DIRECTOR OF PUBLIC PROSECUTIONS v COLIN BROWN (1980) Z.R. 42 (S.C.)

SUPREME COURT
BARON, D.C.J., GARDNER AND HUGHES, JJ.S.
21ST AND 22ND MAY, 9TH JULY ,1974
S.C.Z. JUDGMENT NO. 10 OF 1974

Flynote
Employment - Employment permit - Employment without permit - Whether offence.

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Criminal law and procedure - Offences - Whether prohibition without penalty amounts to offence.
Sentence - First offender - Punishment to be imposed.

Headnote
The respondent was engaged in paid employment without an employment permit. The Immigration and Deportation Act had a provision prohibiting that act without stipulating for a penalty. It was argued that no offence was created without provision being made for a penalty.

Held:
(i) Section 30 of the Immigration and Deportation Act provides a general penalty for offences and is not limited in its application to the offences set out in s. 29.
(ii) Where a prohibition is expressed in unambiguous and imperative terms and the matter is one of "public grievance" a breach of such a prohibition must be held to be an offence unless the contrary intention manifestly appears.
(iii) It is a well established principle that where the legislature has prescribed a fine as an alternative to imprisonment a first offender should not be sent to prison without the option of a fine unless the latter punishment is in the circumstances clearly inadequate or inappropriate.

Cases referred to:
(1) R. v Price (1840) 113 E.R. 590; 1 A.D. & E. 727.
(2) Rathbone v Bundock, [1962] 1 All E.R. 257.

Legislation referred to:
Immigration and Deportation Act, Cap. 122, ss. 19, 29 and 30.

For the appellant: E. L. Sakala, Acting Director of Public Prosecutions.
For the respondent: M. A. A. Yousuf, Yousuf & Co.

Judgment

BARON, D.C.J.: delivered the judgment of the court.

This is an appeal by the Director of Public Prosecutions from a decision of the High Court, in the exercise of its revisional jurisdiction, setting aside a conviction and sentence imposed by the subordinate court for contravention of s. 19 (1) of the Immigration and Deportation Act, Cap. 122 (hereinafter referred to as the Act). The facts, which are not in issue, are that the respondent had some years ago come to Zambia under an employment permit issued in terms of s. 18 of the Act; that permit had long since expired but the respondent had continued to engage in paid employment.

The respondent pleaded guilty to the charge and was sentenced to four months' imprisonment; with hard labour. On review the conviction and sentence were set aside by the learned Chief Justice in the High Court on the ground that s. 19 (1) does not create an offence.

It is convenient to set out certain of the provisions of the Act at this point. Section 19 reads:

> " 19. (1) Save under permit issued in accordance with the provisions of this Act authorising such employment, no person shall engage in paid employment under an employer resident in Zambia.
>
> (2) Save in accordance with an entry permit, no person shall for gain engage in any prescribed trade,business or other occupation.
>
> (3) No person shall commence any course of study at an educational institution unless he is the holder of a valid entry permit or study permit."

Sections 29 and 30 read:

> "29. (1) Any person having been required by notice under section *twenty-three* to leave Zambia within a specified period who wilfully remains in Zambia after lithe expiry of such period shall be guilty of an offence.
>
> (2) Any person entering into or departing from Zambia who is required by section *nine* or *thirteen* to appear before an immigration officer and who fails to comply with the provisions of either of these sections shall be guilty of an offence.
>
> (3) Save under temporary permit, any person who belongs to Class C of the Second Schedule and who returns to Zambia Shall be guilty of an offence.
>
> (4) Any person who fails to comply with any lawful requirement made in accordance with the provisions of section *seven* shall be guilty of an offence.
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> (5) Any person who assaults, resists or willfully obstructs any immigration officer in the due

execution of his duty or any person acting in aid of such officer shall be guilty of an offence.

(6) Any person who employs another knowing that that other is a person prohibited under subsection (1) of section *nineteen* from engaging in his employ shall be guilty of an offence.

(7) Any person who wilfully and with intent to conceal his identity, citizenship or country of origin-

(a) fails to comply with a lawful requirement made under subsection (6) of section *twenty-six*; or (b) when required under subsection (6) of section *twenty-six* to answer questions put to him, makes any representations by words, writing or conduct of a matter of fact, which representation is false in fact; shall be guilty of an offence.

30. Any person guilty of an offence under this Act shall be liable on conviction to imprisonment for a period of twelve months or to a fine of five hundred kwacha, or to both such imprisonment and such fine. "

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Director of Public Prosecutions argues that where a provision prohibits the doing of an act then the breach of that prohibition is an offence even if no penalty is provided in respect thereof unless the contrary is manifestly the intention of the legislature. In support of this proposition he cites a slumber of authorities; they are all to the same effect and we propose to mention only two. In *R v Price* (1) the accused was indicted for a misdemeanour in refusing to register the birth of his child pursuant to stat. 6 and 7, W. 4, Cap. 86, s. 20. The title of this Act was

"An Act for Registering Births, Deaths and Marriages in England".

