R. M. PETERSON v. THE CROWN.

CRIMINAL APPEAL CASE No. 40 OF 1940.

Mining regulations—personal responsibility of manager—mere delegation does not relieve manager of responsibility.

The facts and the law are fully set out in the judgment hereunder. The guiding principle is summarised by the Court in the last two paragraphs of the judgment.

The Mining Regulations referred to in the present case were made under the authority of the Mining Ordinance which was repealed and replaced in 1958 by the present Mining Ordinance. In the Mining Regulations made under the new Ordinance, Regulations 1005 (*a*) and (*c*) are substantially the same in wording as Regulations 10 (1) and (3) respectively of the old regulations. Regulations 1006 (*a*) and (*b*) are substantially the same in wording as regulation 10A. Regulation 312 of the new regulations provides for the wearing of safety chains.

Robinson, J.: This appeal raises an interesting point which involves all mine managers. I will therefore set out the facts, which are not now disputed, for the better understanding of the judgment.

I am quoting from the judgment of the learned Resident Magistrate at Kitwe from whose decision this appeal now is:

> "The defendant in this case is the manager of the Mufulira Mine and he is charged with a contravention of Regulation 10 of the Mining Regulations in that he failed to enforce the observance of Regulation 59 (7) of the Regulations which provides that Africans working in places where falling would be likely to entail injury shall, wherever practicable, be provided with and wear safety chains and ropes which shall be maintained in good condition.
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> The facts of the case present no difficulty. On the 26th February last one Chama David, an African employee of the Mufulira Mine, and another African were lashing, that is shovelling, loose rock from a bench that is a ledge of rock, into a stope, that is a cavernous aperture of considerable depth extending into the substance in a roughly vertical direction. Both men were wearing safety chains. In the course of the morning the bench collapsed and both men fell. One of them was subsequently found, alive, hanging by the chain with which he had been provided. The other, Chama David, was found dead a considerable way down the stope with a portion of chain fastened round his waist. This portion of chain was produced in evidence.
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> I have no hesitation in finding in fact that the chain produced was the one with which Chama David was provided and it is clear that the place where he was working was one where falling was

likely to entail injury. I have no hesitation, moreover, in finding in fact that that chain had not been maintained in good condition.

It follows that the provisions of Regulation 59 (7) have not been observed."

The learned Magistrate then went on as follows:

"Having come to that conclusion I have to consider the question of the personal liability in the matter of the present defendant who, as I have said, is the manager of the Mufulira Mine,

by Regulation 10 (1)—

'The manager of every mine shall enforce the observance of all provisions of these regulations in the mine under his charge.'

and by Regulation 10 (3)—

'Any manager who fails to carry out any of the provisions of these regulations shall be deemed guilty of an offence against these regulations unless he can prove that all reasonable means of enforcing the provisions of these regulations and of preventing such breach were taken by him.'

In this case, as I have already found, the provisions of Regulation 59 (7) were not observed. That, in any ordinary use of the English language, is tantamount to saying that the observance of the provisions of the regulation in question were not enforced by the defendant or by anybody else, and I so find in fact; and from that it clearly follows to my mind that the present defendant is by virtue of Regulation 10 (3) to be deemed guilty of an offence in contravention of Regulation 10 (1) unless he can discharge the onus which Regulation 10 (3) places upon him of satisfying me that all reasonable means of enforcing the provisions of Regulation 59 (7) and of preventing a breach of these provisions were taken by him.

I do not think I am doing any injustice to the very able and persuasive argument addressed to me by Mr. Ellis in saying that defendant's main effort (it was not of course his only one) to discharge the onus resting upon him was based on the provisions of Regulation 10A. By that regulation—

'(1) The manager may appoint one or more competent persons to assist him in the management of the mine, and every such person shall have the same responsibility under these regulations as the manager for such portion of the mine as his letter of appointment may specify . . .

(2) The appointment of any assistant manager under subregulation (1) hereof shall not relieve the manager of his personal liability under these regulations.'

Now, at all material times, the defendant had appointed a Mr. Pettijohn to assist him in the management of the underground department of the mine and there is no question that Mr. Pettijohn was a competent person. The appointment was said to have been made under Regulation 10A (1) and although certain formalities were not observed I accepted it for the purposes of this case that the appointment was properly made under the regulation. When that appointment was made Mr. Pettijohn was of course *ipso facto* placed under the same responsibility as the defendant for *inter alia* the enforcement of the provisions of the regulations, but it is clear from the wording of sub-regulation (2) that that imposition of responsibility upon Mr. Pettijohn did not relieve the defendant of his own personal liability under *inter alia* Regulation 10. I am prepared to go further and I do go further. On a reading of Regulation 10 and Regulation 10A together I am satisfied, and I so hold, that it was the intention of the legislature and that that intention is clearly expressed that the appointment of a competent assistant manager under Regulation 10A should not of itself constitute a compliance by the manager with the provisions of Regulation 10.

