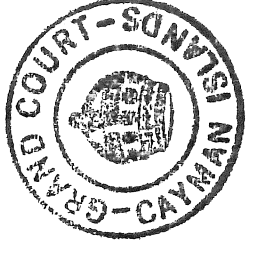


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1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN
3
4

Ind. No. 36 of 2011



7 REGINA
8 V.
9 JEFFREY C. JAEGER

12 **Appearances:** Mr. Trevor Ward of the Office of the Director of Public
13 Prosecutions for the Crown

14 Mr. John Furniss Attorney-at-Law for the Defendant

16 **Before:** Hon. Justice Henderson

18 **Heard:** October 10 & 11, 2011

20 JUDGMENT

22 1. The defendant, Jeffrey Clifford Jaegar, is charged in an indictment with a single
23 count of damaging property which reads in its particulars: "that Jeffrey Clifford
24 Jaegar on a day unknown, between December 1st, 2009 and January 31st, 2011, at
25 South Side East Road, Cayman Brac, without lawful excuse damaged property

1 belonging to Suzie Miller, namely vegetation and landfill to the value of \$3,000
2 CI intending to damage such property or being reckless as to whether such
3 property would be damaged.”

4 2. Before I may convict Mr. Jaegar, I must be sure that damage was caused to
5 property owned by Suzie Miller, that the property in question was vegetation or
6 landfill, that the damage was, if not to the value of \$3,000 CI, at least of a more
7 than trifling value, and that Mr. Jaegar either intended to damage the property or
8 alternatively was reckless as to whether such property would be damaged. I must
9 be sure that his act or acts causing the damage occurred between the dates
10 mentioned and occurred at the location mentioned. I must be sure that he had no
11 lawful excuse. Those are the essential elements of this indictment, and it is only
12 when I am sure of each of the essential elements that he may be convicted.

13 3. As for the element of recklessness, a cogent definition of that appears in the
14 Judicial Studies Board Guidelines for High Court judges charging juries. The
15 charge to the jury defines recklessness this way:

16 “The prosecution will have proved that the defendant was reckless if,
17 having regard to all the available evidence, you are sure, one, that he
18 was aware of a risk that property would be destroyed or damaged;
19 and, two, that in the circumstances which were known to him it was
20 unreasonable for him to take that risk.”

21 I turn now to the evidence I have heard.

22

1 4. Ms. Kimberly Ebanks is a real estate agent on Cayman Brac. She testified that she
2 had been retained by Susan Miller, the woman named in the indictment, to sell
3 Ms. Miller's property located at plot 110A, 31 on Cayman Brac.

4 5. She said that on her first visit after being so retained, she noticed that a boundary
5 marker had disappeared and that some of the land had been cleared. She had a
6 general familiarity with the land and the area and she was aware that the marker
7 existed previously and that the land had not been cleared on the last previous
8 occasion when she had observed it. She described the clearing as some five to ten
9 feet of land running from east to west. She said that the current owner, Miller, had
10 planted some trees on the property after buying it in 2005 or 2006, but when
11 pressed in cross-examination Ms. Ebanks could not say what, if any, trees had
12 been in the cleared area.

13 6. Ms. Ebanks said she noticed on February 5th, 2010 a container on the property.
14 She said the container was running along the side of the road but was on the
15 Miller property. It had been on the adjoining property, plot 110A, 75, but
16 appeared to have been moved over on to the Miller property.

17 7. When she drove past on February 10th, she noticed that more of the land had been
18 cleared and she noticed fill had been taken from a hole which had been dug on
19 plot 75 and some of that fill was on the Miller property.

1 8. She said the clearing of the vegetation and the loss of the marker made the
2 property more difficult to sell. The owner decided to bring the price down to
3 \$350,000. It had been listed at \$425,000. The property has still not been sold.

4 9. The marker has been re-established by a new Government survey, which was paid
5 for by the Cayman Islands Government.

6 10. The second witness, Jerry Banks, testified to having surveyed the property and
7 having re-established the position of the boundary marker in March 2010.

8 11. The third witness, Raymond Scott, is a heavy equipment owner and operator on
9 Cayman Brac who has worked in that field for 20 years. He was hired by Mr.
10 Jaegar's company to do excavation work on the adjoining lot which was described
11 as plot 75. He was hired to excavate to bedrock the area where the 1,000 square
12 foot house would sit. He said that the fill was piled up on the west side of plot 75,
13 the side which is adjacent to the Miller property, but it was piled up some six feet
14 from the boundary. In other words, it was still on the plot 75 side of the boundary
15 and some six feet away from where he estimated the line to be. He said he was
16 careful to stay within the boundary lines of plot 75 and for that reason did not pile
17 it any nearer than six feet to the line. He denied causing any damage whatsoever
18 to the adjoining Miller property and denied removing any fill from it or levelling
19 it in any way. He said his operation stayed within the boundary lines of plot 75.

1

2 12. The fourth witness, Constable Nation, described arresting Mr. Jaegar and taking a
3 statement from him.

