SAUVAO OTO AND OTHERS v. POLICE

SUPREME COURT. 1964. 15, May; 6, July; MOLINEAUX C.J.

Appeal against conviction and sentence - prosecution under section 21 Land Ordinance 1959 - wilful obstruction of surveyor or assistant - meaning of "obstruct".

With respect to the offence created by section 21 Land Ordinance 1959, the term "obstruct" would extend to any act done with the intention of preventing, delaying, or interfering with the performance of a particular task undertaken by a surveyor in the execution of his duty. Where therefore, as in this case, a surveyor is about to redefine a boundary line in the execution of his duty and he is confronted with a declaration of firm opposition to what he is about to do by a group of assembled matais (of which the three appellants were the principal spokesmen), the declaration of that opposition, if intended to prevent or delay him in redefining the boundary line, would amount to an obstruction. The Court concluded that the appellants intended to prevent a survey of boundary from being carried out and in confronting the surveyor with their decision in the way they did, they obstructed him.

Appeal against conviction dismissed; penalties imposed reduced.

APPEAL against conviction and sentence.

Phillips, for appellants.
Frapwell, Attorney-General, for respondent.

Cur. adv. vult.

MOLINEAUX C.J.: The facts relating to the circumstances of this Appeal are not in dispute but are somewhat lengthy. On the 6th June 1956, the Ali'i and Faipule of Tufulele filed a petition in the Land and Titles Court for an order confirming that the boundary between the villages of Tufulele and Faleasi'u was indicated by the red line shown on a certain survey plan and not the yellow line shown thereon as claimed by Faleasi'u. The case came on for hearing on the 22nd August 1956 and the petition was upheld, the relevant parts of the decision being as follows:-

> 1. The true boundary between Tufulele and Faleasi'u is that shown by the red line on survey plan dated 18 May 1932, and extends from the southern end of the red line as far as the alafa'alava along the line of the old stone wall.
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> 2. Within the space of six months from the date of this judgment, persons of Faleasi'u will vacate all lands occupied by them to the east of the line described in Clause 4 of the Judgment of this Court dated 13 April 1932 and give up possession thereof to Tufulele and Utuali'i.
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> 3. At any time after the expiration of five years from the date of this judgment, petitioners may apply ex parte to this Court for an order for possession of all or any of the lands situated between the boundary fixed in Clause 1 hereof and the line described in Clause 4 of the previous judgment and such Order for possession will be made as of right.

An application for rehearing lodged by the respondents was declined. Five years passed and the Ali'i and Faipule of Tufulele applied to the

Court for an Order for possession of the lands referred to in Clause 3 of the 1956 decision. On the 20th of September 1961, an Order for possession was made to be effective within six months. After six months the Registrar wrote to the Ali'i and Faipule of Faleasi'u at the request of Tufulele informing them that the time fixed by the Court for their removal from the land in dispute had expired and that they were required to vacate pursuant to the Order of the Court made on the 20th September 1961. Similar letters were sent out in June and July but it appears that the Faleasi'u people made no move. Being of the opinion that the Faleasi'u people had no intention of complying with the order of the Court the Registrar decided, and rightly so in my view, that the only way to have the Order executed would be to prosecute those members of Faleasi'u villages who had failed to comply with it. As a preliminary measure he requested the Director of Lands to send a surveyor out to redefine the said red line on the ground so that the parties should know the true position of the boundary fixed by the Court in the event of the Police deciding to prosecute. The Director of Lands arranged for the 19th of September 1962 as being a suitable date and on the 12th of September 1962 the Registrar advised both parties in writing of the proposed visit. On the day before the survey, representatives of the Ali'i and Faipule of Faleasi'u, including the three appellants, presented themselves at the Mulinu'u office and according to the evidence of the Registrar informed him that they wanted to contest the survey, one of the appellants Fesola'i Pio stating that if the yellow line (the line claimed by Faleasi'u as being the true boundary) was surveyed they would agree, but that they would not agree to the red line (the line decided by the Court as being the true boundary) and if a survey of that line was made they would not take part in it. The appellants contended that the purpose of this visit was to remind the Registrar of an application for rehearing of the 1956 case and that the survey should be stopped until that application had been disposed of. Be that as it may when they returned to Faleasi'u they resolved not to attend the survey to be carried out the following day.

