

JERSEY / JUDGMENT

Wragg v AG [2023] JRC

164 (14 September 2023)

[2023] JRC 164

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judgment

the Commissioner: 1. The Appellant appeals against conviction and sentence following his conviction in the Magistrate's Court (the Assistant Magistrate presiding) on 19 January 2023 in respect of three charges of malicious damage committed on 26 December 2020, 15 November 2021 and 26 December 2021. Each of the charges related to damage caused to a public display on La Route de la Liberation, St Helier. 2. The appeal was heard by us on 2 May 2023 and the following is our decision.

Background

3. The public display in question comprised a mural with vertical-coloured stripes, the colours and shade of which represented the annual air temperature for individual years. At the time of the first offence, the mural contained a reference to a Jersey government website www.gov.je/climateemergency. By the time of the third offence, the website address had been changed to www.climateconversation.je. On each occasion the Appellant was alleged to have painted graffiti on the mural or the adjacent wall which in various terms suggested that the information depicted was false. 4. The trial was held over two days, the first being 3 October 2022 and the second being 19 January 2023, with an interim hearing on 12 December 2022. 5. On 3 October 2022, the first day of trial, the prosecution presented their case, opening the case and reading excerpts from a number of witness statements. The Appellant was not legally represented and he did not challenge the evidence presented. The Assistant Magistrate adjourned the trial to allow the Appellant to instruct an advocate to assist him in presenting his case. The trial was adjourned part-heard, and a review hearing was set down for 12 December 2022. On 12 December 2022, the review hearing took place. The Appellant addressed the Court in relation to the difficulties he had encountered in applying for legal aid. The Court again encouraged the Appellant to make an application for legal aid and the case was adjourned to 19 January 2023 for the trial to conclude. On 19 January 2023, the trial concluded and the Appellant remained unrepresented. The Appellant addressed the Court in relation to his case. The Appellant did not give evidence. The Assistant Magistrate retired and upon his return convicted the Appellant on all three charges. The Assistant Magistrate proceeded to sentence the Appellant. The Appellant was

sentenced following conviction as follows: 1) Charges 1-3: six-month binding over order concurrent all charges; 2) Compensation order in the sum of £500 pounds (which represented the insurance excess in respect of the cost of repairing the damage) with a default sentence of three weeks' imprisonment if not paid. The payments were to be made at a rate of £200 per month. 3) Costs were ordered in the sum of £800. 6. On 26 January 2023, the appellant submitted a letter to the Royal Court indicating that he wished to appeal his conviction and sentence. The principal ground of his appeal, as expressed in his Defence Statement, was that he was morally obliged to take the action that he did in order to prevent serious harm to children's mental health and that his actions were necessary to prevent a crime. The facts 7. The facts are not in dispute. The malicious damage involved spray-painting the climate change mural at the Waterfront and spray-painting a wall adjacent to the mural. The defences available 8. The elements of the common law offence of malicious damage are: (a) destroying or damaging property; (b) belonging to another; (c) intentionally or recklessly; (d) and that it is the person the prosecution says it is who has caused the damage. 9. In *Attorney General v Freeman*

[1994] JLR 29, in a decision of the then Magistrate, Mr Sowden, it was said that: "Malicious damage can be committed only "wilfully" and in Jersey this means that the damage must have been inflicted either intentionally or recklessly. It is enough if the damage is done by a person who shows a deliberate disregard of, or even indifference to, the property or possessory rights of others." 10. The Magistrate went on to say that: "In Jersey, a misconception of legal rights, however gross, will never justify the substitution of the law of the jungle for rules of civilised behaviour or even of common sense". 11. In *Freeman*, the defendant acted deliberately and the Court held that he knew what he was doing, and displayed in his conduct a complete disregard of the rights or interests of the complainant. It is clear from *Freeman* that where the damage has been caused intentionally then an offence has been committed and we do not disagree with that proposition. 12. In *Attorney General v Dwyer and O'Bartuin* [1987-88] JLR N 9b, in a decision of the Royal Court (Crill, Bailiff), the Court considered the meaning of "malicious" in a charge of malicious damage and found that: "The element of "malice" in malicious damage does not refer to wickedness in general but specifically means that the accused has either (1) an actual intention to do the particular kind of damage that was in fact done, or (2) recklessness as to whether such damage would occur or not, i.e. he had foreseen that the particular kind of damage might be done but had gone on to take the risk of it. It follows that accidental damage will not fall within the definition." 13. In the present case, the Appellant made admissions in interview that he was the person who spray-painted the walls, intentionally, on the dates set out in the charge sheet. Furthermore, he was caught on CCTV on the last occasion, both spray-painting the wall and being arrested. 14. The unchallenged evidence at trial was that the wall did not belong to the Appellant and that he did not have permission to damage the wall. 15. The Respondent submitted before the Assistant Magistrate that, on the evidence before the Court, the three offences of malicious damage were proved beyond reasonable doubt. 16. The Respondent accepted, correctly in our

