NOT
RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2004-404-000281

BETWEEN	NATHAN LAMPP Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 25 August 2004

Appearances: B Donald for Appellant
N Malarao for Respondent

Judgment: 1 September 2004

RESERVED JUDGMENT OF GENDALL J

---

[1] The appellant was convicted in the District Court at Auckland on 22 April 2004 of wilful damage which provided that everyone who committed a crime who wilfully destroyed or damaged any property, the property in question was a wooden sculptured artwork valued at $6,900. After conviction he was ordered to come up for sentence if called upon within six months and ordered to pay costs of $130 and compensation of $3,000 to the owner of the item.

[2] He appeals against his conviction.

[3] The facts that can be ascertained from the evidence are that the appellant, a young man then aged 19 years, and two of his associates were observed at about 4pm on 17 June 2003 to be behaving in a disorderly and intoxicated manner in a street in Newmarket. The appellant, and his colleagues were making a disturbance as they strolled down the street kicking over rubbish bins, touching car door handles and generally behaving in a larrikin fashion in the street. They then entered, for no

apparent reason, an art gallery where they behaved in an aggressive, boisterous manner hardly consistent with the type of hushed behaviour that normal patrons exhibit. The art gallery owner was concerned at their excited and agitated behaviour and could smell alcohol on their breaths. They were there for about three to five minutes and were becoming confrontational. The proprietor told them that they should leave or else she would call the police. At that point the appellant ran from the gallery and as he proceeded out the door a large piece of wooden sculpture, three metres tall, fell to the ground and was smashed. It was a valuable item worth about $7,000. Whilst the gallery proprietor did not see how the object came to fall to the ground she said that if it was nudged by a person that would "definitely not" be sufficient force for it to fall as it was very heavy and impossible to move just by bumping it.

[4] The appellant ran away but was apprehended by the police and when asked to explain what had happened he said:

> "I ran past the statue, nipped it and it fell over...."

He went on to say that he and his friends were talking to the proprietor

> "about a piece of wood that's in there....I ran outside. Just as I got out I nipped a bit of wood that was in the doorway. It fell over."

[5] The prosecution called an independent witness a tax accountant who was at her business premises across the road. Her attention was drawn to the noise of the three men in the street and she observed them looking intoxicated, and were kicking over wheelie bins and identified the appellant as the apparent leader of the group. She said:

> "To me they were looking for trouble and pushing over wheelie bins....They were just kicking, you know rubbish around and then they walked into the arts gallery because I watched them the whole way down the street because I was a bit concerned of the cars, they were playing with car doors."

[6] She then said she observed the appellant running out of the gallery "with his arms out and the artwork fell over and then he took off down the road and then the next two boys came out with the owner of the gallery". She described the manner in which the appellant came from the gallery as "it was a pushing the way he came out

and then the artwork fell over which I saw the bang the crashing and the break". She did not see contact between the appellant's hands and the object art. Apparently when giving her evidence she gave a demonstration of a person pushing with both arms extended.

[7] The appellant gave evidence in which he said that he and his friends went into the art gallery to have a look at the "massive round thing about the size of this room but wood". His evidence was that as he ran from the gallery he accidentally knocked over the statue and that is what he told the police officer. He demonstrated to the District Court Judge how he turned as he ran past the sculpture and the door and considered that his back hit the wood which caused it to fall. In cross-examination he said:

> "I was running out through the door and the sculpture which was standing in the middle was round and tall. When I was running out I turned like that (Witness indicating) and the back of it just banged it and when I turned around to look at it I just saw it smashed against the wall."

He said that when the object was falling "I tried to grab it but it was too late". There was an exchange of questions with the Judge as follows:

> "Q. You said that you kept running because you felt you were responsible for knocking the thing over?
>
> A. Yeah.
>
> Q. Tell me you were tiddly?
>
> A. Yep.
>
> Q. Do you think you would have knocked it over if you weren't tiddly?
>
> A. I don't know.
>
> Q. Probably not?
>
> A. Probably if I wasn't tiddly I wouldn't have run out."

[8] In delivering his decision the Judge reviewed the evidence saying that it was "quite clear". He referred to the evidence of the independent witness across the road:

> "Fundamentally, she saw the defendant come out and she indicated a pushing motion and at that same time she heard the artwork fall over and it broke."

But he did not go as far as finding that this act was the deliberate pushing over of the object, because of what follows in his decision.

[9] The Judge then turned to consider the defence which essentially was the object was accidentally knocked over and not wilfully damaged. The Judge then in his decision said:

> "The defence places a lot of importance on the definition and the meaning of the word 'wilfully'. That was why I asked the question which I thought was important of the defendant, whether he was 'tiddly'. He admitted he was. But fundamentally, I also asked – would he have caused the damage and nipped the statue if he were not tiddly. He truthfully said, probably not. I am satisfied that whatever happened, the defendant caused the damage. I am satisfied that he knocked the statue over but I need to be satisfied whether he did that wilfully. I am satisfied from his answer that he would not have knocked it over had it not been for the fact that he was tiddly."

