SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.2 OF 2002

BETWEEN:

[1] JAMES MILNES GASKELL
[2] JOHN YEARWOOD

Appellants

and

ISLAND DREDGING COMPANY LIMITED

Respondent

Before:

The Hon. Sir Dennis Byron — Chief Justice
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]

Appearances:

Mr. Thomas Anthony Sharp, QC; Mr. Jeffrey Nisbett with him for the Appellant
Mr. Anthony Gonsalves for the Respondent

2002: September 18;
2003: March 31.

JUDGMENT

[1] **BYRON, C.J.**: At the close of the case for the prosecution Her Worship Magistrate Yasmine Clarke dismissed the private prosecution brought by the appellants against the respondent for removing a natural barrier against the sea, an act prohibited by sections 26[a] and 32[a] of the National Conservation and Environment Protection Act 1987 on the ground that there was no case to answer.

The Law

[2] Section 26[a] of the National Conservation and Environment Protection Act provides that no person shall remove or assist in the removing of any natural barrier against the sea; and Section 32 (a) of the Act provides that any person who removes any natural barrier against the sea is guilty of the offence and is liable on summary conviction to a fine.

The Evidence

[3] The evidence adduced indicated that there is a sandbar off the coast of St. Thomas Parish, Nevis, stretching from Paradise Estate to Cades Bay running roughly parallel to the coastline. It rises from the ocean floor to just below the surface of the water and is approximately 200 yards from the shore at its closest point and about 350 yards away at its furthest. During the months of August and September 2000, a dredge belonging to the respondents removed approximately 80,000 cubic yards of sand from the sandbar and deposited it on the beach at the Northern End of the Four Seasons Resort. This beach had previously sustained damage from erosion during a hurricane.

[4] The witnesses included a marine biologist Robert Young. His evidence was that a sandbar serves as a breakwater even though it is just below the water rather than rising above it. As the waves come in from the sea they loose a significant amount of energy as they cross the bar and that protects the coast behind it. He explained that with the sand that has been removed it is now a less effective natural barrier against the sea because the amount of wave energy that can be reduced or be absorbed depends on the size and the depth of the Sand bar. Any removal of sand reducing its size or depth will make the Sand bar a less effective barrier and increase the risk to the property behind it. In cross examination he stated that although he was not a coastal engineer, in his view the only proper way to take sand from a Sand bar is if the Sand bar is far off the shore. That way it

would not harm the coast. He confirmed his conclusion that the coastline is in equilibrium with the position of the Sandbar so even though there may be a significant portion left that still means that a significant portion of the protection has been lost."

The Decision

[5] In her reasons for decision, the learned Magistrate concluded as follows:

> "The court found that this is a criminal matter and as such all the elements of the charge must be proved. The complainants therefore had to prove that Island Dredging Limited did remove a natural barrier against the sea. The evidence led for the complainants was that a significant portion of sand was taken from the sandbar. The evidence given by Prof. Young was that the sandbar was still a barrier against the sea, although it is less effective than it was before.
>
> To my mind the statute is not ambiguous in relation to the section under consideration. I therefore consider that the statute should be given its ordinary meaning. If the statute is given its ordinary meaning the natural barrier must be removed or so significantly removed that it is no longer a natural and effective barrier against the sea. There is no such evidence before the court. I therefore hold that the charges have not been made out against the defendant company. The matters are dismissed."

The Appeal

[6] The appellant submits that the Magistrate erred both in the test she applied and in concluding that there was no evidence that a natural barrier had been removed.

The Amendment Point

[7] I should first dispose of the appellant's application to allow an amendment to correct their error in describing the offence as being contrary to section 26(a) when the section creating the offence is section 32(a). The point had been taken by the respondents at the close of the case for the prosecution and the Magistrate did not expressly declare her decision. However, from the reasons given for her decision it

is implicit that the amendment should be allowed in the interests of justice because it merely regularized the complaint in relation to the facts that were in issue in accordance with the principles explained in **Scunthorpe Justices ex parte Mcphee** (1998) 162 JP 635. I would confirm the amendment.

The Point in Issue

[8] This appeal turns on the construction of the relevant statutory provision. The question that this court is being asked to consider could be defined as: whether the words "remove any natural barrier against the sea," mean removing the whole of a natural feature forming the barrier or so much of it that it was no longer an effective barrier, as the Magistrate held, or as the appellant submits removing anything that is a natural barrier whether or not forming part of larger natural feature.