view, that it is a defence to a charge of malicious damage if it was done as an accident, out of necessity or under duress. The Respondent contended that, giving these words their ordinary meaning: · "Accident" means an unfortunate incident that happens unexpectedly and unintentionally, typically resulting in damage or injury. · "Necessity" means the state of being required. · "Duress" means threats, violence, constraints, or other action used to coerce someone into doing something against their will or better judgement. 17. The Respondent's position at trial was that none of these defences were made out on the evidence. The Appellant's grounds of appeal 18. The Appellant raised in his contentions that he was "morally obliged to do the honourable thing" and that his "actions were also entirely justified as [he] was using reasonable force to prevent a crime". 19. The Respondent submitted that neither of these constituted defences to the charge of causing malicious damage. The test on appeal 20. The relevant test is that set out in *Graham v AG*

[2013] JRC 014 , which considered the appeal provisions in the Magistrate's Court (Jersey) Law 1949 , which has been essentially replicated in the Criminal Procedure (Jersey) Law 2018 . The key passage is an extract from the decision in *Rushton v AG* (Royal Court October 16 1989 [Unreported] where the Court said: "The Court of course has on many occasions said that its duty in looking at an appeal on conviction from the Magistrate below is to examine the transcripts to see if there is evidence on which the Magistrate concerned could properly have come to the decision he did. If there was that evidence, then even though the Court might not necessarily come to the same decision, the Court does not lightly interfere with it. The Court has to be satisfied that there was insufficient evidence [for] the Magistrate to have come to the decision he did, or that he drew the wrong conclusion and inferences from the evidence before him." Our review of the proceedings before the Assistant Magistrate 21. It is clear from the transcripts that the Assistant Magistrate recognised the difficulties that a defendant who is not legally represented may face in conducting his defence. He made every effort to ensure that the Appellant understood the procedure that would be followed at trial and not only urged him to seek legal advice, but also adjourned the proceedings following the conclusion of the prosecution case to enable him to do so. However, the Appellant, having consulted with a lawyer, chose to continue to represent himself. The Appellant similarly chose to represent himself in relation to this appeal and we found him to be articulate in his presentation. It was however clear from the transcripts of the trial that the Appellant found it difficult to distinguish between submissions and evidence. Accordingly, the Assistant Magistrate took what he described as "a slightly unusual course" in asking the Appellant to address him generally on the basis that if at any stage there was anything that he said that was clearly of an evidential nature then he would be sworn in the usual manner. This was particularly relevant to several scientific papers and publications on the subject of climate change to which the Appellant referred. We see no objection to the course that the Assistant Magistrate adopted given that, having accepted the evidence adduced by the prosecution, the Appellant was essentially making submissions as to an alleged legal justification for the actions that he took. The Assistant Magistrate accepted that the Appellant's views on climate change

