J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL No. 30 of 1973.

BEFORE: The Hon. Mr. Justice Luckhoo, President (ag.)
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Grannum J.A. (ag.)

R. v. RUDOLPH DUJOY

W.B. Brown for the appellant.

H. Downer for the Crown.

17th May 1973, 31st July 1973

EDUN, J.A.:

At the conclusion of the hearing of the appeal, we dismissed the appeal and affirmed the conviction and sentence. We promised to put our reasons in writing. We do so now.

The appellant Dujoy and Weston Henry were jointly charged with the possession of ganja. Constable Fred Johnson, a witness for the prosecution, said that on October 2, 1972, he was in front of the Palisadoes police station, with Corporal Cotterell, when he noticed a white Vauxhall car drive towards the police station. The driver who was Henry parked it under a tree about one and half chains away. The appellant was in the front seat beside him. He kept the car under observation. He saw the car then drive off towards the airport and stop about a chain from the terminal building. He and Cotterell followed. Henry came out, so too the appellant. Henry opened the trunk of the car with a key and took out a suitcase. The appellant removed a similar suitcase from there. The appellant signalled to a porter who came up and put both suitcases on a trolley. The appellant then opened the left rear door of the car and removed a similar suitcase. None of the three suitcases had any labels.

Johnson said he approached both defendants, identified himself and asked Henry what was in the three suitcases. Henry said, "Ask Dujoy the car belong to him." The appellant could have heard the question. Johnson then asked the appellant the same question. The

appellant replied: "Is a job the brother got to take the suitcases." Johnson then asked both of them the name and address of the man who gave them the job and both defendants said they did not know. The police detained them and took them with the three suitcases to the police station.

At the station, Johnson searched the appellant and found in his right side trousers pocket two small keys and with one of them he opened all three suitcases in the presence of both defendants. In each of them, vegetable matter resembling ganja was found. Johnson then arrested them, charged them with the unlawful possession of ganja and cautioned them; they made no statement. An analyst's certificate tendered in evidence disclosed that the suitcases had 52 lbs., 53 lbs. and 51½ lbs, each of ganja. Corporal Cotterell gave supporting evidence for the prosecution.

The appellant in his defence, said that on October 2, 1972, as a result of what Henry told him, he agreed with one Charlton to carry the three suitcases to the airport. Charlton paid him $20 and gave him the keys and asked him to deliver them to one Michael Scott. He never knew what was in the suitcases until they were opened by the police. The appellant was convicted, fined $600 and in default to serve 3 months imprisonment with hard labour and in addition to serve two years imprisonment at hard labour. Henry did not appeal.

Learned attorney for the appellant submitted that as against conviction there was no evidence of possession in the appellant of the ganja found in the suitcases and therefore, the verdict was unreasonable and could not be supported having regard to the evidence. As against sentence he submitted that it was manifestly excessive. We did not call upon learned attorney for the Crown to reply.

In considering the facts and circumstances of the case the learned Resident Magistrate was entitled to conclude that -

(a) there was no man named Charlton who employed defendants to "handle" the suitcases, and

(b) there was no man named Michael Scott to whom the suitcases were to be delivered.

On this aspect of the case, there was evidence from the prosecution that when both defendants were asked the name and address of the man who gave them the job to "handle" the suitcases, they said they did not know.

When, however, both the appellant and Henry came to give evidence in February 1973, the names of Charlton and Michael Scott cropped up. The learned Resident Magistrate had also seen and heard the witnesses; he had in view of the submissions of learned attorney for the defence to consider whether or not the defendants were merely physically handling the suitcases. We have no reason to hold that the learned Resident Magistrate in finding that both defendants were jointly in dominion and control of the suitcases, misdirected himself: see Hobson v. Impett (1957) 41 Cr. A.P. 138. So far as their knowledge of the contents of the suitcases is concerned, if the Magistrate disbelieved the defence concerning Charlton and Michael Scott, then the appellant, in particular must have known of the contents therein as the keys which opened all three suitcases were found on him.

As regards sentence, we saw no justification for interfering. For the reasons stated we dismissed the appeal, and affirmed the conviction and sentence.