In my opinion the proper construction to be placed upon the two regulations is this. All reasonable means of enforcing the regulations and of preventing their breach must be taken, the onus of proving that they have been taken being of course on the defendant. If it is established that all such reasonable means have in fact been taken it is immaterial whether they have been taken by the manager or by the assistant manager and there is no offence. But if it is not established that such reasonable means have been in fact taken and there has been in fact a failure to observe the provisions of the regulations, as I have found there has been in this case, then the appointment of an assistant manager cannot avail to relieve the manager of his personal criminal liability under Regulation 10."

He then comes to the conclusion, on the evidence that all reasonable means had not in fact been taken and convicted the appellant of the offence charged.

The grounds of appeal are threefold:

1. The appellant was convicted of contravening sub-regulations (1) and (3) of Regulation 10 of the Mining Regulations, but the appellant could not be liable criminally under either or both of such sub-regulations unless he personally committed some neglect or default and there was no evidence that the appellant did personally commit any neglect or default.

2. The appellant appointed a competent person under Regulation 10A of the Mining Regulations to be in charge of the underground department of the mine of which the appellant was the manager and to assist the appellant by seeing to the enforcement of the Mining Regulations in the said underground department and by such appointment the appellant discharged all his

general obligations under sub-regulation (1) of Regulation 10 of such regulations and consequently he could not be liable for any want of observance of the regulations in such underground department unless the same were caused by some personal neglect or default by himself as provided by sub-regulation (2) of the said Regulation 10A.

3. The appellant appointed a competent person to be in charge of the said underground department of the said mine and to see to the enforcement of the Mining Regulations in that department, and by making such appointment, whether the same were made under the said Regulation 10A or otherwise than under that regulation, the appellant had taken all reasonable means of enforcing the provisions of the regulations and preventing any breach of them and thereby came within the meaning of the saving clause to that effect in sub-regulation (3) of the said Regulation 10.

In short, this Court is asked to decide whether the construction put upon Regulation 10 and 10A of the Mining Regulations by the learned Resident Magistrate is the right one or not.

It is not suggested that the appellant knew about these defective safety chains or personally committed or aided and abetted a breach of Regulation 59 (7). The only point to be decided is whether by reason of a breach of that regulation the appellant as a necessary consequence is punishable under Regulation 10 (1) and (3).

Mr. Ellis, for the appellant, in a very interesting argument covered a wide field. He referred extensively to the English Coal Mining Acts, to wit, 23 and 24 Vict. C. 151 S. 22, 35 and 36 Vict. C. 76 S. 76, 50 and 51 Vict. C. 58 S. 50, and 1 and 2 Geo. V. C. 50 S. 75 and S. 102. He drew a distinction between 23 and 24 Vict. C. 151 and the other Acts, in that, in the first Act, the section creating liability was less wide than in the succeeding Acts.

The wording in 23 and 24 Vict. is as follows:

"S. 10. The following rules . . . shall be observed in every . . . coal mine . . . by the owner and agent thereof;

S. 22. If any coal mine . . . be worked, and through the default of the owner or agent thereof any of such . . . rules . . . provision of which ought to be observed by the owner and principal agent . . . of such . . . coal mine . . . be neglected or wilfully violated by any such owner or agent, such person shall be liable to a penalty of not exceeding £20."

That is to say there must be personal default on the part of the owner or agent.

In the later Acts the wording is altered and is as follows:

"Every person who contravenes or does not comply with any of the general rules in this Act shall be guilty of an offence; and in the event of any contravention of or non-compliance with any

> of the said general rules . . . *by any person whomsoever* the owner, agent and manager shall each be guilty of an offence . . . unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules . . . to prevent such contravention or non-compliance."

In other words, liability is complete as soon as a breach is committed by *anybody* unless it can be proved that all reasonable means had been taken to enforce the rules.

Mr. Ellis then said that under the Northern Rhodesia Law it is the duty of the manager to enforce the observance of the regulations and he shall be deemed guilty of an offence if he fails to carry out any of the provisions unless he can prove that all reasonable means of enforcing the provisions and preventing the breach were taken by him. Mr. Ellis argued that under our law the manager is not made a guarantor of the good behaviour of " any person whomsoever " and therefore English cases decided under the later Acts containing that phrase are inapplicable.

