

IN THE FEDERAL COURT OF APPEAL
BENIN JUDICIAL DIVISION
27TH FEBRUARY, 1979. FCA/B/2/78

CORAM:- O. EBOH, A. G. O. AGBAJE, P. NNAEMEKA-AGU, JJCA

CHIEF SAMUEL OTERI & 4 ORS. APPELLANTS
AND
THOMAS AFONUGHE AND ANOR. RESPONDENTS

CRIMINAL LAW - *Bona fide claim of right - Where raised by evidence - Manner of doing so does not matter - And it was erroneous to hold - That the defence cannot form the basis of a no case submission - Or that such a defence can only be assessed after the trial court had the opportunity of hearing the defence.*

CRIMINAL LAW - *Bona fide claim of right - The principle of reasonableness as propounded in R v. Clemens - Where used as the basis for testing the correctness of the decision of the learned chief magistrate - He was not wrong in upholding the no case submission.*

CRIMINAL LAW - *Malicious damage - Defence of bona fide claim of right - Admission by an accused person of having damaged the property to which a charge relates - Is not a condition precedent to the raising of the defence.*

CRIMINAL PROCEDURE - *No case submission s.286 CPA - Was properly upheld by the trial Chief magistrate.*

FACTS

The appellants as defendants were in 1974 charged in the Ughelli Chief Magistrate's court with wilfully and unlawfully destroying the respondent's (complainants') family hall which was already built up to window level, and thereby committed an offence punishable under section 389 of the Criminal Code cap 28 Vol. 1 Laws of Western State of

Nigeria, applicable to the Midwestern State of Nigeria. The facts elicited in evidence from the witnesses for the prosecution in examination in chief, in cross examination and in re-examination during the trial were that in suit No. UHC/30/72, the 3rd accused sued in a representative capacity, the 1st and 3rd p.w.s along with another for a declaration of title in respect of the land in which the hall is being built and that the parties are blood relations. The matter was settled out of Court upon their reaching agreement that the parties should farm the land in common. At the close of the case for the prosecution, counsel for the defendants made a no case submission on their behalf based on section 21 of the Criminal Code the effect of which was that the defendants did what they were accused of doing in exercise of an honest claim of right and without intention to defraud.

The learned chief magistrate upheld the submission and discharged the accused persons. The complainants appealed against the ruling to the Ughelli High Court which upheld the appeal and set aside the ruling of the learned chief magistrate to the effect that the defendants has no case to answer. The defendants have now with the leave of the High Court appealed to the Court of Appeal.

ISSUE FOR DETERMINATION

Whether the learned judge on appeal was right when he held that the defence under s. 21 of the Criminal Code (bona fide claim of right) cannot form the basis of a no case submission and that such a defence can only be assessed after the trial court had the opportunity of hearing the defence.

HELD (Unanimously allowing the appeal per judgment delivered by **AGBAJE JCA**)

Defence of a claim of right

1. It is also clear on the authorities that provided the issue has been raised by evidence, the manner in which it was raised does not matter. See for instance Bullard v R. (157) A.C. 635 P.C. From what we have just been saying we are satisfied that the learned judge on appeal was in error when he held (1) that the defence of a claim of right under Section 21 of the

Criminal Code Law cannot form the basis of a no-case submission and (2) that such a defence can only be assessed after the trial court had the opportunity of hearing the defence. (p. 802 A)

Malicious damage

2. Counsel for the complainants sought to canvass before us the points raised in these grounds of appeal in support of his contention that the defendants had a case to answer in the Chief Magistrate's Court. He submitted that since the defendants denied damaging the property in question, the defence of a claim of right could not be available to them. We are not in any doubt that this submission is fallacious. It is trite law that any defence which is open to an accused person on the evidence before the court is available to him whether or not the defence was raised by him. In other words, we are satisfied that the admission by an accused person of having damaged the property to which a charge of malicious property relates is not a condition precedent to the raising of the defence of a claim of right. (p. 802 F)

The principle of reasonableness as propounded in R. v. Clemens

3. Can it be said that the defendants did more damage than they could reasonably suppose to be necessary for the assertion or protection of the right they claimed? The answer we give to this is 'NO'. So if the principle of reasonableness as propounded by Lord Russell of Killoway C.J. in R. v. Clemens is used as the basis for testing the correctness of the decision of the learned Chief Magistrate, we are not persuaded that he was wrong in upholding the no-case submission based on Section 21 of the Criminal Code Law. This is not to say that we endorse the view that the extent of action taken to assert the right claimed must be reasonable before a defence of a claim of right can be upheld. (p. 804 E)