J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL No. 70/72

BEFORE: The Hon. Mr. Justice Fox - presiding
The Hon. Mr. Justice Edun
The Hon. Mr. Justice Swaby

BETWEEN: MICHAEL MILES ROSENBERG and HYMAN LLEWELYN BATTLE — Plaintiffs/Appellants

AND REGINALD SHERWOOD - Defendant/Respondent

Mr. J. Leo Rhynie for Appellants

Mr. W. Frankson for Respondent

FOX, J.A.,

This appeal is concerned with the right to the user of a beach known as Salt Creek Bay or Zion Hill Bay in Portland. A small river, the Zion Hill River, running from southeast to northwest, bisects the beach. The Dragon Bay Hotel is on sea-front land to the west of the river. This land with the hotel was purchased by the plaintiffs from Blue Reefs Limited, in January, 1969. On the beach west of the river, cabanas are available for use by guests of the hotel, and by a limited number of the public upon payment of a fee of fifty cents. The land east of the river was purchased by the plaintiffs from the legal representatives of the estate of Simon Thompson. This land east of the river includes the beach which is the subject matter of the action of trespass brought by the plaintiffs against the defendant. The alleged trespass occured within the area of an exclusive licence granted by the Beach Control Authority to the plaintiff Rosenberg. On 15th August, 1971, the defendant, together with five other persons said to be members of the Miller family now residing in New York, U.S.A., came on to the beach east of the river, and bathed in the sea. The defendant refused to pay the prescribed fee of fifty cents when it was demanded by Rosenberg. He told Rosenberg, "You do not own the

"beach .....

"beach, it is Miller's beach." At the commencement of the trial of the action of trespass by the learned resident magistrate for the parish of Portland, the defence as stated asserted a right in the defendant to the use of the beach east of the river. It is necessary to set out the facts upon which this right was claimed.

On 10th August, 1932, the fee simple in two lots of land east of the river was conveyed to Simon Thompson and Hamilton Boreland Miller as tennants-in-common. The conveyance and the attached diagrams were received in evidence at the trial. The diagram, exhibit 1B, which is relevant to the case shows two lots of land east of the river labelled "A" and "B". Each lot contains an area in excess of 8 acres. Lot "B" included the land immediately east of the river and contains the beach which is the subject matter of the dispute. In 1946, all the land was divided between Thompson and Miller. Thompson retained that portion of land which adjoins and includes the beach in dispute. Miller was given the remainder of the land east of the portion retained by Thompson. The diagram for Miller's land was received in evidence as exhibit 2. It shows a narrow elongated strip of land to the south of the portion retained by Thompson running in a westerly direction towards the eastern bank of the river, and separating Thompson's land from the land of one Ralph Bailey. This narrow elongated strip of land ended at a point on the eastern bank of the river above its mouth. What was described as a right of way 20 links wide, ran from this point along the eastern bank of the river across the land of Thompson and ended at a point on the beach immediately east of the mouth of the river. The defendant claimed that the land was divided in this way, and an easement of the right-of-way over Thompson's land was established to enable the Millers to make use of the beach east of the river, and that, as the accredited representative of the Millers, his presence on the beach was in accordance with that right.

The critical point to notice in connection with the defendant's claim is the fundamental alteration to the common-law right to the use of beach land which was effected by the Beach Control.....

Control Law 1955, Law 63 of 1955. Under the provisions of section 3(1) of that Law all rights in and over the foreshore of the island of Jamaica and the floor of the sea within the territorial sovereignty of the crown were declared to be vested in the crown save the rights set out in sub-section 2 of the same section which were expressly preserved. By section 3(4) of the law, "no person shall be deemed to have any rights in or over the foreshore of this island or the floor of the sea save much as are derived from or acquired or preserved under or by virtue of this law." Section 5(1) prohibits user of the foreshore or the floor of the sea without a licence. Section 9(1) established a Beach Control Authority which by section 10 (1) is authorised to grant applications for licences (whether exclusive in character or not) for the use of the foreshore or the floor of the sea in connection with any business or trade upon such conditions as they may think fit. On 20th June, 1969, such an exclusive licence to use of the foreshore and the floor of the sea at Salt Creek Bay in the parish of Portland was granted by the authority to the plaintiff, Rosenberg. That part of the beach upon which the plaintiffs claim the defendant had trespassed is admittedly within the area of the licence. The onus was, therefore, upon the defendant to show that he was exercising a right "derived from or acquired or preserved under or by virtue of this law" (section 3(4))

The right was not "acquired under or by virtue of the Registration of Titles Law or any express grant or licence from the crown" and section 3 (2) could not assist the defendant in discharging this onus. The defendant sought to rely upon the provisions of section 4 of the law. This section entitles "any person who is the owner or occupier of any land adjoining any part of the foreshore and any member of his family and any private guest of his "to use" that part of the foreshore adjoining his land for private domestic purposes, that is to say, for bathing, fishing and other like forms of recreation, and as

"a .....