Pausing there, I would observe that it is the duty of this Court to construe the wording of the regulations enacted in Northern Rhodesia. The regulations in this country do not appear to follow exactly any precedent. The " all reasonable means " clause seems to have been taken from the later English Acts (and the S.A. Act also talks of " all reasonable measures ") but our Regulation 10A (*vide supra*) appears to have been adopted from the regulations made under the Union of South African law, i.e., the Mines and Works Act, 1911, Regulation 157 (2) (*a*) reading as follows:

> " The manager may appoint one or more persons who shall be holders of a Mine Manager's certificate to assist him in the management, such as an assistant, sectional, or underground manager, and such person shall have the same responsibility under these regulations as the manager for such portion of the mine or works as his letter of appointment shall specify, but the appointment of such person shall not be taken to relieve the manager of his personal responsibility under these regulations."

As the wording is so similar I thought it wise, in order to save, if possible, further litigation, to inquire from Southern Rhodesia whether there are any reported cases from the Union of South Africa on the construction put upon the words " shall not be taken to relieve the manager of his personal responsibility ". Through the courtesy of HUDSON, J. my attention has been drawn to the following cases:

Davidson v. *Rex* 1910 T.P.D. 1236.

Rex v. *Bennett* 1916 T.P.D. 355.

Rex v. *Waller* 1934 T.P.D. 265.

A further opportunity was given to learned Counsel to argue on these cases. I will deal with them later.

Mr. Ellis urged that under the Northern Rhodesia regulations a manager, if he had made a proper appointment under Regulation 10A (1), cannot be made criminally responsible unless he is personally guilty of

such infringements, or is so much involved that he can be said to have aided and abetted them. His contention is that the true meaning of Regulation 10A (2) is that if a manager makes a proper appointment and in spite of that actively interferes then only he is not relieved of his personal liability. He cited the English case of *Dickenson* v. *Fletcher* (1873) 9 C.P. 1 in support of his argument. That case was decided under 23 and 24 Vict. Cap. 151, which it will be remembered, implies that there must be personal default on the part of the owner and agent. A competent person was appointed to see that all safety lamps should be examined and locked before being given out. There was a default but as it was not a personal default on the part of the owner, he was found not to have committed an offence. In my view that case is not of any help in construing the Northern Rhodesia regulations in which the wording is far wider. To reconcile his arguments on the English law and English cases, Mr. Ellis submitted that an " agent " in the English Acts is the equivalent of a " manager " in Northern Rhodesia, I cannot agree. " Manager " is defined in our regulations as " the person appointed to be manager of a mine under regulation 8 (1) . . . " and Regulation 8 (1) says " the owner of every mine shall appoint a manager whose duty it shall be to control and supervise such mine . . . "

As DARLING, J. said in the case of *Stokes* v. *Mitchison* (1902) 1 K.B. 857 an agent " may be agent for a very large extent of property. He appoints a manager and an under-manager. Why ? to see after the very things to which it is not reasonable to suppose that he can be giving his own constant personal attention." The Court held in that case, decided under 50 and 51 Vict. Cap. 58, that the agent was not criminally liable for a mere casual piece of negligence on the part of the manager for the contravention of a general rule, and, in the circumstances of that case, the agent had taken " all reasonable means " by the appointment of a manager. I cannot see that a manager under our regulations is at all equivalent to an agent in England who may be agent for several mines and not be resident at any.

Other English cases cited were, *inter alia*:

Wynne v. *Forrester* (1879) 5 C.P. 361.

Baker v. *Carter* (1877) 3 Ex. 132.

Howells v. *Wynne* (1863) 143 Eng. Reports 682.

Brough v. *Homfray* (1868) L.R. 3 Q.B. 771.

Atkinson v. *Morgan* (1915) 3 K.B. 23.

None of which are decisive on the points before the Court.

The South African cases are helpful but they do not throw any direct light, except by implication, on the bearing of the words of our Regulation 10A (2).

In *Davidson* v. *Rex* it was held on appeal that a mine manager who appointed shift bosses and gangers with instructions to see that the regulations were carried out, but who never went below when work was commenced, did not discharge the onus of proving that he had taken

reasonable measures for enforcing the regulations and was rightly convicted for contravening Regulation 145 (which requires the mine manager to provide for the safety and proper discipline of the workman and " unless he proves that he has taken all reasonable measures by enforcing to the best of his ability these rules, he is guilty of an offence against these regulations "). DE VILLIERS, J.P. said in the course of his judgment, " It is true that the appellant appointed shift bosses and other persons to take his place, because naturally he cannot be everywhere. But by having done that he has not by any means discharged his duties. His position is undoubtedly one of great responsibility. The latter portion of Regulation 145, as I read it, was expressly inserted to show a manager that he does not, by appointing shift bosses and other men necessary, discharge the onus which is upon him. A mine manager has very grave responsibility and it is not for this Court to say what a manager should do to enforce the observance of the rules, because that would depend upon the particular circumstances of each case."

