R. v. NEWELL.

CRIMINAL APPEAL CASE No. 18 OF 1932.

Employment of Natives Ordinance (Chapter 62) section 50—failure of employer to provide medicines and also (if procurable) medical attendance during serious illness.

In this case the obligation imposed on an employer to provide medicines and (if procurable) medical attendance for a native servant in case of illness is considered.

One of the questions in the lower Court was the meaning of the word "illness", the native servant in question having sustained injuries in an accident during the course of his employment which led to septicaemia; the lower Court held that "illness" indicated a state or condition of health other than that of "good health" and included a condition of body caused by or resulting from an accident. This question was not dealt with in the judgment of the High Court and presumably the appellant accepted the decision of the lower Court on this point.

The Employment of Natives Ordinance is now Cap. 171 of the Laws. The present case was distinguished in *R.* v. *Smith* 3 N.R.L.R. 14.

Hall, J.: This is an appeal from the Judgment of the acting Police Magistrate, Ndola, delivered on the 14th May last, herein.

Appellant, who is manager of Pauling and Company, was convicted under section 50 of the Employment of Natives Ordinance (Cap. 62).

That section reads:

> "Every employer shall provide his servants with proper medicine during illness and also (if procurable) medical attendance during serious illness, and any employer failing so to provide shall, in addition to his liability for breach of this section, be liable to pay any expenses incurred by a district officer in providing such medical attendance:
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> Provided that an employer shall not be liable under this section where any illness or incapacity is occasioned by the neglect or default of the servant."

Appellant is admittedly, an "Employer" within the definition contained in section 2 of the Ordinance.

The facts are, to a large extent, not in dispute and are fully set out in the judgment of the Court below. I do not propose, therefore, to go into them in detail.

A native labourer, by name Mupisa, was injured in the course of his employment with the aforesaid company on 2nd January, 1932, and the fact of his illness (which undoubtedly became serious) did not come to appellant's knowledge until 3rd March, when steps were taken to remove him to hospital. During the period January to March, the boy had been under the care of a native medical orderly in the employment of appellant. It is not suggested that the illness was due to any neglect or default of the labourer.

The first question is, whether appellant could be convicted under the above section, in the absence of knowledge of the boy's condition.

Mr. Yelloly, who appeared for the appellant, placed great reliance on the case of *Dickenson* v. *Fletcher* (1873) L.R.C.P. p. 1. In that case, an owner of a mine was indicted, under the Mines Regulations Act, 1860, for not having the safety lamps used in the mine examined and securely locked by some duly authorised person. It was proved that the respondent had appointed a competent lampman, and that it was through his default that, on the occasion in question, the lamps had been given out unlocked. Upon these facts, the Magistrates had refused to convict, and, on appeal, their decision was confirmed, on the ground that a person cannot be made liable to a penalty if there had been no neglect or default on his part.

The sections in question in that case were as follows:

> "10. The following rules . . . shall be observed in every colliery or coal mine or ironstone mine *by the owner and agent thereof.*
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> 3. Whenever safety lamps are required to be used, they shall be first examined and securely locked by a person or persons *duly authorised for this purpose.*
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> 22. If any coal mine, colliery or ironstone mine be worked, *and through the default of the owner or agent thereof* . . . any of such rules, provisions of which ought to be observed by the owner and principal agent or viewer of such coal mine, colliery, or ironstone mine be neglected or wilfully violated by any such owner, agent or viewer, such person shall be liable to a penalty not exceeding £20."

In the course of his judgment, Brett, J. said:

> "It must be taken that such person, when appointed to perform such duty, was a person whom the owners and agent were entitled to appoint as being a competent person, and that there was no personal default of the owners or agent. The question, therefore, is whether they were liable to a penalty in respect of the neglect or default of the person whom they so appointed *and were entitled to appoint.*
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> We are called upon to construe a penal enactment. Those who contend that the penalty may be inflicted, must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of a construction that would, and one

that would not, inflict the penalty. Assuming that section 10 says that the rule is to be observed, and that the owners and agents are the persons to observe it, we have then to consider what the twenty-second section says. It does not say, if the rule is not observed, the owner and agent shall be subject to a penalty. It says, '*If through the default of the owner or agent thereof*' the rule has been neglected, then the penalty shall be incurred. . . . That being so, it appears to me that these words imply something in the nature of a personal default."