No case submission s.286 CPA

4. In sum we are satisfied that the learned judge on appeal was wrong in reversing the ruling of the learned Chief Magistrate on the on-case submission made to him. In the result the appellants' appeal is allowed. The

judgment of the learned judge on appeal is set aside. The ruling of the learned Chief Magistrate upholding the no-case submission made to him is restored. The appellants are discharged under section 286 of C.P.A. (p. 805 H)

B

NOTABLE POINT OF INTEREST

AGBAJE JCA

1. Bona fide claim of right - What it involves

C True enough the defence of a claim of right under Section 21 of the Criminal Code Law involves the assertion of some explanations for the conduct of the defendants in respect of the subject matter of the charge before the court. In like defences, such as "accident", "automatism", "provocation", "self-defence", "duress" or "mistake", it has been held that D the accused either by cross-examination of the prosecution witnesses or by evidence called on his behalf or by a combination of the two must place before the court such material as makes the defence a live issue fit and proper to be left to the jury. But once he has succeeded in doing this E it is then for the prosecution to destroy that defence in such a manner as to leave in the jury's minds no reasonable doubt that the accused cannot be absolved on the ground of the alleged facts constituting the defence per Edmund Davis J. in R. v Gil (1963) 47 Cr. App. R. 166 at p.171 F (duress). See also Winn L.J. in R. v. Wheeler (1968) 52 Cr. Appl. R. 28 at p. 31 (provocation, self - defence). (p. 801 F)

REPRESENTATION

Dr. J. O. Akpojaro for the Appellants
G Dr. D. O. Mowoe for the Respondents

CASES REFERRED TO

R v. Gil (1963) 47 Cr. App. R. 166 at p. 171
H R. v. Wheeler (1968) 52 Cr. Appl. R. 28 at p. 31
Nwachukwu v. Commissioner of Police (1970-71) Vol. 1 E.C.S.
R. v. Clemens 1898 1 Q.B. 556
R. v. Twose 1879 14 Cox 327

R. v. Ruller 1 C.A.R. 174

R. v. Skivington (1967) 1 ALL E.R. 483

JUDGMENT DELIVERED BY AGBAJE JCA

This is an appeal in a private prosecution. The private prosecution was instituted by Thomas Afonughe and Okeh Akpobome as complainants against Chief Samuel Oteri and 4 ors. as defendants in an Ughelli Magistrate's Court. The complainants charged the defendants with having committed the following offence:

"CHARGE

That you Chief Samuel Oteri, Ikpekuru Oyovbikowhe, Onowhereukaye Erhimu, Iwuru Udumebaye, and Ugovbayerhe Oyovbikowhe, on the 2nd day of June, 1974, in Erhurhie land, Iwhereko in the Ughelli Magisterial District, unlawfully and wilfully destroyed the Onotame family Hall which was already built up to window level, valued at N600.00, the property of Onotame family of Ughelli and thereby committed an offence punishable under Section 389 of the Criminal Code Cap. 28 Vol. 1 Laws of Western State of Nigeria, applicable to the Midwestern State of Nigeria."

The case was tried by Mr. J. O. Idahosa, Chief magistrate, as he then was. Four witnesses gave evidence for the complainants. At the close of the case for the prosecution, counsel for the defendants made a no-case submission on their behalf and this was upheld by the learned Chief Magistrate. The facts elicited in evidence from the witnesses for the prosecution in examination in chief, in cross-examination and in re-examination were admirably summarised in the judgment of the learned Chief magistrate and they were as follows:

"There is no question that Erhurhie hall which was built up to window level was built on Erhurhie farm land. There is no question that in suit No. UHC/30/72, the 3rd accused sued in a representative capacity, the 1st and 3rd P.WS. along with another for a declaration of title to a piece of land in Erhurhie farm area in Ekiugbo and that the subject matter of that action is the very land on which Onotame hall was being built by the 1st complainant on behalf of Onotame family of Ekiugbo.

There is sufficient evidence that the accused persons are blood relations. There is evidence that about two days or so before this present matter was reported to the police, Ughelli, the 5th accused reported the two complainants and twelve other members of his family to the police Ughelli for digging up cassava stems belonging to members of his family and laying a building foundation on the area occupied by the cassava stems so destroyed. This leads me to the order made in exhibit "B" which reads as follows:- "In view of the settlement reached by both the parties, I hereby strike out the case without any order as to costs". The 1st complainant in this case was the 2nd defendant in the suit under reference in exhibit "B". The 3rd p.w. in this case was the 1st defendant in that case. According to the 1st defendant - that is 3rd p.w. in this case - the agreement was that the parties should go and farm the land in common."

