11 pages.

ROYAL COURT

10th May, 1990 68.

Before: Commissioner Hamon and
Jurats Vint and Le Ruez

Police Court Appeal: Michael René Gosselin

Appeal by Her Majesty's Attorney General by way of case stated. Gosselin had been acquitted before the Police Court on one charge of a contravention of Article 29 (2) of the Road Traffic (Jersey) Law, 1956, as amended, by placing a wheel clamp on a motor vehicle.

Advocate S.C. Nicolle, Crown Advocate
Advocate M.S.D. Yates for the appellant

JUDGEMENT

COMMISSIONER HAMON: This is an appeal by way of case stated from a decision of the Magistrate made on the 1st February, 1990. The facts can be briefly stated.

On Saturday 23rd September, 1989 Miss Jane Strachan parked a Falles hire car in Tunnell Street, on a car park made available for that purpose by Express Electrix Limited. It was 3.30 p.m. when she parked the car. She habitually used the car park when employed by Falles to collect parts for their garage. When she did so, she parked with permission.

At 3.30 p.m. on that Saturday the business was closed, she was not working for her employers, and the social visit that she was making was a personal one. When she returned some forty minutes later, she found that her vehicle had been clamped with an immobilisation device. The effect of clamping the car was entirely to immobilise it. There was a large sign warning against unauthorised parking and of the penalty for so doing.

When Miss Strachan returned to her car she met Mr. Michael Gosselin, who is an independent wheel clamper. One of his customers is Express Electrix Limited. He unclamped Miss Strachan's car after she had paid him the £30 levy that he demanded and which was specified on the sign. She reported the matter to the Police.

In his case stated the Magistrate said "the Court has no doubt that the place where the complainant parked her car was private premises and was used as an integral part of the commercial operations of Express Electrix Limited. Its use by members of the public was severely restricted, and confined to such individuals as had obtained permission from the owner's agent on clearly specified terms". It should be made clear that Express Electrix Limited run a wholesale and not a retail business.

Mr. Gosselin was charged under Article 29 (2) of the Road Traffic (Jersey) Law 1956, which reads:

> "If, while a motor vehicle is on a road or a public place, or any place provided for the parking of vehicles, any person, otherwise than with lawful authority or reasonable cause, gets on to the vehicle or tampers with the brake, or other part of the mechanism of the vehicle, he shall be liable to a fine not exceeding £100".

The learned Magistrate, in his case stated, considered three points which appeared to him to be particularly relevant. Firstly, whether the place where the complainant parked her car was a place covered by the words "road or public place, or any place provided for the parking of vehicles". Secondly, the meaning of the word "mechanism", and, thirdly, the interpretation to be placed on the words "without lawful authority or reasonable cause". There was, of course, a fourth and equally important word which required to be considered judicially, and that was the word

"tamper". The Magistrate merely defined the word in his case stated but without adumbrating further upon it. After discussing the matter with Counsel, we have decided, rather than face the prospect of having at some time to refer this particular point back to the Magistrate for his consideration, to deal with it ourselves.

We will take the points out of order and consider firstly the question of "wheel clamping" within the terms of Article 29 (2).

In England the immobilisation of vehicles illegally parked in public places is provided for by Statute. There is, of course, no similar provision in our law. Whether such legislation is desirable is not for this Court to say; suffice it to say that this legislation, which first saw the light of day in London, in April, 1983, has had a limited growth. Its use is strictly controlled by legislation and only named immobilisation devices can be used.

The Statute prohibits tampering with the brake or other part of the mechanism of the vehicle. The learned Magistrate concentrated in his case stated on a line of cases (Lawrence -v- Lowlett 1952 2 AER 74, Floyd -v- Bush 1953 1 AER 265, Newberry -v- Simmonds 1961 2 AER 318 and Smart -v- Allen 1962 3 AER 893). With respect to the learned Magistrate, we did not find that line of cases particularly helpful. They were all concerned with what constituted a motor vehicle, or a mechanically propelled vehicle and whilst we agree that the cases make it clear that whether a vehicle is a mechanically propelled vehicle or not, depends on whether it has, or is designed to have, an engine, we cannot go with him to his conclusion that the consequence of these decisions, is that in the present statute the word "mechanism" means the engine.

