and *L. F. D. Smith* for respondent.

ROWE, P.: Her Honour Mrs. Z. McCalla, Resident Magistrate for St. Andrew ordered the five appellants who were tenants of five similar apartments at No. 2 Norbrook Way, St. Andrew, to quit and deliver up possession of the separate apartments on or before April 30, 1988 on the ground that the apartments were reasonably required by the landlord for the purpose of being repaired, improved or rebuilt. By consent, the five cases were tried together and although there were five separate appeals, they were all heard together. The appeals were

allowed, the Orders for possession were set aside and the respondent was ordered to pay costs of the appellants in the Court below and costs fixed at $50.00 in respect of each appeal. Herein are the reasons which guided our judgments.

Mr. Johnson, the respondent, bought the demised premises from Life of Jamaica Ltd., and went into possession during the third week of March 1987. On March 25, 1987, within days of entering into possession Mr. Johnson served notices to quit to expire on April 30, 1987, upon the appellants under Section 25(h) of the Rent Restriction Act, claiming that he desired possession because the premises were reasonably required by the landlord for the purpose of being repaired, improved or rebuilt. The tenants did not comply with the notices to quit. In May 1987, the respondent caused a draft lease to be circulated to each appellant offering a two-year lease at a rental of $2,500.00. The tenants joined issue with him. They made an application to the Rent Board to have the rent assessed under Section 19 of the Rent Restriction Act. Further, they tendered as rent sums considerably less than the $1,200.00 they were paying at the time when the respondent bought the premises. The respondent has steadfastly refused to negotiate these cheques.

The learned Resident Magistrate admirably summarised the respondent's evidence as to his reason for requiring the premises.

She said:

> "The Plaintiff relied on Section 25 of the Rent Restriction Act and gave evidence that he required possession of the premises as he needed to recondition the furniture, construct 2 balconies to the front of the 2 blocks of apartments and effect repairs by removing the worn carpets from the floors of all the bedrooms and the greater portion of the living rooms of these apartments and to replace them with parquet flooring."

Mr. Johnson who is a Civil Engineering Contractor maintained in his evidence that the process involved in the laying of parquet flooring was a delicate and elaborate one which could not be performed while the tenants were in occupation. His expert witness Mr. Samuel Martin gave a full description of the parquet process. In examination-in-chief he said his company normally asks for vacant place especially when polyurethene finish is being used. It would not be possible he said to lay parquet in the entire apartment with people living in it. But in cross-examination Mr. Martin said the very opposite:

> "Oh yes I have parquet floor of residents (where) they did not move out. I have done this on one or more occasions. In cases where inmates don't move out it takes more time."

Two of the apartments at No. 2 Norbrook Way were parqueted by Mr. Johnson but the contract had not been awarded to Mr. Martin's company although he had tendered for the job. On that state of the respondent's case, the learned Resident Magistrate found that the parquet flooring could not be done while the appellants were in occupation and based herself on what she described as the "unchallenged evidence given by witness that empty apartments were required for work to be done." Mr. Tenn has quite rightly challenged this finding by the learned Resident Magistrate. The parquet flooring could be more efficiently completed if the rooms were vacant but it was an over-statement and contrary to the positive evidence of Mr. Martin to hold that such work could only be done if the apartments were vacant.

One factor of some importance was the time required for putting down the new flooring. The respondent estimated that the work could be completed in four to six weeks. At the start of the negotiations between the respondent and the applicants the respondent had suggested that he would re-locate two tenants in two refurbished apartments while their apartments were re-decorated and continue this until the entire complex was completed. To this proposal the tenants demurred on the sole ground of the increased rental to $2,500.00 per month when they returned to their old apartments. But the tenants were prepared to co-operate. Each said he or she would voluntarily remove personal belongings from the apartment, go on vacation from present employment, and return to the apartment when the repairs etc., were completed.