The no-case submission made on behalf of the defendants in the Chief Magistrate's court was based on Section 21 of the Criminal Code Law of Western State of Nigeria applicable to Bendel State which provides as follows:-

"21. A person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud."

In effect counsel for the defendants submitted that the defendants did what they were accused of doing in respect of the property to which the charge relates in exercise of an honest claim of right and without intention to defraud. In upholding this submission, the learned Chief Magistrate held as follows:-

"One thing is clear and that is that the 3rd accused has since, at least, 1972 been making a claim to ownership or at least a claim to control the land in question on behalf of himself and others. There is no evidence that he has at any time abandoned this claim but rather exhibit "B" shows that he and the people he represents as well as the 1st and 2nd defendant - that is the 3rd and 1st P.WS. in this trial - have been told to farm the land in common. This confirms the right of the 3rd accused and his people to farm on the land in question. To introduce building struc-

tures on the land in question without the consent of the 3rd accused and his people would be a negation of the right to farm on the land in question in common. It was therefore competent of the 3rd accused and his people to remove from their land what they genuinely considered a nuisance thereon. It cannot therefore be validly held that the claim of the 3rd accused and his people is not honest. The evidence in support of this charge having revealed a genuine case of dispute to Erhvrhie land and the right to control the said land, being seriously in dispute, it is my considered view that the prosecution has failed to establish that the accused persons acted unlawfully. This being so, I hold that the prosecution has not succeeded in making out a case sufficient strong for me to call on any of the four accused persons to make a defence to the charge as laid. I therefore hereby discharge each of the four accused persons on the merit under section 286 of the C.P.A."

The complainants appealed against this ruling to the Ughelli High Court. The points canvassed in the complainants' grounds of appeal in the High Court were as follows:-

"GROUND OF APPEAL"

(1) The learned trial Chief Magistrate erred in law in holding that the defence of bona fide claim of right as provided by section 21 of the Criminal Code Law of Western State of Nigeria was applicable to the particular circumstance of this case when it was clear from the evidence before the court that the defence of the accused persons was a total denial of the charge.

(2) The learned trial Chief Magistrate erred in law in holding that the defence of bona fide claim of right availed the accused persons of the charge when there was no allegation by the accused persons that they demolished the building subject matter of the charge in the exercise of the bona fide claim of right.

(3) The learned trial Chief Magistrate erred in law in ruling that defence of bona fide claim of right was applicable to the peculiar circumstances of this case when there was evidence that the destruction of appellants' building was wanton, deliberate and/or excessive."

It was not suggested in the High Court that the learned Chief Magistrate

misdirected himself on the evidence before him. However, the learned judge on appeal Amissah J. upheld the complainants' appeal, set aside the ruling of the learned Chief Magistrate to the effect that the defendants had no case to answer. The reasons the learned judge on appeal gave for the conclusion he reached in the matter could be found in the following passage of his judgment:

"The evidence before the court below centered around a claim and counter claim Over a piece or parcel of land known as Erhurhie and not over the ownership of the damaged Hall. It is my view that section 21 of Criminal Code is a statutory defence and is quite distinct from a PRIMA FACIE CASE. The said Section 21 of the Criminal Code reads:-

"A person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect of any property in the exercise of an honest claim of right and without intention to defraud."

It is also my view that being satisfied on the evidence adduced by the appellants in the court below that the respondents in fact damaged/destroyed a hall belonging to Onotame family, the learned trial Chief Magistrate should have ruled that a prima facie case had been established notwithstanding the fact that the ownership of the land on which the said hall was built is in dispute between respondents and appellants. I am of the opinion that the exercise of an honest claim of right and without intention to defraud on the part of the accused/respondents can only be assessed if the trial court had the opportunity of hearing the other side of the story (i.e. defence). I am unable to see how this honest claim of right on the part of the respondents has been established by the prosecution."

The defendants have now with the leave of the High Court appealed from the judgment of the High Court to this Court. Counsel for the defendants submitted that the learned judge on appeal was wrong in trying to divorce a claim to the piece or parcel of land known as Erhurhie from the land. Counsel submitted that this is so because of the maxim quic quid plantatur solo solo credit. Counsel for the respondent was hard put to it to defend the observation of the learned judge on appeal, namely, the evidence be-

fore the court below centered around a claim and counter claim over a piece or parcel of land known as Erhurhie and not over the ownership of the damaged property, in the consideration of the defendants' plea of a claim of right over the damaged property. In the end, counsel for the respondents conceded it that the distinction which the learned judge on appeal was trying to draw in the passage under consideration was quite inappropriate. We are in agreement with counsel for both sides on this point. The main attack by counsel for the defendants is on the following views of the learned judge on appeal:

"(a) it is my view that section 21 of Criminal Code Law is a statutory defence and is quite distinct from a prima facie case;"

"(b) I am of the opinion that the exercise of a honest claim of right and without intention to defraud on the part of the accused persons can only be assessed if the trial court had the opportunity of hearing the other side of the story that is the defence."