The case of *Rex* v. *Bennett* was a case in which the appellant was the overseer; the manager, who had been jointly charged, having been acquitted by the Magistrate. Regulation 160 provides that a mine manager may appoint a mine overseer to assist him in the control, management and direction of the underground work of a mine, and Regulation 61 provides that no person shall be permitted to remain in any place in a mine if the air contains dust, smoke or fumes. When workmen had been allowed to remain in a place where air for a considerable period during the course of one and a half months had contained dust and smoke, it was held that the mine overseer had been rightly convicted of a contravention of Regulation 61, even though he had no actual knowledge as to the presence of the dust and smoke. WESSELS, J. in the course of his judgment said, " It is contended that the overseer should not be held responsible for the state of affairs because he was ignorant; that the words in Regulation 61: ' No person shall be permitted to remain ', etc., mean that if any person *knowingly* permits people to work in the dust and fumes he is to be held liable, but, if he does not know of the circumstances, then he cannot be held responsible. I take it that argument would be subversive of the whole object of the legislature in allowing these regulations to be framed, because the object of the Act is to prevent injury to workmen. . . . It would be subversive of the intention of the regulations if a person could say he had been attending to other matters, had left the dust and smoke to a subordinate, and that it did not concern him, until it was reported to him by one of his subordinates." At the end of his judgment, he goes on " The overseer cannot make it his excuse that the engineer's department is a different one to his own. As with the manager, so with the overseer; it is his duty to know everything that goes on and every transaction of the law that takes place in the mine, and he must take such steps as will ensure that he is made acquainted with everything that goes on. The manager has been excused by the Magistrate; in my opinion on insufficient grounds. He appears to me to have been just as guilty as the overseer."

Mr. Ellis submitted that the proposition as put above is too sweeping and it was winnowed down in other parts of the judgment showing it had special reference to Regulation 61.

The last case is *Rex* v. *Waller* decided in 1934. Regulation 8 (1) reads:

> " Every entrance to every vertical or steeply inclined shaft . . . or other dangerous place shall be kept properly fenced off . . . "

In terms of Regulation 156 (1), it is one of the duties of a mine manager to take all reasonable measures to enforce the requirements of these regulations and to ensure that they are observed by every person employed on the mine or works.

The appellant, an underground manager of a gold mine, was convicted of a contravention of Regulation 8 (1) by a Magistrate. The evidence was to the effect that an opening underground was not properly fenced off and an employee fell through and was killed. The appellant had never personally inspected this opening, but had relied upon the reports of subordinate officials to the effect that everything in the mine was in order. It was held that the appellant was not entitled to delegate responsibility for ensuring the enforcement of the regulations to subordinates, and that he had not carried out his duties under the regulations by relying merely on the reports of other officials without personally satisfying himself that the regulations were being observed, and that he had therefore been rightly convicted.

It is true, as Mr. Ellis pointed out, that the appellant in that case was an underground manager and there was no official delegation under South African Regulation 157 (2) (*a*), but, nevertheless, I think he was the scheduled person appointed to be responsible for the control, management and direction of a portion of a mine, which is the definition of " manager " in the South African Regulations. However, I think the case is useful as showing that the reasonableness of the measures taken must depend on the circumstances in each case.

Reference was also made to *Mills* v. *Rex* (1907)—a South African case to be found in Vol. 34 *English and Empire Digest*, p. 748, footnote " *g* ".

I can now get back to the facts of this particular case and construe the Northern Rhodesia regulations in the light of the foregoing. The only law and the only regulations I am concerned with are those of this Territory, but I am satisfied that no hard and fast rule has been laid down elsewhere. The Courts, as is proper, have always preserved to themselves the right to construe, in the light of the circumstances of each case, whether the means taken to enforce the provisions of the regulations have been reasonable or not. It is not disputed that a manager of a mine in Northern Rhodesia has very many and varied duties to perform and grave responsibilities to carry. It is clearly impossible for him to go round and inspect all the workings and the workshops very often. It is obvious he must delegate. A manager of a mine in England, South Africa or Northern Rhodesia cannot give constant personal supervision to see whether each and every regulation is being enforced, and yet, in each country, the manager is made criminally responsible for any transgression unless he can prove that he has taken all reasonable means so to enforce them. It seems clear to me that it has been the deliberate intention of the legislature when framing laws to control mines, where slackness may so

easily lead to disaster, to fix the responsibility at the top (see *Hannaford v. May* (1935) 1 K.B., at p. 395) and a manager can only evade that responsibility by proving " all reasonable means ".