In so doing they would be retaining possession of the apartments, paying their normal rent and at the same time facilitating the work which the landlord wished to undertake. At the time of the hearing before the Resident Magistrate this temporary alternative was still possible, but the proposal by the landlord to temporarily re-locate was no longer possible as he had by then rented the two unoccupied apartments.

The learned Resident Magistrate visited the locus in quo and referred to her visit in her findings of fact. She said:

> "The Court at the invitation of Counsel visited the locus in quo and after carefully considering the evidence and the submissions of both Counsel found that:
>
> (1) The Plaintiff had a genuine need for possession of the apartments occupied by the defendants for the purpose of installing new parquet flooring.
>
> (2) The carpets in all the apartments are worn.
>
> (3) The painting and reconditioning of the furniture can be done while the defendants remain in occupation.
>
> (4) On the question of the construction of the balconies there is not sufficient evidence that Plaintiff is in a position to commence the work in the near future.
>
> (5) Parqueting of the floors cannot be done while the defendants remain in possession (Court accepted unchallenged evidence given by the witness that empty apartments were required for work to be done).
>
> (6) The Court in giving very careful consideration to the question of temporarily vacating the premises for the work to be done considered that not only was there no agreement by Plaintiff to this proposal (for reasons stated by him) but in the opinion of the court there were too many uncertainties involved and the court felt that Section 25 (9) of the Rent Restriction Act is applicable and in these circumstances the Plaintiff is entitled to an order for possession of the premises."

The relevance of Section 25 (9) of the Rent Restriction Act to the circumstances of this case is not immediately apparent. A landlord who obtains an Order for possession under Section 25 (1) (h) on the ground that he desires possession for purposes of repair, etc., who, without carrying out such repairs, re-lets the premises to another person, commits an offence under the Rent Restriction Act. That provision cannot favour the landlord as against a tenant who is contending that the landlord does require the premises for repairs. Further the tribunal of fact cannot make an Order for possession under the repair/refurbish provision unless the Court is satisfied that having regard to all the circumstances of the case less hardship would be caused by granting the Order than by refusing to grant it, and specifically the Court had to consider whether at the time of making the Order other accommodation was available to the tenant – vide proviso to Section 25 (1) of the Rent Restriction Act.

The Rent Restriction Act provides a comprehensive scheme of control of rent as between landlords and tenants in respect of dwelling-houses, public commercial building and building land. Under that scheme the standard rent is to be determined by a statutory tribunal, viz., Rent Board or Community Rent Tribunal, and until such a determination is made the standard rent is fixed by Section 17 of the Rent Restriction Act at the rental at which the premises were let in the same category of letting on July 1, 1976, the rent at which they were first let. Provision is made in Section 21 for increase in the Standard Rent and one of the circumstances is by any amount sanctioned by the Appropriate Rent Board on the application of the landlord where "the landlord has incurred expenditure in effecting:

> "(i) substantial improvements or structural alterations in the premises; or
>
> (ii) substantial improvements to the amenities of the premises . . ."

It is a matter of public notoriety that the Rent Board in the Corporate Area is wholly incapable of performing its statutory functions in an efficient and satisfactory manner in fixing standard rent for all the controlled premises in the Corporate Area. Public utterances from every conceivable quarter confirm that in the state of near collapse of the Rent Board as a rent-fixing body, landlords have resorted to market factors. This case, however, has nothing to do with the morality of the issues and must be decided within the framework of the Rent Restriction Act.

Dr. Barnett was plainly right when he submitted that it is a reasonable and legitimate objective for a landlord to wish to preserve and enhance the equity in his property by repairing and refurbishing it and in the process to be able to earn the right to increase rental. But the real issue is whether the landlord is entitled to possession in order to be able to carry out the projected work.

Dr. Barnett submitted that the finding of the learned Resident Magistrate that the landlord required the premises for repairs is unassailable. True the tenants did not make any request for repairs or re-decoration, but in the view of the landlord he did not have to show that he reasonably required the premises for repairs. It was enough he said if his desire to repair was not an arbitrary, capricious one, but a genuine desire. The distinction between "reasonably required" and "required" has received judicial recognition and for these purposes the experience of the Court of Appeal in Trinidad and Tobago is instructive.