We agree with the learned Magistrate that as the brake is mentioned with no other part of the vehicle, then there is nothing to apply "ejusdem generis" and, it is possible to look to "other parts of the mechanism" which may be quite different to the brakes. The Shorter Oxford Dictionary defines "mechanism" as "the structure, or mutual adaptation of parts, in a machine, or anything comparable to a machine". It is clear that the wheels were immobilised by the clamp.

At page four of the transcript the Magistrate asked Miss Strachan:

"Was it possible for the wheel to move with the clamp on?"

"No".

We agree with Advocate Yates that a car radio aerial is not part of the "mechanism" of the car, but we cannot see why the wheel, like the brake or the pistons of the engine, should not be part of the structure or mutual adaptation of parts of the motor vehicle. We can see no reason why the word "mechanism" means the engine, particularly, as we cannot then see why the brake is any more part of the engine than, say, the steering wheel. We have no doubt that the wheel forms part of the mechanism of the motor vehicle.

If, then, the wheel is part of the mechanism, we have to consider whether, in order to fix the wheel clamp, Mr. Gosselin "tampered" with it. It is perhaps interesting to note that in the English Road Traffic Regulations (The Traffic Regulation Act 1984), which authorises the immobilisation of vehicles illegally parked, the Statute constantly refers to the "fixing of an immobiliation devise to the vehicle". There is no reason to doubt that Mr. Gosselin uses a similar device to one of those authorised for use in England. "Tampering" is not one of those words defined with Article 1 of the Law and perhaps this is because the word has no technical or esoteric meaning. There are two definitions of "tamper" in the Shorter Oxford English Dictionary which are appropriate: "To have, to do or to interfere with improperly; to meddle with a thing and to meddle or interfere with a thing so as to misuse, alter, corrupt or pervert it". It does seem to us that in order to tamper with an object, some physical contact with that object must be made. You cannot, in our view, tamper with the brake unless you make physical contact with the brake. Advocate Yates felt that although tampering meant improperly interfering, it had to consist or more than merely touching. Unfortunately, the learned Magistrate did not rule on whether or not the wheel clamp touched Miss Strachan's car.

At page 13 of the transcript, the Magistrate has this exchange with Mr. Gosselin, who has been describing how the wheel clamps work:

"Do you touch the tyre in so doing"?

Witness: "I don't generally, there is sufficient space for neither myself or clamp parts to touch the tyre. That's not always the case".

Advocate Yates: "What is your policy on touching parts of the vehicle"?

Witness: "Personally I try...I endeavour every time I fit a wheel clamp for my own person not to touch the vehicle, it's a matter of pride and principle".

At page 8 of the transcript, when examining Police Sergeant Malloy on a demonstation of wheel clamping given to the Police by Mr. Gosselin, after the offence had occurred:

"Would the device be actually touching the wheel to hold it in position?"

Witness: "Not on completion of clamping, the particular device he showed me once he'd actually completed the operation, I got down to the actual wheel and once it's actually in place there's no longer any requirement to move the vehicle...the clamp, to get into position. No part of the clamp would appear at that time, to be touching any part of the vehicle".

And finally at page 4 of the transcript the Magistrate asked Miss Strachan:

"And was the clamp actually touching the wheel"?

She replied:

"Yes".

The point is difficult but because of Miss Strachan's affirmative reply to the Magistrate which was not contraverted in any way and because Mr. Gosselin himself admitted that were occasions when he touched a vehicle, we find that in this case there was a "touching" which, coupled with the purpose of the immobilisation device amounts, in our view, to a "tampering" within the terms of the law. Was then the "tampering of the mechanism otherwise than with lawful authority, or reasonable cause?

