

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Criminal No. BVIHCR No. 2017/0016

THE QUEEN

v

**ANAND LETTSOME
REY RODRIGUEZ**

Appearances: Mr. O'Neill Simpson, Senior Crown Counsel, for the Crown
Mr. Stephen Daniels, Counsel for the Defendants

2020: 17th March

RULING – NO CASE SUBMISSION

- [1] **WARD, J:** The defendants are before the court on an indictment that charges them jointly with the offence of pollution contrary to section 292 (2)(b) of the Criminal Code 1997, as amended. The particulars are that they, on 15th day of August 2013 at Road Town, Tortola recklessly vitiated the atmosphere by causing oil to flow into a drain, thereby causing the air to become noxious to the discomfort of persons in Road Town.
- [2] The Crown led evidence that on 15th August 2013 the defendants were employees of Tripple L Company; a company that provides a range of services, including sewage and waste oil disposal. On that day they attended the Water and Sewage Department pump station in Road Town, purportedly to dump sewage from their truck. Supervisor Dion Clarke gave them access to the splitter box. They were required to place the truck's hose into a strainer within the splitter box in order to discharge the truck's contents.
- [3] Clarke opened the splitter box and instructed them to place the truck's hose into the splitter box and to proceed to pump the waste. One of the defendants did so. Clarke then went to his truck to

retrieve his cell phone. After about 15 minutes, he returned to the splitter box. He observed that the hose had been wrongly placed into an overflow pipe in the splitter box, leading into the ghaut. He caused the defendants to stop the truck from pumping its contents.

[4] He informed them that they had put the hose in the wrong place. One of them then removed the hose, placed it into the strainer and opened the truck's valve to continue pumping. Clarke immediately detected a strong odour of used oil. He asked them whether they had oil in the truck but neither defendant replied. As the truck continued to pump, the smell of oil became stronger so Clarke told them to stop pumping because he was concerned that oil would flow into the pump station end up in the sea at Stony Point via the ghaut. After the defendants removed the hose he locked the splitter box and left. He testified that the smell of oil was still very strong because he had to stand over the splitter box to close it.

[5] Sometime later he received a call from Fire & Rescue seeking assistance to have the services of a pump truck to remove oil from the ghaut. When he got there he observed Fire and Rescue and other officials present including Mr. Cecil Jeffrey of Department of Disaster Management. After questioning him, they set about tracing the oil in the ghaut which ran from the bridge by Nagico Insurance all the way up to the pump station; a distance of about 200-260 feet. He said the length of the ghaut was covered with concrete slabs except for the area at the end of the bridge at the crossroad near Nagico. At this section of the ghaut, he was able to observe oil floating in the water. He said that during this process there was a strong stench of oil which affected him to the extent that he experienced shortness of breath and had to wear a mask.

[6] Having traced the path of the oil, the clean up exercise commenced. The concrete slabs covering the ghaut were removed using an excavator; the oil and water were sucked out using a vacuum truck and the side wall of the ghaut was pressure washed to remove the oil stains. This clean up exercise lasted into the early morning.

[7] Cecil Jeffrey, a level 2 oil spill responder, testified that on arrival at the scene there was the pungent smell of waste oil mixed with a slight scent of sewage. He too was part of the clean-up operation but said although he smelt oil he did not need to go to the hospital. Persons involved in

the clean-up exercise wore protective equipment, meaning coveralls, masks and water boots. He explained that it was necessary to embark on this clean-up exercise otherwise the oil would have flowed out and contaminated the mangroves at Village Cay and the open water area at Craft Alive.

- [8] Under cross-examination, Mr. Jeffrey said he was familiar with waste oil, which he said gives off noxious gases, i.e. ash and trace metals if it is dried. He said in extreme heat, meaning furnace like heat, the atmosphere can be tested for ash and trace metals. He said the atmosphere can be tested for noxious substances but he did not do so. He explained that while you can use an air quality meter to conduct such a test in a closed environment, it is more difficult to perform such a test in the open outside air because, with the wind blowing, different readings would be recorded. He accepted that if the waste oil had emitted gases it would be in the ambient air. He did not test the ambient air to see if any pollutants had been emitted from the waste oil.
- [9] Two oil samples were collected from the ghaut for testing and 3 from the suspect source, which was the truck. An oil sample analysis report stated that comparison of these samples proved inconclusive due to the significant amount of non-petroleum contamination present in the samples from the ghaut. Upon comparison of the 3rd sample from the truck with the samples from the ghaut, the conclusion was that they were not derived from a common source of petroleum oil.
- [10] At the close of the Crown's case, learned counsel, Mr. Daniels submitted that the defendants had no case to answer because the Crown had failed to prove two essential elements of the offence, namely that the atmosphere was rendered noxious within the meaning of the law; and secondly, that in light of the conclusions reached in the oil analysis report, the Crown had failed to establish that the defendants caused the oil spill as it had not been shown that there was a match between the oil sample from their truck and those from the spill.
- [11] On behalf of the Crown, Senior Crown Counsel, Mr. Simpson, submitted that a prima facie case had been made out that the atmosphere was vitiated so as to be noxious. This, he submitted, was an inference open to be drawn from the fact that Mr. Clarke said he experienced shortness of breath and also from the fact that the clean-up team wore protective gear. As it relates to the causation argument, learned Senior Crown Counsel submitted that notwithstanding the

inconclusive nature of the report, the evidence of Mr. Clarke that the defendants were the only ones to access the pump station that day and that they caused the spill by discharging oil into the overflow pipe, suffices to establish a prima facie case.