Statutory Interpretation

[9] The respondent prayed in aid the principle that as the statute is penal any ambiguity must be construed so as give the person against whom the penalty is sought the benefit of the doubt. They contend that this accords with the dicta of Lord Simonds in **London and North-Eastern Railway Co. v Berriman** (1946) 1 All ER 255 at 270 "A man is not to be put in peril upon an ambiguity, however much or little the Act appeals to the predilection of the Court." The respondent was particularly interested in the application of that dicta in **Liew Sai Wah v Public Prosecutor** (1968) 2 All E R 738 where the Privy Council held that possession of grenade bodies not filled with explosives and lacking levers, safety pins and detonators were not ammunition, reasoning that components of ammunition were not ammunition. Lord Dilhorne said at 741 "It is a general rule that penal enactments are to be construed strictly, and not extended beyond their clear meaning. At the present day, this general rule means no more than if, after the ordinary rules of construction have first been applied as they must, there

remains any doubt or ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt." I do not think that the analogy is applicable unless "ammunition" could be equated with "sandbar". But the statute did not prohibit the removal of a "sandbar". More particularly, the Magistrate did not find that there was an ambiguity, and I hasten to add that neither do I. She stated that she was giving the words of the statute their ordinary meaning.

[10] In considering the literal meaning the respondent referred to the New Webster's Dictionary 1992 where "remove" was defined as "to move from a place - to eliminate". This, they submitted, meant that the total item must be removed, and the item in question was the sandbar. This reasoning it seems to me, with respect, is premised on the conclusion that it is the removal of the sandbar, which constitutes the offence.

[11] When the appellant's referred to the Shorter Oxford Dictionary it was for the meaning of "barrier" defined as "a physical obstacle placed in the way". This it was submitted informed the meaning of the statutory prohibition to be that if a physical barrier in the way of the sea is removed so that waves lose significantly less energy, then a barrier, in the ordinary meaning of the word has been removed. Thus the removal of material from a sandbar constitutes the removal of a barrier against the sea if the effect is that the waves lose significantly less energy when passing over it. To the extent that energy is no longer lost, the obstacle or barrier that previously caused the waves to lose that energy has been removed.

[12] Looking at the context of the statute to determine its purpose is a legitimate aid to interpreting the section in question. The statute itself, in its long title states that it is an Act to provide for the better management and development of the natural and historical resources of Saint Christopher and Nevis for the purposes of conservation. Part VI which contains sections 26 and 32 is headed, "Coast Conservation and Beach Protection". "Coast conservation" is defined in section 2 as "the protection and preservation of the coast from sea erosion or encroachment

by the sea …". All of this suggests that the policy is aimed at protecting the coast from the sea. A purposive approach to the construction of the relevant section should take into account the legislative policy revealed by the statute as a whole. In this context the section should be taken to prohibit diminishing the protection to the coast by removing any barrier.

Judicial Precedent

[13] The issue of coastal protection is not new, and has been the subject of judicial determination. The appellant referred us to a case, decided over a century ago, which I think had many similarities to the matter under consideration. Fry J had to consider whether a natural barrier from the sea had been removed. In the case of **Attorney General v Tomline** (1879) 12 Ch D 214 the Crown was in possession of a piece of land occupied by a martello tower, near the estuary of the River Deben, and sought an injunction to restrain the defendant from removing shingle from the natural barrier of shingle protecting the piece of land from the sea. The evidence revealed that the shore along the estuary of the River Deben is what has been called an "accumulating" beach. That is to say if left alone the tendency of the forces of nature is to heap up shingle on the beach to such an extent that, if a small portion of shingle was to be taken away, or a hole made in the shingle bank, there would be a tendency to repair the hole and to restore the bank to its former condition. The evidence showed that the general accumulating operation of nature upon the bank, is however subject to variations and to actions in the opposite direction in that when the winds blew from the north or northeast the tide often abstracted shingle from the bank and when they blew from the south or southeast, the tendency to heap up shingle on the bank was greatly increased. There was, therefore, a certain power of restoration and recovery in the beach itself in respect to any "wound" or "injury" that may have been inflicted on the bank. But at the same time it was the agreed position of the plaintiff and defendant that it was possible to abstract so much shingle from a given point as to cause danger to

the land behind that point, being danger until the natural forces would have operated to heal the wound that had been caused.

[14] Fry J in explaining his role stated that he had to inquire whether there had been inflicted upon this bank of shingle a “wound” or “injury” or excavation that had caused danger to the land which Her Majesty possessed. He considered the evidence that there had been for many years the practice of abstracting shingle from the beach to sell it to vessels for the purpose of making cement and was satisfied that ten years before this case, the bank of shingle was very much thicker and larger.

[15] As a result, he concluded that the “wound” which had been inflicted on the shingle bank had never been healed and to the contrary, its effect progressed over time and that there had been an actual demolition of the land within the enclosure consequent upon the “wound.” He also held that it was shown that the removal of shingle had created danger to the land and that if similar acts were committed in times to come, the danger to the land would have increased.