The fact that Mr. Gosselin was the agent of Express Electrix Limited, and authorised by them to wheel clamp cars parked without permission on their car park, is not, of course, in itself, a reasonable cause. The learned Magistrate was regretfully not correct when he said that it was clear "that

the facility of parking there was only available at the discretion of the owner's agent and after payment of the stipulated fee". This was not a fee of £30 payable in advance after obtaining permission to park. It was a penalty unilaterally demanded by the Company and a prerequisite to the unclamping of the vehicle. It is a form of self-help. In our view self-help has only ever received limited application in our law, which is, after all, based on the continental system and not English Common Law. One only has to recall how in Jersey law one cannot, as one can in England, cut down the branches of a neighbour's tree that overhang one's property without recourse to law.

Advocate Nicolle cited two examples from Le Geyt Privileges Loix et Coutumes. The first from Titre V des Arrests et Executions.

Article 1

"Les meubles, marchandises, navires, dettes actives et personnes des etrangers de l'lles peuvent, par un bref de juge, etre arrestez pour assurance du payement de ce qu'ils doivent, sauf a donner caution. Les mesmes effects peuvent pareillement estre arrestez contre les habitans insoluables et leur personne le peut estre aussi quand, outre leur insolvabilité, leur absence est à craindre".

And from the same work "Des Bestiaux"

Article 5

Permis à tous de saisir le bestail qu'ils trouvent sur leurs propres terres. On aura pour la prise cinq sous par pièce pour les grandes bestes, dix sous pour les cochons, deux sous pour les oyes, et un sous pour les brebis. Pour ce qui est de la garde et nouriture, le jour de la prise non payable, on aura trois brebis. Moyennant le payment de quelles prises gardes et nouriture, on doit promptement restituer, sauf à poursuitre par les voyes accoustume par le dommage s'il yeu a".

If Mr. Gosselin has committed the tort of detinue or of trespass, then, in our view, the commission of a tort cannot be the end result of a reasonable cause. Whilst this act of detaining the car may not be an act carried out

with reasonable cause, and although many tortious acts are also crimes, we still have to remind ourselves that a tort basically gives rise to a civil cause of action, and this statute is dealing only with criminal offences.

We must say that, whilst we fully sympathise with the frustrations felt by owners of parking spaces in St. Helier when these are used without permission, we do not agree with the learned Magistrate when he says "it was the accused's duty to prevent unauthorised persons from fraudulently availing themselves of this facility with no intention of paying the stipulated fee and removing their cars before payment could be enforced". Self-help can only be limited in its use, otherwise we may return to the days of man-traps to catch trespassers or poachers. These are, after all, a form of clamp in a very real sense.

We now return to the nub of the matter. The meaning of the words "road of public place or place provided for the parking of vehicles".

We have one judgement which assists us. Dawson Campbell reported on the 27th October, 1988. That case was an interpretation of Article 16 of the law. The reference in that article is to a "road or public place". The Court held that, although the land in question was private land, it was used so frequently by the public as to make it a public place. The Court said at page 2:

> "There was ample evidence upon which the Magistrate could find that the car park was a "public place". At page 35 he found that, in fact, the owners, whatever their intention, failed to exclude people; that the vast majority of people who wanted to use the car park did use it; that rightly or wrongly the public did have access to that particular place and used it for their own purposes; and that on the facts it was a public place".

So that, as the Court found, "a public place (for the purposes of Article 16) means a place to which the public have access in fact. Whether a place is a "public place" is largely a matter of degree".

If the definitions in Article 16 and Article 29 were the same, we would have no hesitation on the facts in deciding that the car park, in this

case, was not a public place. We have already cited the words of the case stated: "its use by members of the public was severly restricted to such owners, as had obtained permission from the owner's agent on clearly specified terms". Whereas we do not agree that the clearly specified terms was the payment of a £30 fee in advance, the premises were wholesale and not retail and the parking spaces were used for collecting goods or as spaces for cars that were being repaired by the company. We can see no reason to fault the learned Magistrate's findings insofar as they go. But Article 29 goes further than Article 16, because after the words "public place" have been added the words "or any place provided for the parking of vehicles". Miss Nicolle urged upon us that this covered both public and private land. She said this because, in her submission, Articles 28 and 29 referred not to the vehicle, nor its owner, but to third parties, and was intended for the protection of the public at large, to cover any place where the offence was committed.