Law and analysis

[12] The circumstances under which a trial judge may uphold a no case submission are settled. He may do so: (a) when there has been no evidence to prove an essential element of the alleged offence; or (b) when the evidence adduced by the prosecution is tenuous or has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it. **R. v. Galbraith**¹.

[13] It is therefore necessary to examine Section 292(2)(b) of the Criminal Code 1997, as amended, in order to ascertain its essential elements. The section provides:

“292.(1) A person commits an offence, if he

(a)...

(b) intentionally or negligently vitiates the atmosphere in any place so as to render it noxious to the health or comfort of persons in the neighbourhood.”

(2) A person who

(a) intentionally or recklessly commits an offence under paragraph (a) or (b) of subsection (1) is liable on conviction to imprisonment for a term not exceeding Fourteen years or a fine not exceeding seventy-five thousand dollars or both.

[14] Based on this provision, the prosecution must prove:

(a) That the atmosphere was vitiated;

(b) That it was vitiated by the defendants;

(c) That they did so intentionally or recklessly;

(d) That such vitiation of the atmosphere was noxious so as to affect the health or comfort of persons in the neighbourhood.

¹ [1981] 1 WLR, 1039 at 1042

- [15] It is important to have a clear notion of what these terms mean. “Vitiate” in the section simply means to pollute the atmosphere. “Noxious” can bear its dictionary meaning of harmful, poisonous injurious or unpleasant. It seems to me that the word “noxious” must bear the same meaning whether the effect it produces is ill health or discomfort. The more challenging question is which meaning does it bear in the context of a charge of air pollution and what type of evidence suffices to fulfil this requirement? Counsel were invited to provide authorities elucidating the meaning to be ascribed to the word noxious and the type of evidence that must be adduced to prove this element.
- [16] The Crown relies on **R v White and Ward**.² In that case the defendants were tried on an indictment for common nuisance. It appears from the case that it was then a common nuisance to make acid spirit of sulphur, and thereby impregnate the air with noisome stinks. The defendants were convicted of a nuisance in erecting and continuing their works at Twickenham, for making acid spirits of sulphur, oil of vitriol, and oil of aqua fortis. The particulars of the indictment read that “at the parish of Twickenham, & C. near the King’s common highway there, and near the dwelling-houses of several of the inhabitants, the defendants erected twenty buildings for making noisome, stinking and offensive liquors; and then and there made fires of sea-coal and other things, which sent forth abundance of noisome, offensive and stinking smoke; and made, & C. great quantities of noisome, offensive, stinking liquors called & C.; whereby and by reason of which noisome, offensive and stinking & C. the air was impregnated with noisome and offensive stinks and smells; to the common nuisance of all the King’s liege subjects inhabiting & C. and travelling and passing the said King’s common highway; and against the peace & C.”. They were convicted. Counsel for the defendants moved a motion for a new trial. He submitted, inter alia, that although the indictment was laid for making a liquor which impregnated the air with “noxious”, hurtful or unwholesome, and stinking qualities, it appeared upon the evidence that the fumes, however offensive and disagreeable to many persons, were by no means in reality noxious, hurtful or unwholesome. However, the judge’s report on the evidence at trial appeared to say that the smell was not only intolerably offensive, but also noxious and hurtful, and made many persons sick, and gave them head-aches. The prosecution submitted that the word “noisome was synonymous with “noxious” and though it conveyed a complex idea, it included “hurtfulness” and imported a

² (1757) 1 Burr 333

nuisance. The prosecution contended that an offensive stench is of itself a nuisance; even though not strictly hurtful.

[17] Lord Mansfield did not sustain the objection. He held that the jury had found it to be common nuisance. He further held that the word “noxious” also means “hurtful and offensive to smell”. He held that, “it is not necessary that the smell should be unwholesome: it is enough, if it renders the enjoyment of life and property uncomfortable.”