differed from those expressed in the Jersey Government's "climate emergency" campaign and that he was not alone in his view, saying: "It is not my role to listen to arguments about whether or not something that someone says about climate change is true or not. It is a matter obviously of great contention amongst many people. I am aware of that. We are all aware of that. You have very strong views about that, you have made that quite clear. Your views do not tie in with everyone's views because there are conflicting views. But that is not what I am here to deal with." 22. We regard the approach taken by the Assistant Magistrate on this point as a reasonable one to take. The Appellant's defence of necessity 23. Although the Appellant suggested that the vertical stripes on the mural were selective and presented an inaccurate picture, his principal complaint was in relation to the reference to "climate emergency". He maintained that the phrase was unduly alarmist and contended that its public display would alarm young children. In that connection, he made reference to studies which he suggested demonstrated that the use of such terminology could have an adverse impact on the mental health of young people. Issues such as the existence or extent of climate change and whether it constitutes an emergency were not a matter for determination by the Court below, nor were they a matter for this Court. The Appellant is clearly a member of a sector of the population, which may well include individuals with a scientific background, who do not accept either that the climate is changing or that it constitutes an emergency. The issue for the Court below was whether the Appellant's justification for his actions could constitute the defence of necessity. The Assistant Magistrate's decision 24. In delivering his decision, the Assistant Magistrate, having referred to the Appellant's defence that claims made on displays about the climate emergency were blatant falsehoods and that he had a lawful excuse to correct them, went on to say: "Having considered Mr Wragg's submissions to me this morning my finding is that there was no evidence that the public displays contained any falsehoods, let alone anything malicious or blatant, nor that they had contributed to any harm to mental health of children or adults. Likewise nothing to suggest harm to the economy or to public health or to incite civil unrest or promote fraud and corruption. I mention those because that is a matter which Mr Wragg sets out in his defence case statement. Mr Wragg did not take any steps to join the conversation, as the invitation set out, or raise his concerns about untruths to the relevant authorities at any time prior to 26 December 2020 or since. This is not an example of a lawful protest that has led to some incidental damage but on each of the three occasions the defendant has set out to cause damage and has equipped himself for that purpose. He knew that damage would be caused to the displays and would be aware that work would be necessary to repair that damage, especially so after the first occasion. I accept that he has very strong views about the subject of climate change and that he flatly refuses to countenance any contrary view. If his intention was to bring what he believes to be the true position to the attention of the people of Jersey there are legitimate ways that he could have done so. The defendant admitted painting on the displays on these three occasions and this resulted in them having to be repainted at cost to the relevant authorities. I find that graffiti to constitute damage within the ordinary meaning of the words and further find that he had no lawful excuse for his conduct.

Accordingly I find him guilty of all three charges." The defence of lawful necessity 25. Given that the definition of "malice" in relation to the offence of malicious damage does not refer to wickedness, as the layman might think, but has the wider meaning of actual intention to cause damage or recklessness as to whether it is caused (see *Attorney General v Dwyer and O'Bartuin* (supra)), it is unsurprising that necessity can constitute a defence to the charge. Were that not the case, a firefighter who breaks down the door of a burning building to rescue an occupant could find themselves liable. Whilst the range of circumstances that constitute necessity are not strictly defined, we would suggest that they will commonly involve situations where there is a need for urgent action and where there is an absence of a reasonable alternative which would not result in the damage of which complaint is made. 26. In our view the Assistant Magistrate was justified in concluding that the justification advanced by the Appellant for his actions did not constitute necessity. There may well be a debate to be had on the subject of climate change, but that debate can be had without resort to the "law of the jungle" as Magistrate Sowden put it in *Attorney General v Freeman* (supra). Furthermore, there was no evidence before the Magistrate that this particular mural had caused or was likely to cause damage to the mental health of young people who saw it. It was always open to the Appellant to make his views on the alleged risk to the mental health of children known directly to the local authorities but, save for the Appellant's suggestion that the police should have taken action against the Government campaign following the first painting of graffiti, there was no evidence that he had done so. This was not an occasion of such urgency that the Appellant was required to take immediate action and there were reasonable, and lawful, alternatives open to him. Our decision in relation to the appeal against conviction. 27. Given that the facts were not in dispute, we find that the Assistant Magistrate was entitled, on the basis of the evidence before him, to reach the conclusions that he did. Accordingly, the appeal against conviction in respect of all three charges is dismissed. Appeal against sentence 28. The basis of the Appellant's appeal against sentence was not entirely clear, but it appeared from comments made by the Respondent during the sentencing hearing that his principal objection was being required to pay compensation, which he regarded as giving money "which is used to support fraudsters". However, in fairness to the Appellant, we have also considered the binding-over orders that were imposed. 29. The test on appeal against sentence is well established and was summarised by Commissioner Clyde-Smith in *Loureiro v AG*

[2015] JRC 154 as follows: "It is well established that the Court will not interfere with the sentence imposed by the Magistrate unless it was one which is not justified by law, or the sentence was passed on the wrong factual basis or some matter has been improperly taken into or left out of account, or there was some fresh matter which ought to have been taken into account or whether the sentence was wrong in principle or manifestly excessive. In particular, it is not the function of the Royal Court to tinker with sentences which are within the range open to the sentencing Court simply because it might itself have fixed a lower term of imprisonment." 30. In relation to the compensation order, the Respondent

