

ROYAL COURT

28th September, 1987

Her Majesty's Attorney General

-v-

John Dwyer; and Thomas Joseph Patrick O'Bartuin.

---

Police Court Appeal against Sentence  
passed 9th September, 1987 on charge  
of Malicious Damage:  
Dwyer: fine; O'Bartuin: 1 year's Binding Over.

---

Advocate S.C. Nicolle, The Crown Advocate.  
Advocate P.C. Sinel for the Appellants.

---

Judgment

THE BAILIFF: "... That being so I think the principle in R - v. Cunningham which is referred to in passages at page 1723 in Archbold applies. The crime, of course, is not statutory but I think we have been using the word malice for so long that we have accepted that the common law meaning, in fact, is the same. Malice must not be taken in the old sense of wickedness in general, as requiring either an actual intention to do the particular kind of harm that in fact was done or recklessness as to whether such harm would occur or not, i.e. the accused had foreseen that the particular kind of harm might be done, and yet had gone and taken the risk of it. It is neither limited nor does it indeed require any will towards the person injured; this meaning of recklessness is limited to the meaning of maliciously. And, Miss Nicolle, that is the view I have taken considering the legal point.

This appeal arises from an incident in the early hours of the 31st of January, when, the Prosecution claimed, that the appellants caused malicious damage to a motor vehicle; the appellants denied the charges. The sole prosecution witness was P.C. Le Breuilly, who saw the appellants, who were making a noise in the area pass

at a angle from him, near to the car, he did not seen them actually touch the car and he heard however what he called an almighty 'twang' shortly before this the men appeared to fall against the car, they then made off and he followed them and arrested them. Later the policeman had found that the wing mirror was damaged.

Now the learned Magistrate found the charge proved but said at the bottom of page 26 of the transcript - " I believe it was an accident, but it was reckless not deliberate".

Of course he may have meant only to say that the damage was not intended in law. However, he did not go on to enlarge. Now the offence of malicious damage is a common law offence, but we have used the word maliciously for so long that we perhaps lost sight of the fact that it is derived from the Act of 1861 which we have followed in respect of definitions before, and recklessness requires a degree of foresight and a direction of the mind as to what is about to be done. In that connection there is a case which is referred to in Archbold at Chapter 17 - paragraph 23. The case of R. - v. Cunningham (1957) C. A. Reports 1955 C.C.A. - and in that particular case the appellant had opened a gas meter and stolen its contents unknowingly breaking a gas main in the course of the theft, and thus allowed the gas to seep into the house next door, endangering the lives of the occupants. The trial judge upheld that 'maliciously' merely meant 'wickedly', and that was over-ruled, then the Court in the course of their judgment, cited with approval the following passage from the 1st Edition of Kenny's Outlines of Criminal Law, repeated in the 16th Edition edited by Mr. Turner.

"That any statutory definition of a crime of malice must not be taken in the old sense of wickedness in general but as acquiring (1) an actual intention to do the particular kind of harm that in fact was done or (2) recklessness as to whether such harm would occur or not: i.e. the accused had foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it." Well this court cannot find that there was that actual intention because it was an accident, the Magistrate found that so, he has ruled that out himself, and it is impossible to say that the accused had in fact foreseen the particular kind of harm that might be done. Now we think that the meaning of recklessness or recklessly which the Magistrate used has of course been canvassed very much in later cases, in R. -v- Corwell and in R. -v- Lawrence which of course are referred to in Archibold at Section 17/25, but that is really something different from the word maliciously and we cannot find really that the facts of this case support the finding of the learned Magistrate having already said that the offence was not deliberate but that this was an accident. Therefore the appeal is allowed in both cases with legal aid costs.

**Authorities cited.**

R -v- Cunningham (1957) C.A. Reports - 1955 C.C.A.

Kenny's Outlines of Criminal Law 16th Edition.

R -v- Corwell. Archbold Section 17/25

R -v- Lawrence. Archbold Section 17/25

✓