POLICE v. TOM HARRINGTON

HIGH COURT. 1960, 1961. 22, December; 19, January. MARSACK C.J.

Assault - whether element of intentionally applying force present - whether there was lawful justification - Samoa Act 1921 (New Zealand), section 124.

The defendant's mother was the owner and occupier of a property on which had been constructed a small reservoir. On many occasions the defendant's family had complained about the use of water in the reservoir by persons not entitled to use it and in particular their immediate neighbours. On 20 August 1960 the defendant decided to take steps to put an end to trespassing in the locality of the reservoir by breaking bottles and leaving the broken pieces concealed under leaves and lying on the ground near the reservoir over which any person coming there from the road would have to pass. The same afternoon the complainant who had had no notice of the danger awaiting her went to the reservoir to bathe, walked on the concealed glass and received a wound requiring medical treatment.

On a charge of assault -

HELD: (1) While there was no evidence that the defendant had applied any direct or indirect force to the person of the complainant, nevertheless, if a person wilfully creates, without lawful justification, a source of danger whereby it may be expected that another person will be injured and such other person is in fact injured, then the first person is guilty of an assault on the second.

Chapin (1909) 22 Cox C.C. 10 referred to.

(2) Although an occupier of land owes little duty to a trespasser compared with that owed to an invitee or a mere licensee, he is none the less under a duty to refrain from wilfully creating a danger, of which no sufficient notice had been given, into which a probable trespasser may fall.

Commissioner for Railways v. Cardy (1960) 104 C.L.R. 274 followed.

Defendant convicted.

PROSECUTION under section 124 of the Samoa Act 1921 (New Zealand) for assault.

Senior Sergeant Fagatele, for Police.
Phillips, for defendant.

Cur. adv. vult.

MARSACK C.J.: Defendant is charged under section 124 of the Samoa Act 1921 with assault on the person of a thirteen year old girl named Fola Nansen. The facts admitted or proved at the hearing are as follows:-

> The Nansen family is residing on a property belonging to one Joe Steffany at Aleisa. The adjoining property is owned and occupied by Mrs Harrington, the mother of the defendant. The boundary between the two properties is marked by survey pegs in a dry watercourse or former stream-bed. Defendant's father during his lifetime constructed a small reservoir in the dry watercourse, and also installed a tap some thirty yards nearer

the main road. Permission was granted by the late Mr Harrington to persons living on other properties, including that of Steffany, to use the tap, but from time to time he put up notices forbidding the use of the reservoir, the water of which he wished to keep clear from pollution by soap and other foreign matter. Members of the Nansen family have always maintained that both reservoir and tap are situated in the middle of the boundary between the two properties, namely, the watercourse and that they as well as members of defendant's family have the right of free access to both tap and reservoir. Although the evidence as to the precise position of the reservoir with regard to the boundary is a little lacking in certainty, I am prepared to hold for the purpose of the present proceedings that it is situated within the property of defendant's mother. This property is not fenced. Mr Steffany's property is fenced, but some few feet inside the boundary proper.

Members of defendant's family have complained on many occasions with regard to the use of water in the reservoir by persons not entitled to use it and in particular their immediate neighbours. Notices have been posted from time to time on boards put up in the vicinity, but these boards have been damaged or removed, it is not known by whom. On the 20 August 1960 defendant decided to take steps to put an end to trespassing in the locality of the reservoir. He proceeded to break some bottles and leave the jagged pieces of glass lying on the ground near the reservoir over which any person coming there from the direction of the road would have to pass. He then went on to cover these pieces of glass with a layer of leaves from a rubber tree nearby, so that the glass would be concealed from view and yet would not be so thickly covered as to prevent injury to persons walking across it. In this matter I reject - and in this I am supported by my Samoan colleagues - the evidence of defendant that the covering of the pieces of glass was effected by the falling of leaves from the trees nearby between the morning and the afternoon of a day in August.