[10] At that point the Judge appears to say that he has reached the view that the appellant's actions were deliberate, occurring through intoxicated loss of self-control. But His Honour appears to be concentrating on the cause of damage without articulating the act that caused it. In the passage quoted the Judge may also be saying that the event (the damage) arose from an intentional act but nevertheless was accidental, being an act not known by the appellant to probably cause damage. As I will go on to discuss, almost every action of a person is intentional and the Judge had to determine what that act was. He went on to say:

> "Self-induced drunkenness is never an excuse in the law generally and that therefore whether he intended to knock it over or not, I am satisfied he intended to turn around, that he intended to run out of the shop, and that he was inebriated because he self-induced, got himself to tiddliness and I refuse to believe that anyone can come over and say I am not responsible for the damage that I did because I was drunk. Therefore, I am satisfied that the charge is proved and the defendant is convicted accordingly."

Discussion

[11] The issue in this case is a narrow one. Section 293 Crimes Act 1961 then provided that for the purposes of a charge such as wilful damage:

> "Everyone who causes any event by an act which he knew would probably cause it, being reckless whether that event happens or not, shall be deemed to have caused it wilfully."

The issue was whether the prosecution had proven that the appellant knew that his act would probably cause damage, he being reckless whether damage happened or not. The appellant's defence was that he did not intend to cause the damage and did not know that his action, he says in turning around, would have caused it. If that is so or if a reasonable doubt existed as to whether the prosecution had proved his knowledge that his act would probably cause damage, then he was entitled to be acquitted.

[12] Ms Donald on behalf of the appellant submitted that drunkenness was never raised as a defence and the Judge erred in referring to it. Intoxication may however be relevant to assessing whether or not a person knows, in terms of the then s293, that his action would probably cause damage. It seems from the transcript of the Judge's decision that he proceeded on the basis that the act would not have happened but for the appellant being "tiddly" and the appellant could not excuse himself from responsibility through self-induced drunkenness. That is true. But what is not clear from the transcript is whether the Judge was concluding that the appellant knew what he was doing, and did it because his self-control was weakened through drunkenness; or whether his deliberate actions were only those in running from the gallery and turning around so as to come into contact with the item, and it did not matter (the Judge said) whether or not he intended to knock it over.

[13] Crown counsel contended that knowledge of the appellant can only be assessed through the drawing of inferences, which is true. For the appellant's actions to be "wilful" he had to know that they probably might result in damage, and he was recklessly indifferent as to the outcome. Counsel submitted that the appellant must have been acting recklessly by reason of his behaviour in general on the day, with his deliberate knocking over of rubbish bins in the street, his admission that he "nipped" the sculpture as he ran past it, and the location and weight of the sculpture. It is beyond doubt that there was evidence of reckless behaviour on the part of the appellant. But the issue was what *act* caused the damage, and whether that act was one which he knew would probably cause the damage. If it was an act of pushing at

the sculpture with his hands (as the independent witness suggested) or deliberately bumping into it that would be sufficient. But if it was the act of turning around and accidentally bumping the sculpture then he could not be guilty unless he knew it would probably cause damage and he was reckless as to that outcome.

[14] The difficulty in this appeal is that the Judge does not identify, in his decision, *the act* which he found to have caused the damage. If it was the act of pushing at the artwork, he does not say so. Such an event could only be seen to be deliberate and reckless knowing that damage would probably follow. Nor does the Judge say, specifically, that it was the act of turning around and bumping the item that was the relevant act of the appellant. Such an "intentional" act may nevertheless result in accidental consequences – the damage – but not lead to criminal culpability.

[15] Every physical act requires the exercise of volition. But the result may not be intentional. If a consequence comes about that was not desired, or was not foreseen as a probability, the act is not intentional as to that consequence. So, a driver presses the accelerator of his vehicle because he wishes to increase his speed, and his act is intentional as to going faster. Through going faster he strikes a pedestrian. It cannot be deduced that his act is intentional as to the consequence. That is so only if he desired to hit the pedestrian. The going faster is intentional, the striking the pedestrian may be negligent but accidental and unintended (see Glanville Williams, Criminal Law, 2nd ed, para 16). That is why the concept of recklessness of course comes into play in the exercise of the criminal law, and that is why s293 provides that damage is wilfully caused by a person if he did an act which he knew would probably cause it (the damage), being reckless whether it happened or not. But the act must be one, which is known by the actor to probably cause damage, but he does not have to desire it.

[16] The Judge's reasons as given in the passages quoted above do not make clear the basis upon which he found the damage to be wilfully caused. He does not distinguish between accidental damage caused by an act which is deliberate, but which an accused did not know would probably cause it (the defence case); and damage arising from a deliberate act which he knew would probably cause damage. It is the *act* that is crucial, and which usually will determine whether knowledge of

probable consequences existed or can be inferred. Here the Judge does not identify the act apart from saying "he intended to turn around". If it was that act that was "deliberate" and "intentional" it does not automatically follow that there was knowledge of probable damage and reckless as to whether damage was caused.

[17] Because of that uncertainty as to the actual basis upon which the Judge found the charge proven, the conviction is unsafe. But I do not consider this to be a case where the appellant should automatically take the benefit of any error. I do not consider it appropriate for this Court to rehear the evidence and make its own judgment under the proviso to s119(2) Summary Proceedings Act 1957. The preferable course is for the information to be reheard in the District Court.

[18] Accordingly, the appeal is allowed to the extent that pursuant to s131 of the Act the determination is remitted to the District Court at Auckland and I direct that the information be reheard.

J W Gendall J

Solicitors:
B Donald, Barrister, P O Box 26603, Auckland
Crown Solicitor, Auckland

Delivered at 2 ~~am~~/pm on 1 September 2004.