It is the submission of counsel for the defendants that these views of the learned judge on appeal have no legal support for them and that the defence of a claim of right under section 21 of the Criminal Code Law can in a proper case be made the basis of a no-case submission. He went on to say that the present case is eminently one where such submission based on Section 21 of the Criminal Code Law can be made because the evidence upon which it was based had been elicited from the witnesses for the prosecution.

True enough the defence of a claim of right under Section 21 of the Criminal Code Law involves the assertion of some explanations for the conduct of the defendants in respect of the subject matter of the charge before the court. In like defences, such as "accident", "automatism", "provocation", "self-defence", "duress" or "mistake", it has been held that the accused either by cross-examination of the prosecution witnesses or by evidence called on his behalf or by a combination of the two must place before the court such material as makes the defence a live issue fit and proper to be left to the jury. But once he has succeeded in doing this it is then for the prosecution to destroy that defence in such a manner as to leave in the jury's minds no reasonable doubt that the ac-

cused cannot be absolved on the ground of the alleged facts constituting the defence per Edmund Davis J. in R. v Gil (1963) 47 Cr. App. R. 166 at p.171 (duress). See also Winn L.J. in R. v. Wheeler (1968) 52 Cr. Appl. R. 28 at p. 31 (provocation, self - defence). **It is also clear on the authorities that provided the issue has been raised by evidence, the manner in which it was raised does not matter.** See for instance Bullard v R. (157) A.C. 635 P.C. From what we have just been saying we are satisfied that the learned judge on appeal was in error when he held (1) that the defence of a claim of right under Section 21 of the Criminal Code Law cannot form the basis of a no-case submission and (2) that such a defence can only be assessed after the trial court had the opportunity of hearing the defence. And as will be seen, equally from what we have just said, the learned judge on appeal allowed the complainants' appeal to him because of the reasons which have been faulted before us.

The learned judge on appeal expressed no views on the complainants' grounds of appeal to him which we have quoted above, particularly ground 3 which says:-

"The learned trial Chief Magistrate erred in law in ruling that defence of bona fide claim of right was applicable to the peculiar circumstances of this case when there was evidence that the destruction of appellant's building was wanton, deliberate and/or excessive."

Counsel for the complainants sought to canvass before us the points raised in these grounds of appeal in support of his contention that the defendants had a case to answer in the Chief Magistrate's Court. He submitted that since the defendants denied damaging the property in question, the defence of a claim of right could not be available to them. We are not in any doubt that this submission is fallacious. It is trite law that any defence which is open to an accused person on the evidence before the court is available to him whether or not the defence was raised by him. In other words, we are satisfied that the admission by an accused person of having damaged the property to which a charge of malicious property relates is not a condition precedent to the raising of the defence of a

claim of right. Counsel for the complainants also submitted that the defence of a claim of right would not be available to the defendants in the instant case because their action in assertion of the claim of right lacked reasonableness. As we have pointed out above the learned judge on appeal expressed no view on this point. However counsel for the complainants referred us to the following passage in Edward Nwachukwu vs. Commissioner of Police (1970-71) Vol. 1 E.C.S. Law Report 110 at 114, a decision of Aniagolu J. as he then was:-

"Mr. Ukattah has submitted that under the section there is no limit placed to the amount of destruction that a bona fide claimant can do on a disputed land against the crops of his opponent. The section protects him no matter to what extent and how devastating his destruction may be. This contention is not borne out by the authorities. In G. Ejike v. Inspector-General of Police (1961) 5 E.N.L.R. 7 Mbanefo, C.J., held that the section protected the appellant who hired labourers and went and destroyed 562 cement blocks which the complainant moulded and placed upon the disputed land. But His Lordship adopted, in that case, the principle of reasonableness as propounded by Lord Russell of Killower, C.J., in R. v. Clemens (1898) I.Q.B. 516 where he said, in part, that if on the facts before them the jury came to the conclusion that the defendants did more damage than they could reasonably suppose to be necessary for the assertion or protection of that right, the jury may properly find the defendants guilty of malicious damage."

Heaven v. Crutchley (1903) 68 J.P. 52. See paragraph 2399 of 36th Ed. Archibold followed the same principle five years later. These were cases decided on section 22 of the Malicious Damage Act, 1861, dealing with damage to trees.