"a means of access to the sea for such purposes." The learned resident magistrate upheld the defendant's contention on the ground that the Millers were the "owners" of the right-of-way over the beach immediately east of the river.

This finding entirely misapprehends the right which is given by section 4 of the Law. It is a right given to "the owner or occupier" of seafront land. The word "owner" in the definitive section of the law means owner of an estate in fee simple. The owner of a dominant tenement who has the right to the use of a way over a servient tenement is not the fee simple owner of that way. Neither is he the occupier of that way in the sense that he is entitled to exclusive occupation of the way which is the meaning in which the phrase "occupier of land" is used in section 4 of the law. Such right to the use of the beach as the Millers may have had prior to the passing of the Beach Control Law, were completely abrogated by the provisions of sections 3 and 5 to which I have referred above, and section 4 is of no assistance to them.

The learned resident magistrate was also of the view that the defendant's claim to a right to use the beach was protected by the provisions of section 3 A (1) of the Prescription (Amendment) Law 1955, Law 65 of 1955. Section 3 A (1) provides -

> " When any beach has been used by the public or any class of the public for fishing, or for purposes incident to fishing, or for bathing or recreation, and any road, track or pathway passing over any land adjoining or adjacent to such beach has been used by the public or any class of the public as a means of access to such beach, without interruption for the full period of twenty years, the public shall, subject to the provisos hereinafter contained, have the absolute and indefeasible right to use such "beach,.....

"beach, land, road, track or pathway as aforesaid, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

The immediate point to notice in connection with this finding of the learned resident magistrate is that a claim to public user of the beach in accordance with section 3 (A) (1) was not stated as a defence to the action. The issue of public user was not set up at the commencement of the trial, neither did the defence attempt to describe that issue by evidence to that effect. To the contrary, to quote the evidence of the defendant "the beach belonged to Miller and Thompson and I don't see why I should pay.....the beach belonged to Miller and Thompson from original." It is true that on the diagram to Miller's land a parochial road is shown running across the river and ending at a point on the beach east of the mouth of the river where the right-of-way also ends, but there is no evidence that the public used the beach "without interruption for the full period of 20 years." The fact that the parochial road is shown on the diagram is not material from which any inference of uninterrupted user for that period of twenty years can be made. Indeed, the evidence of the defence that the beach, east of the river, was Miller's beach and Thompson's beach is adverse to any such inference.

In the light of these considerations I hold that the defendant has not shown a right to the user of the beach and that his presence thereon was in violation of the exclusive licence granted by the Beach Control Authority to the Rosenbergs. The defendant became a trespasser so soon as he refused to pay the fee demanded by Rosenberg, and the learned resident magistrate should have so found. I would allow this appeal and set aside the judgment which was entered in favour of the defendant; I would enter judgment for the plaintiffs for nominal damages only, since no particular.....

particular loss was proved. I would fix this nominal sum at $25. I would also grant an order for an injunction in the terms stated in the particulars claimed.

SWABY, J.A. (Acting):

I have had an opportunity of reading the judgment of Fox, J.A., with which I agree.

I only wish to add that the learned resident magistrate appeared to have directed his mind to the issues involved and dealt with them in a well written judgment, notwithstanding that he misdirected himself in applying the law to some of the relevant issues which arose on his findings of fact.

In his judgment the resident magistrate said that in determining whether the Millers were entitled as of right to use the beach for bathing it was necessary to examine the provisions of section 4 of the Beach Control Law. He continued:-

> "It is not disputed that the Millers own and occupy the land shown in diagram, exhibit 2. It is admitted that the Millers have a right-of-way from the Parochial Road over the beach to their holding. In section 2 of the Law there is this definition:-
>
> > "Land" includes rights and interests of any nature or description whatever in or over land."