KEATING, J. said:

" It was contended by the Attorney-General that if, in fact, the lamp was not locked in pursuance of the rule, the owner was liable in virtue of that mere fact, and that it was quite immaterial whether he knew of it, and what amount of precaution he took to prevent it; that the Legislature, with a view to securing the safety of those who work in coal mines, had gone the length of enacting that, in such case, he should be liable to a penalty without reference to any question of personal default on his part. In my opinion, the effect of the statute cannot be pushed so far as that, and *I found that opinion upon the words of the twenty-second section . . . 'the default of the owner or agent thereof'*."

It would seem, from the passages in the judgments that I have cited *supra*, that the case turned on the words " through the default of the owner or agent thereof ", and is therefore distinguishable from the case now under review. A person " duly authorised " had been appointed under rule 3, which allowed such delegation, and it was through his default that the omission occurred, and not through the default of the respondent. I am unable therefore to attach the weight to it, as regards the present case, which counsel for the appellant would wish me to do.

I have searched high and low to find a case dealing with a section of the kind now being considered, but I have been unable to do so. It is therefore necessary for me to fall back on general principles. In *Cundy* v. *Lecocq* (1884) 13 Q.B.D. p. 207, STEPHEN, J. said:

" Against this view we have had quoted the maxim that, in every criminal offence, there must be a guilty mind: but I do not think that maxim has so wide an application as it is sometimes considered to have. In old time, and as applicable to the common law or to earlier statutes, the maxim may have been of general application, but a difference has arisen owing to the greater precision of modern statutes. It is impossible now, as illustrated by the cases of *Reg.* v. *Prince* and *Reg.* v. *Bishop*, to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each act that is under consideration to see whether and how far knowledge is of the essence of the offence created."

In *Rex* v. *Tolson* (1889) 23 Q.B.D. 172, WILLS, L. said:

" Although, prima facie and as a general rule, there must be a mind at fault before there can be a crime, it is not an inflexible

rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law, or otherwise to do wrong or not.

There is a large body of municipal law in the present day which is so conceived. Bye-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health, or commerce, and such bye-laws are enforced by the sanction of penalties, and the breach of their conditions are offences, and is a criminal matter—and, in such a case, the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that, if he fails to do so, he does so at his peril."

I think, in this dictum, we are getting nearer to the section under review in this appeal.

What then is the object of Chapter 62 or at any rate Part V thereof which includes the section now under review ? It is obviously framed with a view to the protection of native labourers and others. Part V is headed " Care of Servants ". Section 45 deals with housing, section 46 with feeding, and section 47 deals with water supply for servants. That section reads:

" Every employer shall arrange for a proper water supply for the use of his servants."

Could it be argued under this section that the employer must have knowledge of the thirst of his servants or their lack of sufficient water to cleanse themselves before he could be convicted of failure to arrange ? I think not. I am convinced that, on a fair reading, this Part of the Ordinance imposes an absolute obligation on employers to themselves carry out the various duties laid down therein, and they cannot shelter behind a plea of absence of " mens rea ". The sections in that Part lay an obligation on the European in his dealings with native servants, and he cannot evade the responsibility.

I am fortified in my opinion by the decision of my predecessor, SIR EWEN LOGAN, in *Rex* v. *Rowan* (Police Magistrate, Ndola Criminal No. 711/30). It is true that he gave his decision on review, under section 30 of the High Court Ordinance, without hearing argument, but, nevertheless, it is his considered opinion. The learned Judge, in that case, had before him the question of the very section with which I am now dealing. He said:

" I agree with the magistrate that it is the duty of the employer to see that the proper steps are taken to look after the natives working for him, and to provide them with proper medicines. The employer cannot escape liability by saying that he did not know when he had taken no trouble to know."

The other point raised on behalf of the appellant is the question of the words " if procurable ". This is a question of fact, and depends on the circumstances of each individual case. There undoubtedly was evidence

in the case for the prosecution to show that medical attendance could be obtained. No doubt, the words " if procurable " would have, in each case, to be considered on the basis of " reasonably procurable ", but I am unable to say that, in all the facts of the present case, medical attendance could not be reasonably procured. The appeal must be dismissed and the conviction affirmed.