"Undoubtedly, there must be some limitation to the conduct of a claimant under section 23 of the Criminal Code. He is certainly not entitled under the section to go on a rampage of destruction as Mr. Ukattah's submission would suggest. The likelihood of a breach of peace would dictate that the law must place some limit. The offence of Forcible Entry under section 81 of the Criminal Code would lose most of its essence if the law were to give a claimant this blank cheque for destruc-

tion. Under that section the Federal Supreme Court has held that he who is in actual and peaceable possession, even if he was originally a trespasser, must not be ousted from the land with unreasonable force by a claimant, even if the claimant be the rightful owner. R. v. Okotie Eboh F.S.C. 126/1962."

The facts found by the learned trial Chief Magistrate which have not been faulted before us were (1) that the defendants were farming on the piece of land on which Onotame family hall was built by the complainants; (2) that the defendants had their cassava crops on the land before the complainants came to start their building operations on the land; (3) that in the process of digging the ground for the building of the hall, the complainants destroyed the cassava stems; and (4) since at least 1972 the 3rd defendant has been laying claim to ownership or control of the land. When then on these premises the learned Chief Magistrate held:

"To introduce building structures on the land in question without the consent of the 3rd accused and his people would be a negation of the right to farm on the land in question in common. It was therefore competent of the 3rd accused and his people to remove from their land what they genuinely consider a nuisance thereon."

Can it be said that the defendants did more damage than they could reasonably suppose to be necessary for the assertion or protection of the right they claimed? The answer we give to this is 'NO'. So if the principle of reasonableness as propounded by Lord Russell of Killowier C.J. in R. v. Clemens is used as the basis for testing the correctness of the decision of the learned Chief Magistrate, we are not persuaded that he was wrong in upholding the no-case submission based on Section 21 of the Criminal Code Law.

This is not to say that we endorse the view that the extent of action taken to assert the right claimed must be reasonable before a defence of a claim of right can be upheld. We have not had a full dress argument on this point before us for counsel for the complainants did not give notice to the defendants that he was going to re-open the matter before us. And as we commented above the point had not received the consideration of the learned judge on appeal. So we are not

here expressing a definite or concluded view on the point. However we must observe that the decision in R. v. Clemens had been criticized by some academic lawyers. For instance Professor Glanville Williams pointed out in his book 'Criminal Law'; "The General Part, 2nd Edition at 311, that the decision in R. v. Clemens 1898 1 Q.B. 556 in its requirement of reasonableness as to the extent of action to assert a claim of right is difficult or impossible to reconcile with R. v. Day 1844 J.P. 186, R. v. Twose 1879 14 Cox 327 and R. v. Ruller 1 C.A.R. 174. In R. v. Day a defence of a claim of right succeeded where a person who had distrained sheep damage feasant injured them because their owner would not pay for the damage. And a similar defence succeeded in R. v. Twose where a woman set fire on furze growing on a common thinking that she had a right to do so to improve the growth of the grass and also in R. v. Rutter where a tenant cut down trees claiming a right to do so because he had planted them himself. And more recently in R. v. Skivington (1967) 1 All E.R. 483 the appellant went to the offices of the employers of himself and his wife on a Wednesday. He drew a knife and demanded his wife's wages which according to him, he had her authority to collect. He pushed an assistant manager into an office where a safe was open and there, at the point of knife, the appellant was given two wage packets containing money. Wages were not due until Friday. At his trial on a charge of robbery with aggravation, contrary to s. 23(1), of the Larceny Act, 1916, the appellant contended that he had an honest belief that he had a right to the money. The trial judge directed the jury that before the appellant could maintain a defence to the charge they must be satisfied that he had an honest belief that he was entitled to take the money in the way in which he did take it. On appeal against conviction it was held that a claim of right was a defence to robbery or any aggravated form of robbery, and it was unnecessary to establish that the accused must have had also honest belief that he was entitled to take the money in the way in which he did take it. The appeal was allowed. (underlining ours). The action taken by the appellant in R. v. Skivington to assert the right he claimed was anything but, in our view, reasonable.

In sum we are satisfied that the learned judge on appeal

was wrong in reversing the ruling of the learned Chief Magistrate on the on-case submission made to him. In the result the appellants' appeal is allowed. The judgment of the learned judge on appeal is set aside. The ruling of the learned Chief Magistrate upholding the no-case submission made to him is restored. The appellants are discharged under section 286 of C.P.A. The appellants are entitled to their costs in the court below and this court which we assess at N50.00 and N150.00 respectively against the respondents.

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