[16] The reasoning in that case supports the contention of the appellant for what the court considered to be the operative question was whether the removal of shingle had created a danger to the land. It was clear from the evidence that the shingle bank remained although its thickness and size had been reduced. But the relevant issue was the effect of the removal of shingle as a source of protection to the land on the beach. The finding that there was increased danger to the land informed the decision. In my view the situation in this case is similar. The evidence is that while the sandbar remains with its reduced size, its effectiveness as a protection to the beach has been diminished. I would think that is crucial to the determination of whether the offence has been committed.

Conclusion

[17] I am persuaded that the correct test is that an offence is committed if material is removed which before its removal had caused the waves to lose a significant amount of their energy or if the effect of the removal is to decrease significantly the protection of the coast. Since it is not every removal which would have this effect, for example the removal of a single rock from a sand bar, this is a question of fact which the Magistrate must determine on the evidence. The court should enquire whether "any barrier" has been removed and not whether "the sandbar" has been removed. I think the Magistrate fell into error when she concluded that the natural barrier against the sea was the sandbar and that in order for the offence to be committed the sandbar had to be removed. The magistrate should determine whether the removal of the 80 thousand cubic yards of sand had the effect of decreasing the extent to which the waves would lose energy as they approach the coast.

[18] The appellant asked the court to express an opinion on a potential defence on which the respondent might rely if this appeal is allowed. At this stage of the proceedings it could be no more than a hypothetical question. I think it will be premature to respond to this application at this stage and in any event we have not heard the other side present their evidence or arguments and do not know whether the appellants have read the indications correctly. In the premises I would allow the appeal and order that the matter be remitted to the Magistrate for the case to be continued.

Costs

[19] The appellant submitted that because this is a matter of public importance the costs should be met from public funds. If that is indeed the case the appellants should make the necessary negotiations with the relevant officials. We are not able to order costs against the state when it is not a party to the proceedings. In

addressing the quantum of costs the appellant engaged counsel from England and applied for reimbursement of his travel expenses. But the appellants exercised a choice as to their legal representation. This expenditure reflects a personal preference and is not an expense which was required for the attainment of their legal rights. We have been pursuing the principle of relating the costs ordered to have some reflection on the value of the proceedings rather than on the expenses incurred in their prosecution. I do think that it is an appropriate expense for the respondent to be ordered to reimburse. The appellant has applied for costs on a scale that is quite unusual for the Magistrate's Court but it may be that the nature of this case could be said to justify such an order. The appellants are capable of completing the litigation. In my view it would be more appropriate for an assessment of the costs to be made at the conclusion of the hearing. We would therefore order that the appellants be awarded their costs of this appeal in any event to be assessed by the Magistrate at the conclusion of the hearing.

Order

[20] The appeal is allowed. The order of the Magistrate set aside and the matter remitted for further hearing. Costs to the appellant in any event to be assessed by the Magistrate at the conclusion of the case.

Sir Dennis Byron
Chief Justice

I concur.

Albert Redhead
Justice of Appeal

[21] **GEORGES, J.A. [AG.]:** This appeal turns on a narrow point of construction from the Magistrate's Court where the appellants each brought a private prosecution against the Respondent for removing a natural barrier against the sea namely sand and other material comprising part of a sandbar contrary to section 26(a) of

the National Conservation and Environment Protection Act 1987 (NCEPA) of the laws of St. Kitts and Nevis. The offences were alleged to have been committed on divers days between the 19th day of August 2000 and the 11th day of September, 2000 off the shares of St. Thomas Parish in the island of Nevis.

[22] In upholding Respondent Counsel's no case submission at the close of the prosecutions case and dismissing both complaints the learned Magistrate District "C" held inter alia that there was no evidence that a natural barrier against the sea had been removed.

[23] In the penultimate paragraph of her decision the learned Magistrate stated that:

> "The evidence led for the complainants was that a significant portion of sand was taken from the sandbar. The evidence given by Professor Young was that the sandbar was still a barrier against the sea although it is less effective than it was before."

[24] In the final paragraph she concluded that:

> "To my mind the statute is not ambiguous in relation to the section under consideration. I therefore consider that the statute should be given its ordinary meaning. If the statute is given its ordinary meaning the natural barrier must be removed or so significantly removed that it is no longer a natural and effective barrier against the sea. There is no such evidence before the court. I therefore hold that the charges have not been made out against the defendant company. The matters are dismissed."

[25] In their notices of appeal dated 22nd January, 2001 the appellants raise two grounds of appeal namely:

(1) That the decision is unreasonable or cannot be supported having regard to the evidence.

(2) That the decision was erroneous in point of law in that the learned Magistrate

  (a) ruled that the appellant had no case to answer as the respondent had not removed a 'significant" portion of the sand bar.

(b) ignored the provisions of section 87 of the Magistrate's Code of Procedure in coming to her determination that the respondent had no case to answer.