Douglas v. Pereira (1966) 11 W.I.R. 20 was decided under the Rent Restriction Ordinance of Trinidad and Tobago. Wooding, C.J., said:

> "When the Ordinance speaks of premises being reasonably required the landlord must show a present genuine need. When however it speaks of premises being required, we are of the opinion that it is thereby signifying that the landlord must show a genuine desire, want, intention, call it what you will – something short of actual need."

The Rent Restriction Act contains some similar provisions to the Rent Restriction Ordinance of Trinidad and Tobago and in Section 25 (1) (e) of the Rent Restriction Act an Order for possession can be made if the landlord reasonably requires the premises, being a dwelling-house or commercial premises, for his own use. We are of the view that it is proper to infer that the standard of proof required of a landlord where he can only obtain possession if he "reasonably required" the premises is a higher standard than if he merely "requires" the premises. A Court could not be persuaded that a landlord required the premises for repairs if the work to be done is of an inconsequential nature or is a mere sham to gain possession.

In the instant case the respondent determined that he would install parquet flooring although he had no knowledge of what type of flooring lay beneath the carpets. By putting down parquet flooring in two of the apartments he demonstrated that he was serious about the floor change and there was therefore evidence upon which the Resident Magistrate could say, applying the test in *Douglas v. Pereira* that the landlord required the premises for repairs.

In *Douglas v. Pereira* the Order for possession was upheld on evidence that the premises were in a bad state of repair, that they were getting progressively worse, that in the view of the city engineer they had reached the potentially dangerous stage not sufficient to warrant a demolition Order but sufficiently for a warning. The repairs could only be conveniently, effectively and economically carried out if the appellant whose portion of the building was not in nearly as bad a condition as the rest of the building vacated the premises.

The landlord is required to satisfy the Court that less hardship would be caused by granting the Order than by refusing to grant it. On the question of hardship the learned Resident Magistrate made no finding. There was evidence that some of the appellants had been living on those premises for a number of years, in one case for as long as fifteen years. The respondent adopted an aggressive attitude to the improvement of his property almost from the moment he took possession and was unwilling to have the tenants with whom he bought

the premises, unless they paid more than double the existing rental. As the learned Resident Magistrate found, the tenants were endeavouring to alleviate the hardship but the landlord did not agree to their proposals. The true rule, however, is that the duty falls on the landlord to show hardship.

In *Valrie Thomas v. Beverley Walker* R.M.C.A. 18/84 (unreported) judgment on November 22, 1984) this Court approved of the decision in *Quinlan v. Phillip* (1965) 9 W.I.R. 269; and *McIntosh v. Marzouca* (1955) 6 J.L.R. 349 and said:

> "The two cases cited above make it perfectly clear that the onus is upon the landlord and the landlord alone to satisfy the hardship test and this would include where relevant, any question as to the availability or suitability of alternative accommodation. There was in the instant case no onus upon the tenant to show that she had made reasonable efforts to secure alternative accommodation."

The evidence in the instant case went no higher than to show that the respondent would suffer some inconvenience in executing the work of re-flooring the apartments. Clearly the learned Resident Magistrate misconceived the purport of the evidence of Mr. Martin, the parquet expert, and her finding of fact that the work could only be done when the apartments were vacant was against the weight of the evidence. This Court is always reluctant to interfere with the exercise of discretion by a trial judge, nevertheless it is clear from the Reasons for judgment that she did not consider the question of hardship in relation to the proviso to Section 25 (1) (h) and instead relied upon Section 25 (9) which had no relevance to the case. We did not feel bound in this case to support that exercise of discretion upon which the Orders of possession were based. The appeals were accordingly allowed.

R. *v.* EVERTON WILLIAMS

[COURT OF APPEAL (Carey, P. (Ag.)) Wright and Morgan, JJ.A.) September 22 and October 6, 1988]

Criminal Law – Rape – Defence – Consent – Subjective intention of accused material – Effect of non-direction.