4 13. Mr. Jaegar gave evidence in his defence. He said he is a general contractor
5 operating in the Cayman Brac area. He was hired to build a house on plot 75. First
6 he needed to establish the boundary lines and he did check them. He contacted the
7 client, who sent to Mr. Jaegar a photograph of an iron boundary peg in a concrete
8 setting. Then he, together with his subcontractor, Raymond Scott, spent several
9 hours searching and finally found that marker. He hired Raymond's Heavy
10 Equipment, i.e., Raymond Scott, as a subcontractor to do the excavation. He was
11 asked what instructions he gave. He said he instructed Scott that the setback of the
12 residence from the boundary line was a small one and therefore there was a need
13 to be careful in stacking the fill.

14 14. The fill was removed from the hole by Scott but it was put back in by employees
15 of Mr. Jaegar, assisted by another subcontractor, a Mr. Parchment. Mr. Parchment
16 assisted because he had a piece of equipment which Mr. Jaegar was lacking.

17 15. Mr. Jaegar denied under oath that he uprooted any trees or damaged any
18 vegetation. He denied giving any instructions to anyone to do so. He denied
19 damaging the boundary marker. He denied instructing anyone to remove any

1 landfill from Miller's land, and he denied that any landfill was removed from her
2 land.

3 16. With respect to Mr. Parchment, he said he is a very competent backhoe operator.
4 "I have not had any problems using Mr. Parchment and I had used him before."

5 17. He said that the land on Miller's side of the boundary line was basically green
6 bush, and it still exists in that state. He gave no instructions to anyone to remove
7 any of that vegetation and all of the greenery is still there.

8 18. He admitted in cross-examination that he did not walk the boundaries with Mr.
9 Parchment, and he did not ascertain or confirm that Mr. Parchment knew where
10 the boundaries were. He said, "I just assumed that he would know. I have used
11 him many times. I did not think it necessary to show him the boundary. I
12 inspected the work after he finished, but not while he was doing it." He said that,
13 when he inspected, the Miller property was completely unaffected by the
14 construction. He did point out that Hurricane Paloma removed a lot of vegetation
15 from land in the Cayman Brac area. As for the container, he said it was only on
16 the government right-of-way. It was never on Miller's property.

17 19. I can convict Mr. Jaegar only if I am sure that some damage has been caused to
18 Ms. Miller's land and vegetation. Mr. Jaegar has testified that no such damage
19 was done. He denies that any trees or vegetation were uprooted, and he denies

1 removing any landfill from Ms. Miller's property. Therefore, he can be convicted
2 only if I am sure that he is lying and sure that Ms. Ebanks is telling the truth on
3 these essential questions.

4 20. I am not sure. There is no clear or convincing basis in the evidence for doubting
5 Mr. Jaegar's credibility. Ms. Ebanks' evidence was not very precise. For example,
6 she could not say what, if any, trees had been removed. The owner of the
7 property, Ms. Miller, never testified.

8 21. In addition, I would have to be sure that the value of the damage, as measured by
9 the cost of repairing it, was more than minimal or trivial. I am not sure of that
10 either. Assuming that some fill may have rested upon Ms. Miller's property for
11 several weeks before it was removed, the question is - what damage did that
12 cause? There is no evidence of any such damage. Assuming that some vegetation
13 was removed, what damage did that cause? The evidence is that the alleged
14 clearing of vegetation made the property more difficult to sell in the opinion of
15 Ms. Ebanks. The owner decided to reduce the listing price.

16 22. Before I could be sure that damage which is more than merely trivial had been
17 caused, I would need clear evidence given with some degree of precision, such as
18 appraisals done before and after the damage complained of. That is the sort of
19 evidence I might find convincing. The opinions of the realtor, who is not qualified

1 as an expert, and the owner, who was not subjected to cross-examination, are not
2 sufficient to make me feel sure on this issue.

3 23. For these reasons, I find Mr. Jaegar not guilty.

4 24. Before ending, I wish to say something on the question of *mens rea* and vicarious
5 liability.

6 25. The Crown conceded that there is no evidence Mr. Jaegar intended to damage any
7 property of Ms. Miller. The Crown said Mr. Jaegar was reckless in allowing Mr.
8 Parchment to work without first confirming that Mr. Parchment knew where the
9 boundaries were. In light of Mr. Jaegar's unchallenged evidence that he had used
10 Mr. Parchment as a subcontractor on previous occasions and found him to be very
11 competent, that submission must fail. Allowing Mr. Parchment to establish the
12 boundaries himself before he began work may, with hindsight, have been a
13 mistake, but it cannot be seen as the taking of an unreasonable risk given what
14 Mr. Jaegar knew at the time.

15 26. The Crown's most forceful argument was to this effect - Mr. Ward says that the
16 damage was caused by someone, either an employee of Mr. Jaegar's or an
17 employee of an independent contractor. Either way, Mr. Ward says Mr. Jaegar is
18 liable vicariously.