[18] Basing himself on this authority, Senior Crown Counsel urges the court to find that in the context of section 292(2)(b) air pollution offence, the word noxious can mean hurtful or offensive to smell. With respect, reliance on this case is misconceived. In the first place that case was concerned with the offence of nuisance by the creation of offensive stinks or smell. I understand the judgment to say that in order to prove the offence of nuisance it was not necessary to prove that the smell caused or was capable of causing physical harm; it would suffice if the smell rendered the enjoyment of life and property uncomfortable. It is not hard to understand, why the word noisome/noxious could bear its wider meaning in the context of an offence concerned with stinking smells. Once the prosecution proves an offensive or stink smell the offence was made out without proof that the smell was harmful or unwholesome.

[19] By contrast, the case at bar is concerned with a charge of air pollution. The question is whether the element of noxious is made out in section 292(2)(b) on mere proof that the atmosphere was vitiated by an offensive smell. In determining the proper meaning to be ascribed to the word noxious in the context of the section, I have chosen to be assisted by jurisprudence emanating from India whose Penal Code contains a provision which is very similar to the BVI Code, though not identical. Section 278 of the Indian Penal Code provides:

“Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood, or passing along a public way, shall be punished with a fine which may extend to five hundred Rupees.”

[20] The material differences between this provision and section 292(2)(b) are that the act must be a voluntary one; and the atmosphere must be rendered noxious to health only.

[21] The jurisprudence from India suggests that it is insufficient to prove merely that the atmosphere was made to smell bad or unpleasant. In the case of **re Sanna and 3 others**³, the Court construed section 278 of the Indian Penal Code. In discussing the requirement to prove that the atmosphere was noxious, the court held that, “in the case of vitiating the atmosphere, it will not be sufficient to prove that the vitiation was simply in respect of bad smells”. The Court further held:

“We wish to point out to the Subordinate Magistrate that, in order to sustain a conviction under Section 278, it is necessary to establish, by the evidence of persons competent to express an opinion on the point, that the atmosphere has been vitiated so as to make it noxious to public health.”

[22] This suggests that expert evidence is required on the question whether the atmosphere has been rendered noxious. With this proposition, I am in respectful agreement. In my view, the prosecution is required to prove that the atmosphere has been rendered noxious by evidence of someone competent to speak to the point. They must also establish that the noxious atmosphere affects health or, at the least, the comfort of persons in the neighbourhood. Either way, the ill-health or the discomfort must be attributable to the noxious atmosphere. I am mindful that a penal statute carrying such severe penalties should be strictly construed and am propelled to the conclusion that the word noxious must bear a more restricted meaning in the context of section 292(2)(b).

[23] I am fortified in this view when I consider that section 292(2)(c) specifically creates an offence that relates to the creation of offensive smells. It was open to the legislature to employ the term offensive smells in section 292(2)(b). To my mind, the choice of the word noxious was deliberate and intended to denote its narrower meaning of harmful, poisonous or injurious.

[24] Turning now to the evidence in this case, there is no evidence that the atmosphere was in fact rendered harmful or poisonous, as opposed to producing a “strong or “pungent” smell, employing the adjectives used by the two witnesses who spoke to this issue. Indeed, the evidence is that the atmosphere was not tested. Mr. Jeffrey further testified that waste oil may emit harmful ash and trace metals but only when dry. There is no evidence that the oil was dry; in fact, the oil was floating on water in the ghaut. In reality, the situation seems to have been contained relatively quickly.

³ Criminal revision case No.4 1898-99

- [25] Further, unlike the case of **White and Ward**, there is simply no evidence of how this smell of oil affected anyone in the neighbourhood. There is no evidence, for example, that persons had to be evacuated or businesses closed. Mr. Simpson submitted that the jury can draw an inference that the smell of oil caused discomfort to persons in the neighbourhood because there was evidence that some civic minded citizens assisted in the clean-up. I am unable to follow this line of reasoning. Mr. Simpson further submitted that though Mr. Clarke is the only person who speaks of experiencing some discomfort, his evidence suffices to establish a prima facie case that the atmosphere was rendered noxious since the statute does not require any minimum number of persons to be discomforted. Even if it were accepted that noxious bears the meaning of hurtful or offensive to smell thereby causing discomfort, I consider this too tenuous a basis on which to think that a properly directed jury might convict.
- [26] One can perhaps conceive of a case where noxious gases are emitted and a number of persons have to be hospitalized. In such a case an inference may reasonably arise that the atmosphere has been rendered noxious. To my mind, however, there would still need to be some evidence to establish a nexus between the outbreak of illness and the noxious atmosphere.
- [27] In this case, the Crown must prove that the atmosphere was noxious in the sense discussed above so as to affect the comfort of persons in the neighbourhood. This they have failed to do. Accordingly, on this basis, the no case submission is upheld. For completeness, I would only add that Mr. Daniel's second submission relating to the question of causation is without merit for the reason that the evidence of Mr. Clarke would have been plainly sufficient to establish a prima facie that the defendants' acts caused oil to spill into the ghaut.

Trevor M. Ward, QC
High Court Judge

By the Court

Registrar