Criminal Law – Rape – Warning as to absence of corroboration – Whether directions effective to convey seriousness of warning.

The complainant, a 15 year old girl found herself at midnight in Ocho Rios in need of a ride home to Port Maria. The car she had been travelling in developed engine trouble. The applicant picked her up in his car, saying he was going to Port Maria. He stopped twice, and on the second occasion had sexual intercourse with her. The applicant admitted having intercourse with her, stating that she consented.

The trial judge failed to direct the jury as to the mental element when the defence raised is consent. This omission was argued on appeal, as well as the effectiveness of the judge's warning to the jury on the dangers of convicting on the uncorroborated evidence of the victim of a sexual assault.

Held: (i) it is a grave non-direction to have omitted to direct the jury as to the essential mental element, that it is the man's subjective intention which is material;

(ii) the direction given by the trial judge was ineffective to convey the seriousness of the warning that it is dangerous and unsafe for a jury to convict on the uncorroborated evidence of a woman or girl.

Application for leave to appeal allowed, conviction quashed, sentence set aside, new trial ordered.

Cases referred to:

(1) *R. v. Robinson* (22/1/79) (unreported)
(2) *R. v. McLeod and Berlin* (1987) 24 J.L.R. 160
(3) *R. v. Lewis (Anthony)* (26/10/81) (unreported)

Application for leave to appeal from conviction of rape in the St. Ann Circuit Court treated as hearing of appeal.

Howard Hamilton, Q.C. and *Delroy Chuck* for applicant.
Kent Pantry and *Brian Sykes* for Crown.

CAREY, P. (Ag.): On 22nd September, having heard the submissions of counsel, we treated the application for leave to appeal as the hearing of the appeal which we allowed. We quashed the conviction, set aside the sentence and in the interests of justice, we directed that a new trial should be had at the next session of the St. Ann Circuit Court. We intimated then that we would put our reasons in writing and hand them down later. This we now do.

The applicant was convicted in the St. Ann Circuit Court on 17th May last on an indictment which charged him with the rape of a young woman whose identity we do not propose to divulge but whom, we shall hereafter refer to as 'Miss X.' In light of our decision, the facts can be summarily stated.

The victim, aged fifteen years old, who lives with her grand-parents in Port Maria, St. Mary, found herself at mid-night in Ocho Rios, needing to get home. The car in which she had been travelling from Montego Bay developed engine trouble and unsuccessful attempts to remedy the problem, resulted in her arrival in Ocho Rios at such a late hour. She was alone. While there, the applicant a stranger to her, drove up in his car. Persons among whom she stood awaiting transportation hailed him, and enquired whether he was going to Port Maria. The driver who had brought his car to a halt, acknowledged that he was. She got in and he set off. In the course of his journey, he stopped twice, having got off the main road to Port Maria. On the second occasion, because she had become somewhat alarmed, she asked him what he had in mind. Despite her cries and screams he had intercourse with her. She had removed her underwear and pants at his insistence because she was frightened. She had also told him that she was only fourteen years old. Thereafter the applicant drove to another place where he stopped and went into a building. She got out and made a note of the licence number. He returned and drove to a gas station where she left the car, boarded a bus and returned to the very spot from which she had started the traumatic journey.

The defence was consent. In the course of his evidence, he said that when he saw a group of persons, he heard shouts of "Port Maria" as well as "Teddy" which is his pet name. Miss X whom he did not know before, came up to his car. The learned trial judge described in her summing-up what occurred then in these words (at pp. 121-122):

> ". . . she asked him if he was going to Port Maria and he said no. And he said it could probably be arranged that he could take her there, if they would go partying and he explained what partying meant; a little play on the side and he explained that too. And she was quite up to it. It is not that she said, yes or no, she was quite up to it, and she said, no problem.
>
> She came in the car and he told her that he would give her what she needed, and they went – he was able to tell you where it was that he had gone to. Buckfield was the first place