I cannot agree with Mr. Ellis' argument that the true meaning of our Regulation 10A (2) " the appointment of any person under sub-regulation (1) hereof shall not relieve the manager of his personal responsibility under these regulations " is that the manager will only still be liable if he interferes personally after making an appointment. In my opinion the only object of regulation 10A (2) is to make 10A (1) perfectly clear, if it was not perfectly clear already. 10A (1) makes the manager and persons he may appoint equally responsible, instead of the manager being responsible alone. 10A (1), taken by itself, could not possibly be construed as substituting the appointed persons for the manager or as taking away the manager's personal liability, but, perhaps for the better understanding of laymen interested, such as mine employees, the point was laboured both in the South African regulations and in those of Northern Rhodesia by adding the latter part of regulation 157 (2) (*a*) and 160 (3) in the South African rules and 10A (2) in ours.

It follows therefore in my opinion that, under the law as it stands, a manager can be held criminally liable if he fails to carry out any of the provisions of the regulations even though there is no personal neglect or default, nor can he save himself by making an appointment under Regulation 10A (1) *per se*.

That disposes of the first two grounds of appeal.

The third one is to my mind the most cogent. It is to the effect that by making an appointment under Regulation 10A (1), the appellant had taken all reasonable means of enforcing the provisions of the regulations and preventing a breach.

The learned Magistrate dealt with this part of the case as follows:

> " In my opinion the proper construction to be placed upon the two regulations (Regulation 10 and 10A) is this. All reasonable means of enforcing the regulations and of preventing their breach must be taken, the onus of proving that they have been taken being of course on the defendant. If it is established that all such reasonable means have in fact been taken it is immaterial whether they have been taken by the manager or by the assistant manager and there is no offence. But if it is not established that such reasonable means have been in fact taken and there has been in fact a failure to observe the provisions of the regulations, as I have found there has been in this case, then the appointment of an assistant manager cannot avail to relieve the manager of his personal criminal liability under Regulation 10."

I think that is putting it too high. It is making an absolute rule without regard to the facts of each particular case. The Court has to apply itself to the question whether, under all the circumstances, the manager has taken all reasonable means of preventing the breach and I

can imagine cases in which there may have been some isolated and casual contravention and the Court would say that a delegation under 10A would be sufficient to exonerate the manager. In other cases, where a system or organisation is involved, it would not, because it is the duty of the manager to control and supervise the mine and he cannot evade responsibility by delegation. In such cases ignorance can be no excuse and if he does not know what is going on, he ought to.

I must therefore look at the evidence in this case to see what the system was to maintain these safety chains in good condition.

There was no system except for the shift boss to run the chain through his hands and look at it underground. Rust was not cleaned off. They were never sent to the surface nor were they oiled. This particular chain, with no great exertion, was broken by a witness in Court. An inspector of mines gave evidence that at Nkana and Mindola safety chains are brought to the surface daily and returned to the store. During the time the chain is in the store it is washed in paraffin and hung up on a rack to dry. When clean they are examined. At Luanshya chains are brought to the surface periodically for examination and underground, boys go round examining the chains and cleaning and oiling them as a full time job.

The system at Mufulira was completely inadequate to maintain the chains in good condition, with the result that they were not so maintained. There was a wholesale disregard of Regulation 59 (7), because if I take into consideration the appellant's own evidence that he was chairman of the monthly safety meetings, it only makes matters worse, and the only means which the appellant took to enforce that regulation was to delegate his duties. It is not reasonable.

The appeal must be dismissed.

In my opinion, bearing in mind the local conditions in Northern Rhodesia the rough guide should be this. The manager of a mine is personally responsible for the planning and working of methods and arrangements for enforcing the observance of all provisions of the regulations. He cannot delegate that responsibility.

If a breach occurs and it is due to a fault in the system, then he is liable—if the system is sound but a breach occurs owing to lack of personal attention (but without personal default), then, if he has appointed competent persons under Regulation 10A (1), whose duty it is to give such personal attention, I think the Court would probably say that he had taken all reasonable means under Regulation 10 (3) and he would be excused.