IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S141 of 2018

HIGH COURT OF AUSTRALIA
FILED IN COURT
12 OCT 2018
No.
THE REGISTRY CANBERRA

BETWEEN:

Paul Olaf GRAJEWSKI
Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS (NSW)
Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I:

1. This outline is in a form suitable for publication on the internet.

Part II:

2. This appeal concerns the proper construction of the physical element of an offence contrary to s 195(1)(a) of the *Crimes Act 1900* (NSW) ("the Act"). The offence charged has a fault element of intention or recklessness and a physical element described as "destroy or damage" property, in this case alleged as "damage" property.

3. The precise nature of the alleged physical element of "damage" to property was not spelt out beyond the particulars in the Court Attendance Notice alleging: "damage to property causing the temporary impairment of the working machinery of a ship loader" (CAB 5).

4. The appellant's essential contention is that damage to property, being the physical element of the offence, must involve physical derangement of some kind even if only temporary. This involves an acceptance of the reasoning of Simpson J in *DPP v Fraser & O'Donnell* [2008] NSWSC 244.

5. The approach advanced by the respondent here, and enunciated by Leeming JA in the Court of Criminal Appeal (the "CCA"), extends the notion of damage to property to physical obstruction or interference with the "use" to which property may be put. It is the appellant's case that such a construction of the provision is unsustainable and should not be accepted.

6. The word "property" in s 195 takes its meaning from s 4 of the Act which extends property to all forms of real and personal property, subject here only to a limitation in s 194(1) and an extension in s 194(4). The generality of application of the provision to all forms of property tells against the respondent's construction. So construed,

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damage to property would extend to mere instances of trespass to land and goods, and the like.

7. There is nothing in the language of s 195, or the context in which it is used, that suggests that the word "damage" applied to property extends to conduct and events concerning property which involve no physical insult of any kind, but rather extend its reach to mere physical interferences with use.

8. Nor is an examination of the legislative history apt to deliver up a correct interpretation of the provision if that is done by looking to the repealed legislation, focusing on the breadth of expression of "injuries" applied to very specific conduct, such as injuries to machines (the repealed ss 209, 210), mines (the repealed ss 223, 224), or railways (the repealed s 232) then taking that breadth of expression and giving it decisive significance in construing the word "damage" in the new amending but wholly general provision (s 195). That, it is submitted, is the erroneous approach taken by Leeming JA (at [58] – [59], CAB 52 – 53 and see paras [13] – [30], CAB 36 – 42). Note that the amending legislation retains specific extended provisions relating to mines (s 201) and railways (s 213).

9. *DPP v Fraser & O'Donnell* (JBA 17) involves a fact situation very similar to this one. The reasoning of Simpson J in that decision is persuasive and should be adopted (see in particular at [36] – [47]). In a prosecution under s 195 it is necessary to establish "some physical change or alteration to the property": at [36], or "physical derangement" at [38], even though these changes may be temporary. This construction accords with the natural and ordinary meaning of the words.

10. *R v Heyne* [1998] NSWSC 429 (JBA 31) is a decision of no great significance in this context (cf Leeming JA at [49] – [53], CAB 48 – 50, [63], CAB 54). That decision, although involving some idiosyncratic jury directions at first instance, concerned a clear instance of malicious damage to property. It does not enshrine, as law, the words "temporary functional derangement" taken from the judgment of Walters J in *Samuels v Stubbs* (1972) 4 SASR 200. In any event, the use of that language has to be understood in the factual context in which Walters J applied it in *Samuels v Stubbs* (JBA 31), again a clear instance of damage to property.

11. Shortcomings in the reasoning in *R v Hammond* (2013) 85 NSWLR 313 (JBA 21) are not answered by accepting that property damage extends to instances of mere interference with "functionality" of property, but then limiting that idea to cases involving actual physical presence. The flaw in this approach can be seen in the distinction sought to be drawn by Leeming JA (at [62] (CAB 54)), between a person lying down in front of a bulldozer (said not to be property damage) and a person tying themselves to it (said to be property damage).

12. A specific matter of dispute between the parties concerns the case stated procedure under s 5B of the *Criminal Appeal Act* 1912. The respondent in its submissions asserts that the appellant's position is equivalent to a stick thrust into a pipe in *Fisher*, and other examples taken from cases said to demonstrate "physical interference with property that impaired or stopped the functioning of the property" (RS [43]). The appellant's response to this argument should be accepted (AR [16] – [24]).

13. Having regard to his reasons (at [6], CAB 34) the matter did not assume any great significance in the reasoning of Leeming JA. However, it is the appellant's case that if any ambiguity exists in the case stated which requires resolution then it is permissible to have regard to the reasons for judgment by which the conviction was confirmed in the District Court. In this regard perceived limitations of the case stated procedure (see Leeming JA at [3] – [6] CAB 33 – 34), and particularly the one now provided by s 5B, may be overstated. The case stated procedure in s 5B may be engaged, and is normally only engaged, following disposal of the appeal in the court below (s 5B(2)), and if successful may result in the quashing of a conviction (s 5B(3)). So understood, s 5B effectively operates as a further (and last) mode of appeal after conviction (or acquittal) available to "any party", but limited to "any question of law" (s 5B(1)) (Two recent cases considering s 5B in its current form may be noted: *Talay v R* [2010] NSWCCA 308) (JBA 41) and *Lavorato v Regina* (2012) 82 NSWLR 568 (JBA 24).

14. The facts in the case stated, in these circumstances, could hardly depart from the findings made on the conviction appeal in the District Court. The facts found in the reasons of the District Court (AR 24) which would dispel any conceivable ambiguity in the case stated were that the machine "was rendered inoperable because the appellant's position posed a potential risk of serious harm to himself" (CAB 24, ln 35). The findings in the Local Court were to the same effect (CAB 18).

15. In addition, on a narrower basis, and as explained in *R v Rigby* (1956) 100 CLR 146 (JBA 33), it is a clear implication from the facts recounted in the case stated, that the machine was shut down for safety concerns (rather than a physical inability to function), and once the appellant was removed the machine was able to recommence its operation (see facts 4, 7 – 10 in the case stated at CAB 27).

16. The appeal should be allowed. Applying s 37 of the *Judiciary Act* 1903 to s 5B(3) of the *Criminal Appeal Act* 1912 (NSW), the Court has power to quash the conviction and if so satisfied should make that order. The appellant is entitled to his costs of the appeal if successful.

Dated: 12 October 2018

Tim Game | Sandy Dawson | Neal Funnell