Defendant was seen carrying out this operation with the glass by two boys Leu and Tuileisu. On returning to the house these boys informed their father, Mr Nansen, of what defendant had done. It is clear that this information was not passed on to the girl Fola, who that same afternoon went to bathe at the tap and finding no water there walked up from the tap in the direction of the reservoir for the purpose of having her bath there. Near the reservoir she walked on the concealed glass and received a painful wound in the foot which required medical treatment. It is claimed for the prosecution that this concealment of broken glass constituted a man-trap and that defendant is guilty of an assault in respect of the injury caused to Fola.

Mr Phillips for the defence makes two main submissions. The first of these is that an assault is the act of intentionally applying force to the person of another directly or indirectly, and in the present case there is no evidence that defendant applied any direct or indirect force to the person of Fola.

It is certainly true that the prosecution should have been brought under section 121 of the Samoa Act 1921 (New Zealand) and not 124, and I am unable to understand why this was not done. At the same time I am satisfied that the acts complained of did constitute an assault. If a person wilfully creates, without lawful justification, a source of danger whereby it may be expected that another person will be injured and such other person is in fact injured, then I think the first person is guilty of an assault on the second. This is the principle applied in the case of Chapin (1909) 22 Cox C.C. 10 in which the defendant, who had thrown some corrosive fluid into a ballot box and an official was later injured thereby, was convicted of common assault; and also in the old case of a man who had

thrown a lighted firework into an assembly and was held to have committed a common assault when the firework caused injury to one of the persons present after passing through the hands of a number of others.

Mr Phillips's second submission is that defendant had lawful justification for his action in strewing the approaches to the reservoir with broken glass, and that he owed no duty to Fola who was a trespasser. Although I think that Fola entered on the piece of land in question under a claim of right yet for the purposes of this case I am prepared to treat her as a trespasser. Although it is true that an occupier of land owes little duty to a trespasser compared with that owed to an invitee or even a mere licensee, he is none the less under a duty to refrain from wilfully creating a danger into which a probable trespasser may fall. In the instant case I am satisfied that defendant not only created the source of danger deliberately but he did so for the express purpose of ensuring that the trespasser whom he expected to come would in fact be injured thereby. In his statement to the Police he said:

> "When someone is hurt from these pieces of broken bottle then I will know who is the person who uses the reservoir as a bathing pool".

As an accurate expression of the principle applying to such cases I respectfully adopt the words of Sir Owen Dixon C.J. in a judgment recently delivered in the High Court of Australia in Commissioner for Railways v. Cardy (1960) 104 C.L.R. 274:

> "The rule remains that a man trespasses at his own risk and the occupier is under no duty to him except to refrain from intentional or wanton harm to him. But it recognises that nevertheless a duty exists where to the knowledge of the occupier premises are frequented by strangers or are openly used by other people and the occupier actively creates a specific peril seriously menacing their safety, or continues it in existence".

In certain circumstances the person creating the danger may be absolved from liability by giving sufficient notice to the persons likely to run into that danger. No such notice was given in the present case. The fact that two boys of the Nansen family saw defendant throwing glass down in that particular spot cannot be considered a proper giving of notice by the defendant of the danger created.

This is not merely a case of a person deliberately creating a source of danger into which a trespasser might be expected to fall. It goes further than that. It is the creating of a source of danger for the express purpose of inflicting injury on the expected trespasser, and the manner of carrying out the operation was such as to ensure that the trespasser would not be able to see the source of danger and thus avoid personal injury. Accordingly, in my view he did the act wilfully and without lawful justification.

For these reasons I hold that defendant must be adjudged criminally responsible for the injury inflicted on Fola, and he must be convicted of assault accordingly. If he had been charged with the more serious offence set out in section 121 of the Samoa Act it would have been the duty of the Court to convict on that charge; as the lesser offence of common assault is that charged in the information it is for that the defendant will be convicted.

I regard the offence and the manner of committing it as serious, and the person walking into the trap created by defendant might well have sustained very grave physical injury. I accept counsel's submission that defendant and other members of the family were exasperated by the action of outside persons in using the water of the reservoir for purposes for which it was not intended. Defendant's exasperation in no sense justified what he has done, but I am prepared to take into account in assessing the penalty. Defendant will be fined £10.