On the next morning, the 19th of September 1962, a survey party comprising Joseph Thomas Soon of the Lands and Survey Department, Savea Toso, Field Officer of the Land and Titles Court, and one other proceeded to the house of Luatuanu'u at Tufulele in accordance with the arrangements made by the Registrar. On arrival they found the Ali'i and Faipule of Tufulele present, but no representatives from Faleasi'u. Mr Soon discussed the position with Savea and it was agreed that Savea should go over to Faleasi'u and see why the representatives of their village were not present. He went over and returned later with the information that the Ali'i and Faipule of Faleasi'u were strongly opposed to the survey, and that in his opinion it would be unwise to proceed as there might be trouble if they did. Mr Soon thereupon decided that the work should not be carried out that day and the party returned to Apia. It appears that when Savea went over to Faleasi'u he found some twenty to twenty-five matais assembled in the fale of Apulu Samuelu. He was greeted in the customary fashion and after the exchange of greetings three orators (the present appellants) acting as spokesmen on behalf of the assembled matais made speeches in turn to the effect that the survey should not be proceeded with until their petition lodged with the Registrar had been disposed of. Apulu Uisa spoke first and according to the report prepared by Savea on his return to Apia later that day said that they had returned from the Registrar the day before telling him that the survey of the boundary was not required, and according to his written statement made to the Police the reason why they wanted to petition the "surveyor" and the Land and Titles Court Officer to stop the survey of the land was because they wanted their position (sic) heard first. Sauvao Oto spoke next and according to Savea's report said that the firm opinion reached by the To'atolu and Fuaifale was that, please, their boundary will not be surveyed, and in his own written statement, Sauvao states that they petitioned to the officers (plural) to please not to survey their boundary before their case was held, that they petitioned them to stop to save any trouble which might be caused by any persons. Finally Fesola'i Pio after requesting the survey to be stopped Savea's report states that he

(Savea) be satisfied that their request is not to survey the boundary because they wanted to avoid trouble. In his written statement, Fesola'i Pio says they petitioned to Savea to please not to survey the boundary until their petition had been heard in the Land and Titles Court. Savea replied to each speaker in turn to the effect that his instructions from the Registrar were to proceed with the survey and that the Order of the Court had to be carried out. It appears that during the speeches, Fesola'i Pio gave a warning in Savea's presence to the taulele'a who were there assembled to the effect that any trouble or violence should be ignored and that peace should reign as "he felt that it was his duty to warn them of any violence that might arise". Savea formed the impression that there was every likelihood of trouble breaking out if the survey was to proceed. The translation of his report written on the same day records his impressions of that aspect of the meeting as follows:-

> "The reason why I decided that the work should be set aside on that day because if we were to continue, there would undoubtedly be trouble which might even result in the death or injuries of some of the people and such incident no doubt would also affect the surveyors if the work was carried out at that time".

And in his evidence at the rehearing he said:

> "I immediately came to the conclusion that if I proceed with my mission in the execution of my duties, something will happen and I believe that if that is so, many people will be killed no doubt, and injured, and who is to blame? No doubt it will be me".

Having to come to that conclusion, he informed the Ali'i and Faipule of Faleasi'u that he was leaving and he returned to Tufulele and there reported to Mr Soon.

Subsequently the three orators (the present appellants) were prosecuted in the Magistrate's Court for wilfully obstructing the surveyor Mr Soon in the execution of his duty and each was convicted and fined £40. The Information was laid under Sec. 21 of the Land Ordinance 1959 which reads as follows:-

> "Every person who wilfully obstructs or hinders any surveyor, or any servant or assistant duly authorised by a surveyor, in the execution of his duty in or about ascertaining or marking out any boundary or survey lines, or in or about the fixing, placing, restoring, repairing, or setting-up of any trigonometrical station, boundary mark, or survey mark, post, block, or stone for the purposes aforesaid, or in any way resists any surveyor or other person as aforesaid in the performance of his duty, commits an offence against this Ordinance".

An appeal was lodged on the grounds that the defendants (the present appellants) had not been represented by counsel and that if they had been and certain evidence called the decision may well have been other than what it was. Although the grounds were somewhat tenuous the case was sent back to the Magistrate for rehearing, with the direction that the evidence referred to be taken. On the 17th of December 1963, the case was reheard and the Magistrate re-affirmed his original decision. Against this decision the three appellants have now appealed to the Supreme Court, against both conviction and sentence.

At the commencement of the appeal proceedings counsel were directed in the absence of any statutory provision dealing with the procedure for appeals from the Magistrate's Court that this Court proposed to follow where applicable the procedure laid down by the Summary Proceedings Act 1957 (N.Z.)

concerning appeals from the Magistrate's Court to the Supreme Court in New Zealand. That being so the present appeal is to be taken as a rehearing based on the Magistrate's notes on evidence. Such a rehearing is of course not a re-trial in the sense that the witnesses are heard again but is still essentially an appeal and the onus is on the appellants to satisfy this Court that the decision of the learned Magistrate was wrong.

> "The Court has to re-hear, in other words, it has the same right to come to decisions on issues of fact as well as law as the trial Judge, but the Court is still a Court of Appeal and in exercising its functions is subject to the inevitable qualifications of that position. It must recognise (inter alia) the onus upon the appellant to satisfy it that the decision below was wrong".
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> Powell v. Streatham Manor Nursing Home /1935/ A.C. 243, per Lord Atkin at p. 255.

I do not think this Court should lightly disturb findings of fact made by the learned Magistrate, particularly in those cases where the credibility of witnesses is concerned as it will not have had the advantage of seeing the witnesses and of observing their demeanour, but when it comes to the evaluation of facts, that is to say, the inferences that are to be drawn from facts as distinct from their perception then in the light of decided authority this Court, as the Appellate Court, is in just as good a position to decide as the Court of first instance, and it is perhaps desirable to state that I propose to proceed on that basis.