It is useful to see what the learned Magistrate said in his case stated: "First, whether the place where the complainant parked her car was a place covered by the words "road or public place or any place provided for the parking of vehicles, with particular reference to the last eight words. Applying the ejusdem generis rule as is proper in the circumstances, the words "any place...vehicles", should be interpreted as another form of "public place". It is helpful to examine section 29 (2) of the Road Traffic Act 1930, on which this article was based. Here the words are "on a road or on a parking place provided by a local authority". These words, of course, would have to be altered when adapting the section to the Jersey Statute in order to remove the inappropriate phrase "local authority". Further, Article 32(A) of the Jersey Law uses very smilar words to Article 29 (2) where it talks about "providing suitable places for the parking of vehicles". These two references support the interpretation that the words "any place, provided for the parking of vehicles must mean a place provided for the public at large, primarily for the parking of their vehicles".

Clearly, this is a case for the application of the ejusdem generis rule.

"Road" is defined in Article 1 of the law in this way. "Road" means any public road, any other road to which the public has access, any road

administered by the Housing Committee, any of the roads on the Rue des Pres Trading Estate, any bridge over which a road passes and any sea beach.

A public place is obviously a place used by the public. So a car park attached to a public house in licencing hours, is, in our view, a public place. A public place, as we have seen in Dawson Campbell is a place where the public have access in fact, and its designation is largely a question of degree and fact. We have decided that this car park was not a public place. The law however, goes on to say "or any place provided for the parking of vehicles".

We are concerned whether the intention of the legislature was not to cover such places as the Hospital car park, the Prison car park or the car park at St. Saviours Hospital. Miss Nicolle argued most persuasively and cogently that the legislature intended to cover all parking places, be they on private houses or on private commercial property.

The words "road or other public place" are used sparingly in the Statute. In Article 14 (reckless or dangerous driving), in Article 16 (driving when under the influence of drink or drugs), in Article 16 a, 16b and, of course, Article 29 (2). We can draw no conclusion from these articles, except to note that if someone were charged under Article 14 for dangerous driving on a public place and the Court directed under Article 19 for the case to be tried under Article 15 (careless driving), the new charge would presumably fall away, as under Article 15 one can only be guilty of careless driving on a road and not on a public place. We merely point this out to express the fact that the Road Traffic Law is not without its anomalies. But, it is only in Article 29 (2) that the words "or any place provided for the parking of vehicles" occurs.

It is clear to us that in order to apply the ejusdem generis rule we must find a category or genus. If we cannot find such a category or genus, there seems no point in trying to apply the principle.

We have no doubt that we have a class of public place - a "road" has, by it's definition, a public connotation. Indeed, under Article 31 (3) of the law, the definition of a "road" was extended in that Article to include any

land under the administration of any public or parochial authority. "Public place" by its very nomenclature has a public connotation.

As early as 1766 James Barrington in his work Observations upon the Statutes 2nd Ed 1767 p.114 said this:

> "It is a rule in the construction of statutes, that if particular words are followed by those which are more general, the more general words shall receive a confined construction, as what is first mentioned must be supposed to have been chiefly in the contemplation of the legislature".

To widen the general words to include private parking places with public places is, in our our view, against the application of the rule and we feel that we must confine the general words to a genus which has a "public" application. If this matter is thought to be important, then amending legislation can easily cover the flaw in the legislative intention. As it is, we find that the learned Magistrate was right in law but, for the reasons we have stated, to acquit Mr. Gosselin to the charge of Tampering with a Motor Vehicle contrary to Article 29 (2) of the Road Traffic (Jersey) Law 1956.

Advocate Yates will have his costs.

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