had placed before the Assistant Magistrate a schedule of the cost of repainting the mural on three occasions, amounting to £10,996.37. However, following further enquires it became clear that the cost had been covered by insurance, save for an excess of £500 and the claim was accordingly reduced to that amount. The Respondent also sought an order for legal costs in the sum of £800, being the standard amount awarded for a one-day trial. Our decision in relation to the appeal against sentence 31. Having reviewed the transcript we are satisfied that the Assistant Magistrate gave the Appellant every opportunity to make representations in relation to the orders that were being considered, and that he took into account the points made by the Appellant. The compensation order that was made was, in our view, entirely reasonable and within the Appellant's means to pay. 32. In relation to the binding-over orders, the Assistant Magistrate dealt with the Appellant as a first offender, but pointed out that conviction for the offence of causing malicious damage could expose him to penalties such as imprisonment, community service or a fine. Accordingly, the imposition of the binding-over orders was at the lower end of the scale of possible sanctions. Given that the Appellant had repeated the offending on two occasions after the first, the binding-over orders would also act as a disincentive in relation to repeating the offending behaviour. In the circumstances we do not regard the orders imposed as either wrong in principle or manifestly excessive. 33. The appeal against sentence is accordingly dismissed. Addendum 34. On receipt of the draft judgment, Mr Wragg responded that the judgment was "factually incorrect and has completely ignored the judgment of Mr Justice Burton in *Stuart Dimmock v Secretary of State for Education and Skills* on 10 October 2007 for which I provided a transcript". 35. It is fair to say that we did not refer in the draft judgment to the English High Court decision to which Mr Wragg referred, the reason being that we did not regard it as relevant to the matters in issue in the appeal. However, given the importance which Mr Wragg appears to attach to the High Court decision we should explain why we came to that conclusion. 36. In the Appellant's Appeal Defence Statement he stated that: "I was morally obliged to do the honourable thing and correct the blatant falsehood of a "climate emergency".....because this alarmist nonsense is causing serious harm to children's mental health (and to that of gullible adults) tantamount to child abuse and without any warning would also breach the Education (No.2) Act 1986 and Education Act 1996 according to the judgment of Mr Justice Burton in *Stuart Dimmock v Secretary of State for Education and Skills* on 10 October

2007. If illegal to show Mr Al Gore's science fiction disinformation to older children without numerous corrections then it most certainly is to display a similarly proven falsehood to passing children of all ages." 37. The Dimmock case turned on statutory provisions in England and Wales relating to "political indoctrination" and to the "duty to secure balanced treatment of political issues" in schools, then contained in sections 406 and 407 of the Education Act 1996 which derived from identical provisions in sections 44 and 45 of the Education (No.2) Act 1986. These provisions forbade the "promotion of partisan political views in the teaching of any subject in the school" and required local education authorities, governing bodies and head teachers to "take such steps as are reasonably practicable to

secure that where political issues are brought to the attention of pupils.....they are offered a balanced presentation of opposing views". 38. Mr Dimmock, as a father of two sons at state school and a school governor brought an application in the High Court to declare unlawful a decision by the then Secretary of State for Education and Skills to distribute to every state secondary school in the United Kingdom a copy of former US Vice-President Al Gore's film, *An Inconvenient Truth*, as part of a pack containing four other short films. The judge found that although it was clear that it was based substantially on scientific research and opinion the film was a political film, albeit not party political. The Secretary of State did not challenge that the film promoted political views. The judge found that there were a number of errors of fact in the film of which he regarded some nine errors as of particular importance. He found that in order to establish and confirm that the purpose of sending the films to school was not so as to "influence the opinions of children" but so as to "stimulate children into discussing climate change and global warming in school classes" a guidance note had to be incorporated into the pack putting the film into a context in which a balanced presentation of opposing views could and would be offered. 39. Mr Wragg did not identify any statutory provisions in Jersey equivalent to those contained in the Education Act 1996 in England and Wales nor was it demonstrated that the murals of which he complained were directed specifically at school children. Whilst the murals were on public display they were not in an Education setting and were clearly intended to inform the general public, rather than being directed to school children. Even if there were such a statutory duty in Jersey and even if it could be shown that the murals amounted to the promotion of partisan political views Mr Wragg's remedy would be to pursue legal proceedings similar to those pursued by Mr Dimmock, not to cause damage to the murals.- Although the Dimmock decision was referred to, albeit briefly, in the court below, the Magistrate clearly did not regard it as providing a defence to the charges, a view with which we concur. *Authorities AG v Freeman*

[1994] JLR 29 . *AG v Dwyer and O'Bartuin* [1987-88] JLR N 9b. *Graham v AG*

[2013] JRC 014 . *Magistrate's Court (Jersey) Law 1949. Criminal Procedure (Jersey) Law 2018. Rushton v AG* (Royal Court October 16 1989 [Unreported]. *Loureiro v AG*

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