1 27. He cites the following authorities. *The Queen v. Stephens* [1866] 1 L.R. 702 is an
2 old case in which the court seems to have accepted a vicarious liability argument
3 on an indictment for creating a public nuisance. The court was clearly uneasy
4 about the position. For example, Mellor, J. said:

5 "It is quite true that this in point of form is a proceeding of a criminal
6 nature, but in substance I think it is in the nature of a civil proceeding,
7 and I can see no reason why a different rule should prevail with regard
8 to such an act as is charged in this indictment between proceedings
9 which are civil and proceedings which are criminal."

10 Blackburn, J. said:

11 "I only wish to guard myself against it being supposed that either
12 at the trial or now, the general rule that a principal is not criminally
13 answerable for the act of his agent is infringed. All that it is necessary
14 to say is this, that where a person maintains works by his capital,
15 and employs servants, and so carries on the works as in fact to cause a
16 nuisance to a private right, for which an action would lie, if the same
17 nuisance inflicts an injury upon a public right the remedy for which
18 would be by indictment, the evidence which would maintain the action
19 would also support the indictment. That is all that it was necessary to
20 decide and all that is decided."

21 The case is hardly a ringing endorsement for the proposition that the *mens rea* and
22 *actus reus* requirements for a true crime, such as the crime of criminal damage,
23 can be established through vicarious liability.

24 28. Mr. Ward also cited *Coppen v. Moore* (No. 2) [1898] QBD 306. That was
25 essentially a prosecution for a regulatory offence under the *Merchandise Marks*
26 *Act* of 1887. The case involved a forged trademark, and the provisions of the *Act*
27 made a master criminally liable for acts done by his servants in contravention of
28 the section in question provided that the servants were acting in the general scope

1 of their employment. Lord Russell referred to the general rule requiring proof of
2 *mens rea* on a criminal charge, and then at page 312 said:

3 "There is no doubt that this is the general rule, but it is subject to
4 exceptions, and the question here is whether the present case falls
5 within the rule or within the exception. Apart from statute, exceptions
6 have been engrafted upon the rule: for example, in the case of
7 *Reg. v. Stephens...*"

8 That was the only example His Lordship provided of a decision as distinct from a
9 statutory provision which engrafted vicarious liability upon a criminal proceeding.

10 29. He went on to find that it was clearly the expressed intention of the Parliament
11 that the master be criminally liable for the acts of the servant.

12 30. A modern decision relied upon by Mr. Ward is the decision in *Associated Oxtel*
13 *Co. Ltd.* [1996] 1 W.L.R. 1543. That was a prosecution under a regulatory statute,
14 the *Health and Safety at Work Act* of 1974. It was the prosecution of a corporate
15 entity as well.

16 31. Finally, Mr. Ward mentioned the section on vicarious liability found in
17 *Blackstone's Criminal Practice* at paragraph A4.4 and an article in the
18 *Construction Law Journal* entitled "Of Delegable and Non-delegable Duties in
19 the Construction Industry" reported in the *Construction Law Journal* 2000 at
20 pages 88 to 101.

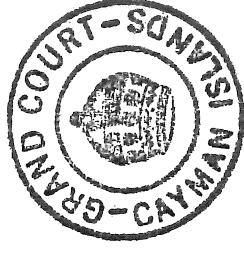
1 32. My understanding of the general law is this. Vicarious liability is liability
2 acquired by virtue of a relationship, typically that of master and servant, with the
3 individual who committed the act in question. There is no *mens rea* requirement
4 at all. Someone may be liable vicariously even though he had no intention that the
5 harm occurred and took no unreasonable risk of it occurring. It is not a concept
6 with any real role to play in the modern law of what I will call "true crimes."

7 33. Of course vicarious liability is made possible by a large number of modern
8 statutory provisions of a regulatory nature. These statutes contain penalties, such
9 as a fine or a licence suspension, which ordinarily do not result in a loss of liberty.
10 Even then the statute often provides that a defendant who might be found liable
11 vicariously can escape liability by proving that he exercised reasonable diligence
12 to avoid the violation, thus tying the concept, if only to a degree, to the notion of
13 recklessness.

14 34. True crimes often result in a term of imprisonment. The purpose of the criminal
15 law is to punish acts committed with a blameworthy state of mind. Vicarious
16 liability lies well outside the scope of that fundamental goal. Where vicarious
17 liability for a true criminal offence is said to be possible, one can expect to find
18 clear and explicit language to that effect in the statute. There is no such language
19 in our definition of criminal damage. Nevertheless, the penalty can be
20 imprisonment for up to ten years, which demonstrates beyond doubt that criminal
21 damage is what I have termed a true crime.

1 35. If the Legislative Assembly were minded to provide for vicarious liability in
2 criminal damage cases, I am sure it would, before amending the legislation, give
3 solemn attention to the human rights ramifications of such a fundamental
4 realignment of the *mens rea* requirement.

5 Dated this 11th day of October, 2011



6 *Henderson, J.*

7 Henderson, J.
8 Judge of the Grand Court