

## R. v. ADAMSON TOLOKIA AND OTHERS.

CRIMINAL REVIEW CASE NO. 207 OF 1939.

*Native tax—evasion of payment—failure to pay is not necessarily evasion—no wilful neglect until nine months after tax payable.*

Mere failure to pay tax is not evasion of tax within section 14 (1) (b) of the Native Tax Ordinance, Cap. 161. To constitute evasion there must be definite evidence that the accused evaded the payment by some particular act. If the charge is wilful neglect to pay tax the charge cannot be brought until nine months after the tax became payable (section 14 (2)) and in that case it is only necessary to prove that the accused failed to pay the tax and had not obtained exemption. Once this has been done the onus moves to the accused who then has to satisfy the Court that there was no wilful neglect on his part.

Section 14 (2) of the Native Tax Ordinance was amended by Ordinance 7 of 1944 which amendment altered the date after which non-payment of tax is considered prima facie evidence of wilful neglect to pay the tax. The date is now the 31st of December of the year in which the tax becomes due and payable.

For further cases on defaulting in payment of tax see *R. v. Chibati Simati* p. 130 post; *R. v. Kawana* 4 N.R.L.R. 9; *R. v. Kenan Mutambo* 4 N.R.L.R. 11; *R. v. Solomon Musa Manda* 4 N.R.L.R. 13; *R. v. Muchuma* 4 N.R.L.R. 64; *R. v. Isaiah Jonase and Eleven Others* 4 N.R.L.R. 100; *Bwembo Nyambe v. Reg.* 4 N.R.L.R. 228; *Kangachepe Njovu v. The King* 4 N.R.L.R. 262; *R. v. Faroe Zirore* 5 N.R.L.R. 50.

Jeffreys, A.J.: The charge in each case is “did unlawfully fail to pay and evade payment of his tax . . . for the year 1939” contrary to section 14 (2) of the Native Tax Ordinance (No. 36 of 1938).

In each case there was failure to pay the tax but what evidence was there of *evading* tax?

Again why was the charge brought under section 14 (2) of the Ordinance? Section 14 (2) deals with wilful neglect to pay tax . . .; the charge is not wilful neglect to pay tax but of evasion; in any case there will have been no wilful neglect to pay tax for 1939 until nine months after the date when this tax became payable (section 14 (2)), i.e., not until after 31st December, 1939.

The reference was intended, I presume, to read section 14 (1) (b) and as such I shall consider it, treating the reference to section 14 (2) as a clerical slip.

Section 14 (1) (b) provides that any person who by any means whatsoever evades (or attempts to evade) payment of the tax shall be guilty of an offence, etc., etc.

It is true that the accused in each case pleaded guilty but I do not suppose that he actually said "Guilty". No doubt he made an answer which the Court construed as an admission of guilt, but section 187 (2) of the Criminal Procedure Code requires that, where an accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him. To evade tax is something much more than to fail to pay tax. Failure to pay tax is an offence created by section 11 of the Native Tax Ordinance and is punishable in a manner far less severe than evasion of tax is punishable under section 14 (1) (b). To constitute evasion there must ordinarily be some definite overt act as the result of which payment of the tax is evaded.

Merely to fail to pay tax, which is an omission rather than an act, is not in itself evasion.

If a native when asked whether he has paid tax gives an answer which is intended to deceive and does deceive the tax collector that may be evasion, e.g., if he gives the name of another native who he knows has paid 1939 native tax intending that the officer to whom he gives the information shall look up the name in the tax register and there find payment of the tax recorded against such other name. Or if, when the tax collector is going from hut to hut calling upon natives to produce their receipts or pay the tax, he hides under a bed or in a grain bin, etc., etc. Again acts done or words spoken in the *attempt* to evade payment are punishable under section 14 (1) (b).

I trust that I have made it clear that there has been no evasion in the cases now before me.

In each case the conviction and sentence is quashed and any fine which has been paid must be refunded.