He went on to find, inter alia, that:

> "the Millers as owners of the right-of-way over the eastern beach are in the terms of section 4 of the Beach Control Law the owners
>
> "and.....

"and occupiers of land adjoining the foreshore and members of the family are entitled to use that part of the foreshore adjoining their land, i.e. the right-of-way for bathing."

It appears that this finding did not give due consideration to the word "owner" which as defined in the Law means "owner of an estate in fee simple in the land or beach in relation to which the expression is used." It is true that "land" is defined as including rights and interests of any nature or description whatsoever in or over land, and that therefore the easement of a right-of-way would fall within this definition. Nonetheless the controlling words in section 4 in relation to the rights given by that section are "owner or occupier", and unless a person can be said to be a fee simple owner of land or an occupier of land adjoining the foreshore under some recognizable form of tenancy (e.g. a lessee), he is not in a position to claim the rights given by section 4.

The evidence shows that Simon Thompson, and not Miller, was the fee simple owner of the land adjoining the beach and it is Thompson's successors in title, the Plaintiffs, and their families who are entitled to exercise those rights. The guests at the Plaintiffs' hotel enjoy similar facilities but only by virtue of the licence granted to the Plaintiffs by the Beach Control Authority. The Millers still have a right-of-way over the Plaintiffs' land down to the line of the foreshore; but in so far as this right-of-way may previously have extended over the foreshore to the floor of the sea, to that extent the right was extinguished on the coming into operation of sections 3 and 5 of the Beach Control Law, as it was not such a right specially preserved under section 3(2) or derived from or acquired by virtue to the Beach Control Law section 3(4). Consequently the Millers and the defendant have no existing legal rights to which condition 12 of the second schedule to the Plaintiffs' exclusive licence can apply in so far as any rights in or over the foreshore or the floor of the sea at Salt.....

Salt Creek Bay is concerned.

The Defendant did not claim and further, did not attempt to show that as a member of a class of the public he had a right to use the beach in question or the parochial road passing over it without interruption for the full period of twenty years. For the reasons stated by Fox, J.A., I agree that there is not sufficient evidence to support the finding of the resident magistrate on the basis of public user under the provisions of the Prescription Law.

In the light of these considerations I am of the view that since the Defendant was clearly within the area of the beach in the Plaintiffs' exclusive licence the Plaintiffs were entitled to demand from the Defendant payment of the approved fee (50 cents) for use of the beach and that upon a refusal by the Defendant to pay same or to leave the beach when requested to do so he became a trespasser.

I agree with the judgment proposes to be entered in this appeal by Fox J.A.

EDUN, J.A.:

In 1932, Simon Thompson and Hamilton Miller had the fee simple as tenants-in-common of two lots of land east of Zion Hill river which runs into Salt Creek Bay, Parish of Portland, and divided the sea-front lands in that area. Lands, west of the river, were owned by Blue Reefs Ltd., and were purchased by the plaintiff/appellant in January, 1969.

In 1946, the two lots of land east of the river were divided between Thompson and Miller. Thompson retained the portion which included access to the beach in dispute and Miller was given the remainder of the lands east of Thompson's portion. In Miller's portion, there is an elongated strip of land running across Thompson's portion but that strip reaches up to the river mouth and not up to the foreshore. There is another piece of land about 20 links wide extending from the farthest north-eastern end of that elongated strip, running along the eastern side of the river mouth and leading up to the foreshore. That 20-links-wide piece of land constitutes a right of way by grant over Thompson's land to enable Miller to make use of the beach east of the river, giving immediate access to the beach, thereabouts. The piece of land to which a right of way is appurtenant is called the dominant tenement, andthat over which it is exercisable, the servient tenement. The owners of the respective properties are referred to as the dominant and servient owners. Thus, when Miller acquired a right of way over Thompson's land, he possessed an easement of way, not because he was Miller but because he was the fee simple owner of land which included the elongated strip.

When the appellant bought Thompson's land east of the river, so long as Miller's right of way subsisted, that portion of land remained the servient tenement or Miller's retained portion, the dominant tenement, and to which the easement of way was appurtenant. The appellant, soon after his purchases applied for and obtained from the Beach Control Authority an exclusive licence to use that portion of the foreshore and the floor of the sea at Salt Creek Bay subject to the conditions set out in the Second Schedule and one of which is -

> "(2) This licence is granted subject to any legal rights of third parties."