(c) failed and/or declined to rule on the appellant's request to amend the information as requested by Counsel for the appellant in order to charge the Defendant under section 32 (a) of the National Conservation and Environment Protection Act 1987 instead of under section 26 (a) of the Act."

[26] Ground 2 (b) was not pursued and the main thrust of learned Queen's Counsel's submission on behalf of the appellants being that any removal of sand or other material from a sandbar which undermined or affected its integrity and effectiveness as a natural barrier against the sea constituted an offence in respect of sections 26(a) and/ or section 32 of the NCEPA resulting in erosion of beach and damage to the coast/shoreline which the Act was designed to protect. And it mattered not if, a part or a large portion of the sandbag remained as long as its integrity as a whole was impaired and its capacity as a sea defence was thereby rendered less effective resulting in greater vulnerability to damage and or erosion of the beach, the provisions of the Act were infringed/violated.

[27] NCEPA section 26 (a) provides:

"No person shall –

(a) remove or assist in the removing of any natural barrier against the sea"

NCEPA section 32 provides:

"Any person who –

(a) removes any natural barrier against the sea

……

is guilty of an offence and is liable on summary conviction to a fine of $1000… and in addition thereto, any boat or vehicle used in connection

with the commission of an offence under paragraphs 9a) or (b) is liable to forfeiture."

[28] The provisions of the Act as the learned Magistrate rightly held are clear and unambiguous. They are also strict. And the canons of construction require that legislation of this kind which (as in the instant case) is designed to promote, enhance, protest and conserve the environment, must be given a generous and purposive construction in order to achieve its aim.

[29] The preamble to the Act states that its aim is "to provide for the better management and development of the **natural** and historical **resources** of Saint Christopher and Nevis for purposes of conservation, …"

[30] The evidence shows and learned Counsel conceded that a significant portion of the sandbar was left (after the "dredging" but a significant portion had been lost. There was substantial depletion he argued. Part of the sandbar which served as a natural barrier against the sea and prevented sea erosion or sea encroachment and been removed thus rendering coastline defenceless. It was submitted that that part of the sandbar which had been removed constituted a natural barrier to the sea.

[31] Learned Queen's Counsel rejected the learned Magistrate's conclusion in the last paragraph of her decision that "if the statute is given its ordinary meaning the natural barrier must be removed or so significantly removed that it is no longer a natural and effective barrier against the sea (in order to ground a conviction).

[32] With the greatest respect such a view is in my judgment untenable and I fully agree with learned Counsel's submission that an offence is committed if anything that is a natural barrier (whether or not forming part of a larger natural feature) is removed.

[33] In the ordinary meaning of the words the removal of material from a sandbar constitutes 'removal of a barrier against the sea' if the effect is that the waves lose significantly less energy when passing over it. To the extent that energy is no longer lost, the obstacle or **barrier** which caused the waves to lose that energy has been removed.

[34] In construing the meaning of the statute learned Queen's Counsel submitted that the correct test is that an offence is committed if material is removed which caused the waves to lose a significant amount of their energy or if the effect of the removal of material is to decrease significantly the protection of the coast. I fully agree not every removal from a barrier will satisfy this test. It is a question of degree with each case being decided on its own merit having regard to the particular circumstances.

[35] In this case the evidence revealed and Professor Young testified on behalf of the Appellant that there had been a significant reduction in the effectiveness of the protection previously afforded by the sandbar leading to the conclusion that a barrier against the sea had been removed and hence there was a case to answer. The learned Magistrate therefore evidently erred when she decided that no offence was committed because the sandbar was still there. The original sandbar was clearly not still there. Its integrity had been impaired with consequential risk and/or detriment to the coast/shore and so there was a case to answer.

[36] Learned Counsel for the Respondent submitted that for the purpose of sections 26 (a) and 32 (a) of the NCEPA the expression "natural barrier" connotes a natural recognized geological structure. As long as a sandbar exists there was a natural barrier. Removal of a portion would not constitute removal of the natural barrier. A strand of sand was not per se a barrier he further submitted nor did a shingle by itself or silt by itself constitute a barrier. Hence he argued having regard to all the circumstances of the case there had been no removal of any natural barrier against the sea albeit that a significant portion of the sandbar had been removed.

The sandbar which was the natural barrier against the sea continued to exist and provide protection to the beach.

[37] Plausible though that argument may be I am not by any means persuaded or convinced of its validity for it does seem to me that any removal of material from any natural barrier against the sea which impairs its integrity as a whole and diminishes its effectiveness as a defence or protection to the beach contravenes the aforesaid provisions of the Act. Grounds 1 and 2 (a) of the appeal accordingly succeed and there is in my opinion no need in the circumstances to adjudicate on ground 2 (c)

[38] The appeal is accordingly allowed and the matter is remitted to the learned Magistrate for rehearing according to law. Costs of the appeal to be costs in the cause.

Ephraim Georges
Justice of Appeal [Ag.]