It is apparent then that from the outset the Ali'i and Faipule of Faleasi'u were strongly opposed to the definition of the boundary as being the red line on the survey plan. They maintained a steadfast refusal to accept this decision, and for that reason failed to comply with the order for possession. The protest against the survey made at Mulinu'u on the day before is consistent with this attitude of refusal and their behaviour when the survey party arrived confirms it. They did not want the surveyor to redefine the boundary until their application for re-hearing of the 1956 case been disposed of. Their intention was to prevent the survey from being carried out, or at least to delay it until their application had been dealt with. The gathering of matais was solely directed towards this purpose. The appellants in their capacity as orators acted as spokesmen and conveyed the wishes of the meeting that the survey be stopped until after their case. Two of them alluded to the possibility of trouble breaking out and one gave a warning to the taulele'a then present. Savea was the intermediary and his impressions are significant as being those of an experienced field officer and a matai well qualified to gauge the mood of such a meeting. He was convinced that there would be trouble if they were to proceed and I accept that he was justified in feeling as he did. I am satisfied that the speeches made by the appellants were intended to achieve just what they did achieve - the postponement of the survey. They were delivered in such a way as to confront Mr Soon with the mental hazard of the opposition of Faleasi'u to what he was about to do, set against the background of their assembly in council and heightened by the references to the possibility of some outbreak of violence developing. Under the circumstances it would have been folly on his behalf to have gone on and bearing in mind the nature of his duties well nigh impossible for him to have done so. The stand taken by the appellants was successful and the survey was abandoned. I have no doubt that what the appellants did amounted to an obstruction.

The learned Magistrate in his decision held that the appellants acting in pursuit of a common purpose issued a threat to Savea which in his opinion constituted an obstruction to the surveyor. It was submitted by Mr Phillips that the phrase relied on as constituting the threat was not so much a threat as perhaps an indication of the way things might turn out if the survey was proceeded with, and that even if it was a threat, which

was denied, it was not proved that it was delivered to the surveyor as against Savea, for example, or the taulelo'a who were then present, and consequently there was no obstruction. I must say that if the appellants had been charged with threatening the surveyor and not obstructing him I would have been disposed to uphold this submission. The term "obstruct" however as used in the Section is not synonymous with threat. It may be inclusive of it but it carries, I think, a much wider connotation.

So far as I am aware, the term "obstruct" has not been considered in its present context before, although it does of course occur in numerous other Statutes. In the police cases, for example, wilful obstruction of a police officer in the execution of his duty is made a statutory offence. It is clear that obstruction need not necessarily be physical. See Betts v. Stevens /1910/ 1 K.B. 8; and Hinchliffe v. Sheldon /1953/ 3 All E.R. 406. In the latter case police officers wishing to enter an inn were obstructed from doing so by the appellant who called out warnings so that the door was not opened until the premises had been cleared of certain unauthorised persons inside. Obstructing was held to mean "making it more difficult for the police to carry out their duties". In the former case where a verbal warning was given to motorists to prevent detection by the police "obstruction" was considered to mean "frustrating the purpose of the police". This construction has been followed in New Zealand Courts and adapted into something of a formula in which obstruct means "any act done with the intention of preventing or delaying the police in the execution of a particular duty". Police v. Carter (1939) 1 M.C.D. 132; Police v. Maddocks (1939) 1 M.C.D. 359; and Police v. Woolf (1943) 3 M.C.D. 543. Mere failure to present ones self for medical examination has been held to be an obstruction under the Workers' Compensation Act in England. In the Shorter Oxford Dictionary 2nd Ed. "obstruct" is defined as meaning "persistently to oppose the progress or course of a purpose or action - to impede, retard, withstand or stop" - a definition that is under the present circumstances perhaps apt. The work of a surveyor however as contrasted with that of a policeman, for example, calls for the exercise of precision and skill in the use of delicate instruments and the demands for accuracy are so high that what in other occupations, dissimilar in nature, might be regarded as a relatively insignificant or even trivial act may in the circumstances contemplated by the section, if intentional, be sufficient to constitute an obstruction. The essential element is the intention behind the act. The Legislature has recognised that it is in the public interest that a surveyor when duly authorised to undertake a particular task should be free to do so unencumbered by influences of any kind that may interrupt or interfere with its performance. To this end, any one who wilfully obstructs, hinders or resists a surveyor or his assistant in the execution of his duty is rendered liable on conviction to a fine or imprisonment. The term "obstruct" would extend I think to any act done with the intention of preventing, delaying, or interfering with the performance of a particular task undertaken by a surveyor in the execution of his duty. Where, as here, a surveyor is about to redefine a boundary line in the execution of his duty and he is confronted with a declaration of firm opposition to what he is about to do by a group of assembled matais, the declaration of that opposition, if intended to prevent or delay him in redefining the said boundary line, would in my view amount to an obstruction. There is no doubt, that the appellants intended to prevent the survey from being carried out that morning, and in confronting the surveyor with their decision in the way they did they obstructed him. In my opinion the appellants were rightly convicted and the appeal against conviction should be dismissed. No submissions were made on the question of penalty but I think the fines imposed were excessive and they will be reduced to £20 in each case. There will be no order for costs.