On August 15, 1971, the respondent went to the beach east of the river and bathed in the sea. The appellant demanded the payment of fifty cents from him. The respondent refused to pay it because he did not use the

cabanas which the appellant erected and so far as his bathing in the sea was concerned he claimed that it was Miller's beach, and he was a descendant of the Millers and agent for them. The action was one of trespass, not a claim which challenged the validity of Miller's easement of way nor was it one which would necessarily decide the issue as to whether it was Miller's beach or the appellant's, or as to what portion of the beach was accessible to either party. But suffice it to say that the respondent was asserting a legal right to use the beach. Paragraph 5 of the affidavit of the appellant, supporting his claim for an injunction against the respondent if his case of trespass succeeded, states:-

> "That this said right-of-way passes over a small section ... of the beach occupoed by the plaintiffs at the eastern end thereof."

In his evidence on oath before the learned Resident Magistrate, the respondent said he understood the appellant was claiming right to use the beach as part of his right of way. The learned Resident Magistrate found for the respondent and in his reasons for judgment stated, inter alia -

> "(1) ....
> (2) the defendant is a member of the Miller family and agent for their land.
> (3) On 15th August 1971, the defendant and 5 members of the Miller family were enjoying their right.
> (4) This right is expressly reserved in Clause 12 of the Second Schedule of the licence granted by the Beach Control Authority to Michael Rosenberg (appellant).
> (5) The defendant's right to use the beach for bathing is not contingent on the use of the Cabanas.
> (6) Not having used the Cabanas the defendant was not obliged to pay the fee demanded by Rosenberg ....."

In arriving at his conclusions, the learned Resident Magistrate considered and correctly directed himself on the facts. He stated:-

1. "It is not disputed that the Millers own and occupy the land shown in the diagram, Ex. 2."
2. "It is admitted that the Millers have a right of way from the parochial road over the beach to their holding."
3. "Section 2 of the Beach Control Law: "land includes rights and interests of any nature or description whatever in and over land."

The relevant portions of the Beach Control Law, No. 63 of 1955, provide as follows -

"3(1) Subject to the provisions of this section, all rights in and over the foreshore of this Island and the floor of the sea are hereby declared to be vested in the Crown.

(2) .....

(3) .....

(4) No person shall be deemed to have any rights in and over the foreshore of this Island or the floor of the sea save such as are derived from or acquired or preserved under or by virtue of this Law.

S4 Any person who is the owner or occupier of any land adjoining part of the foreshore and any member of his family and any private guest of his shall be entitled to use that part of the foreshore adjoining his land for private domestic purposes, that is to say, for bathing, fishing and other like forms of recreation and as a means of access to the sea for such purposes." (Underlining mine).

In my view, the learned Resident Magistrate also correctly directed himself on the law.

So far as the granting of a licence is concerned section 10(1) gives power to the Beach Control Authority to grant licences (whether exclusive in character or not) for use of the foreshore or floor of the sea.. for any public purposes, or in connection with any business or trade or for any other purpose, upon such conditions and in such form as they may think fit.

From those enactments, it is quite clear from sub-sections 3(1) and (4) that the right of an owner or occupier of any land adjoining part of the foreshore to use that part of the foreshore adjoining his land for domestic purposes and as a means of access to the sea, is preserved. The findings of the learned Resident Magistrate regarding -

(a) the respondent being a member of the Miller family, and

(b) the use complained of, being domestic,

are unchallenged.

So far as the condition 12 of the exclusive licence is concerned, the Beach Control Authority out of abundant caution, made it clear to the appellant that he could not expropriate the legal rights of third parties. And in my view, even if condition 12 was not stated in the appellant's exclusive licence, sub-sections 3(1) and (4) of the Law nevertheless preserved the respondent's legal rights, having regard to the findings of the learned Resident Magistrate.

For the reasons stated, I hold that the decision of the learned Resident Magistrate was correct. I would dismiss the appeal.

By a Majority:

The appeal is allowed. The judgment of the resident magistrate is set aside. Judgment is entered for the Plaintiffs/Appellants in the sum of $25 with costs to be taxed or agreed. The Appellants are to have the costs of the appeal fixed at $40.