

COMMONWEALTH OF THE BAHAMAS

2021

IN THE SUPREME COURT

APP/sts/00008

Appellate Division

BETWEEN

DUDLEY MATHER

Plaintiff/Appellant

AND

MICHELLE MATHER

Defendant/Respondent

Before The Hon. Mr. Justice Neil Brathwaite

Appearances: Sidney Dorsett for the Applicant

Lenthera Culmer for the Respondent

Date of Hearing: 15<sup>th</sup> February 2023

### DECISION

1. In this matter the Appellant appeals against the decision of the Magistrate's Court dismissing his summons, by which he sought the return of property alleged to be in the possession of the Respondent.
2. The brief facts are that the Appellant and Respondent were previously husband and wife. In June 2018 the Appellant was convicted and sentence to incarceration following an attack on the Respondent, leaving a number of items at the home formerly occupied by them both. Upon his release from prison, the Respondent, on his version of events, went to the home accompanied by a police officer to collect his property, and discovered that his tools which he needed for his employment were missing, and a truck that he had left there had been

parked across the street from the home and vandalized. He thereafter filed a summons seeking the return of his property.

3. On 14<sup>th</sup> April 2021 the matter was called before the magistrate's court, but was dismissed in the absence of the Appellant's counsel, who had been present but who had asked opposing counsel to have the matter stood down so that he could attend before the Deputy Registrar of the Supreme Court. The Appellant thereafter challenged that dismissal on the basis of a denial to right to counsel in breach of Article 20 of The Constitution, as well as the consideration of an affidavit of the Respondent which had just been served that morning, and which counsel complained he had not had the opportunity to discuss with his client and formulate a response.

4. With respect to the issue of a denial of counsel, I note the constitutional mandate at Article 20 (8) which provides as follows:

20 (8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

5. This provision has been held to encompass the concept of due process, which can include the right to be represented by counsel in a civil matter. However, in cases where there has been an allegation of a denial of that right, the Privy Council in *Bain v The Queen* [2020] UKPC 10 Privy Council Appeal No 0088 of 2017 has noted that the right is not absolute, and stated as follows:

“The fact that a defendant is unrepresented does not in itself mean that the trial is unfair. If it is the result of the free and informed choice of the defendant or if he has brought it upon himself, as, for example, if he is judged to be manipulating the system, then it is unlikely to be unfair. Even if there is no such choice or fault, the prejudicial effect of the lack of representation needs to be considered. All relevant circumstances must be taken into account, including the impact of the defendant's lack of representation on the conduct of the trial, the evidence and the outcome.” It must also be noted that this was in the context of a capital case, which of necessity requires a far more stringent approach to the issue of proceeding in the absence of counsel, given the possible jeopardy faced by a defendant.

6. In the instant case, counsel appeared at court and spoke with co-counsel, seeking to have the matter stood down. The matter was initially stood down by the magistrate, and enquiries were made as to whether the matter should be transferred to another court, but when it was called again counsel was still not present. The learned Magistrate then apparently swore in both parties, and proceeded to hear the matter, hearing from the Appellant himself, before dismissing the case.
7. It is important to note that there is no entitlement to an adjournment, which is completely within the discretion of the learned Magistrate. There is no requirement that the court must manage its schedule to accommodate counsel. Indeed, the opposite is true. Given the very simple nature of the claim, and the simple factual dispute in issue, there is no merit in the contention that the learned Magistrate was wrong to refuse an adjournment, or to proceed to hear the case in the absence of counsel. However, during the course of the hearing of the appeal, it became apparent that the Appellant had been questioned by the learned magistrate, but the sparse record did not indicate the gravamen of what transpired, or the reasons for the dismissal of the complaint. On this basis, while the Court did was not troubled by the repetitious grounds of appeal advanced by counsel, this court decided in the interests of justice to treat the appeal as a rehearing, and heard the evidence of the Appellant and the Respondent.
8. The Appellant in summary testified that he his tools and truck were left in the home and yard of the Respondent while the Appellant was incarcerated, and that during that time he had been taken before the Magistrate's Court for a hearing with respect to a protection order. The Appellant testified that during that hearing, the Respondent was told by the Magistrate that she was responsible to keep the items in the home and yard until the Appellant came to collect them, but that when he went there after being released from prison he found that his work tools were missing, and that his truck had been parked across the street from the home and vandalized, with the engine stripped and the windshield broken. He further testified that the truck was not roadworthy, and he was told by the Respondent that she had taken his tools from the home and stored them inn a laundry room in the yard as she needed the space. The Appellant denied that the vacant lot across the street was sometimes used by them for parking, or that he had picked through his tools and

taken some but left the others. He further stated that he could not recall driving the truck after it was towed.

9. The Respondent relied upon the affidavit that had been placed before the Magistrate, which she identified under oath, and in which she averred that after the Appellant's incarceration she secured his items as best she could by placing the tools that were on the western side of the property and in the gazebo in the laundry room and in the truck. She further averred that in March 2019 she noticed that her ladder and lawnmower were missing, and that tools were missing, after which she made a report to the police. The Respondent also stated that after she was told that the Appellant was coming for his stuff, she advised him that some items had been stolen, and that when he came she paid for a tow truck to assist him in removing his vehicle. After she was advised that a summons had been filed, she visited the police station to retrieve a report of the report she had made when the items were stolen, but was told that her report was not in the system. The Respondent stated that the only thing wrong with the truck was that the battery was dead, as the truck had not been moved for more than two years. The Respondent further denied being given any instructions by the Magistrate during the protection order hearing to keep the items in any particular place.
10. In considering this matter, I note that the Appellant submits that the Respondent should not be believed as she was unable to produce a copy of the report made to the police, and her evidence that she had been told that the report was not put in the system because she could not make a report about someone else's property was not credible, as some of her property had also been stolen. In my view the same attack can be made on the credibility of the Appellant, as he alleges that his truck was damaged, but has provided no proof of the same. I also note that the Appellant said that he "could not recall" having driven the truck after he retrieved it, before going on to say that the engine was stripped. If the engine was in fact stripped, in my view the obvious answer would have been "no", as opposed to "I cannot recall". Having examined this matter with care, I have no hesitation in saying that I accept the evidence of the Respondent, who appeared credible in giving evidence, that the items were in fact stolen, and that the truck, which was more than twenty years old, was not vandalized.
11. The Appellant seems to contend that the Respondent did not take sufficient care as the truck was parked across the street instead of on their actual property, and the tools were

- placed in a laundry room as opposed to in the actual home. It seems that no complaint with respect to the tools would have been made if they had been stolen from the home itself, and no complaint would have been made about the truck if it had been parked in front of the parties' home as opposed to directly across the street. In my view the question is therefore whether the Respondent took reasonable steps to store the Appellant's property.
12. In my view, these contentions of the Appellant are unsupportable. It is not as though the Respondent discarded the tools, or placed them in a location from which passers-by could remove them. It is not uncommon for tools to be stored in a laundry room. Indeed, that is the more usual place for them to be stored. It is also perfectly normal and usual for a vehicle to be parked in a vacant lot directly across from a residence, and it is not inconceivable that an old vehicle which is not used for more than two years might fall into disrepair. I am therefore unable to conclude, as the Appellant seems to invite the Court to do, that the Respondent did not take reasonable steps to secure the property of the Appellant with respect to the truck and the tools, and I further am unable to find that the Respondent should be held liable for the theft of the tools, which I accept occurred. The Respondent cannot be held responsible for the larcenous nature of others, where there is no evidence that she was a party to the theft, or invited the removal of the items.
13. In all the circumstances of this case, I find on the balance of probabilities that the Respondent was not responsible for the loss of the tools, or any damage to the truck, which in any event was not proved. I therefore dismiss the appeal, with costs to the Respondent to be taxed if not agreed.

Dated this 16<sup>th</sup> day of February, A.D. 2023



Neil Brathwaite

Justice