The section reads:

"The father or mother of every child born in England . . . shall, within 42 days next after the day of eatery such birth, give information, upon being requested so to do, to the said registrar, according to the best of his or her knowledge and belief, of the several particulars hereby required to be known and registered touching the birth of such child."

Nowhere in the statute was a breach of this provision expressed to be an offence, nor was a penalty provided in respect of such breach. Breaches of other provisions of the statute were specifically made offences. Lord Denman, C.J., said:

". . . but the words of this clause are unambiguous and imperative . . . Here is a direct and positive injunction . . . And, looking to the general object and effect of the recent law, we cannot avoid holding that the matter is of public concern."

Lord Denman in his use of the expression "public concern" appears to have been referring to a passage in Hawkins' *Pleas of the Crown* which has been cited wish approval in succession of English cases and is unquestionably a correct statement of the law on this subject. The passage was

cited for instance by Ashworth, J., in *Rathbone v Bundock* (2), a decision of the Court of Appeal in which Lord Parker, C.J., and Fenton Atkinson, J., concurred, when he said at p. 261:

> "Ultimately, as it seems to me, the issue can be stated quite simply, although the answer is not easy, namely: What is meant by, or involved in, the word 'offence' ? If the true view is that there can be no offence properly so called unless or until provision is made for penalising it, the appellant should succeed. On the other hand, if an offence can occur irrespective of any provision as to penalty, the present appeal should fail. In my judgment, the latter is the true position. The general principle was thus stated in 2 HAWKINS' PLEAS OF THE CROWN, c. 25, s. 4:
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> 'It seems to be a good general ground that wherever a statute prohibits a matter of public grievance to the liberties and security of the subject, or commands a matter of public convenience, as the repairing of the common streets of town, an offender against such statute is punishable not only at the suit of the party aggrieved but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it.'

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> This principle was applied in *R. v Hall*. In that case, and in others in which the decision was followed, the main issue was whether procedure by way of indictment was manifestly excluded but the principle stated above was not challenged and it must, in my view be taken as well established."

We stress that although in the old cases the issue was whether the procedure by way of indictment was manifestly excluded the Court of Appeal in *Rathbone v Bundock* (2) applied that approach to the question whether there can be an offence without provision being made for penalising it.

There is no magic in the word "offence". It comes from the word "offend", and if one contravenes the provisions of an enactment one offends against it. Of course, s. 3 of the Interpretation Act, Cap. 2, defines "offence" as "any crime, felony, misdemeanour, contravention or other breach of, or failure to comply with, any written law, for which a penalty is provided". But the reference to the provision of a penalty takes the matter no further in the present case because s. 30 of the Act provides general penalty for offences, and only if s. 30 can be held to refer exclusively to the offences set out in s. 29 could an argument based on the failure to prescribe a penalty be sustained. We are satisfied that s. 30 cannot be limited in its application to the offences set out in s. 29; had this been the intention of the legislature it would have been very easy to refer in s. 30 to an offence "under s. 29" rather than an offence "under this Act".

The first issue in the present case is therefore whether the language in s. 19 (1) is, in the words of Lord Denman, C.J., "unambiguous and imperative", "a direct and positive injunction", or whether the language is merely directory. It cannot in our view be seriously argued that the language of s. 19 (1) is other than peremptory. What consequences are intended to flow from a breach is another question, but that the legislature intended to prescribe a firm prohibition the breach of which would

be visited by some consequence is abundantly clear from the language, we have been unable to find any case in which language of this kind has been held to be merely directory or explanatory.

This being so, the case turns on whether it is manifest on a proper construction of the Act that it was the intention of the legislature that a breach of this provision should not be an offence. The learned Chief Justice approached the matter from the opposite direction; he held that s. 19 (1) did not create an offence because he saw "no good reason why the court should be assiduous to find an offence where the legislature has not clearly so stated"; the cases are however clear that this is not the correct approach, and that the breach of a prohibition will be an offence unless the contrary intention clearly appears. Mr Yousuf on behalf of the respondent submits that such contrary intention does in fact clearly appear from a consideration of the Act as a whole.

Mr Yousuf's argument is that s. 29 of the Act was intended to be exhaustive of offences. He argues that had the legislature intended breaches of other provisions to be offences it would have been very easy

to say so and that the failure to say so is a clear indication of the contrary intention. He submits that there are other consequences which flow from contraventions of provisions in the Act not referred to in s. 29 and that the legislature must be presumed to have regarded these other consequences as sufficient to deal with the mischief which the Act was designed to meet. To test this argument it is necessary to analyse the provisions referred to in the several subsections of s. 29 and also several provisions which are not referred to in that section.

Section 29 (1) makes it an offence for a person who has been required by notice under s. 23 to leave Zambia within a specified period wilfully to remain in Zambia after the expiry of such period. Section 23 (1) reads:

> "23. (1) Any immigration officer may or, if so directed by the Minister in the case of a person to whom subsection (2) of section *twenty-two* relates, shall by notice served in person on any prohibited immigrant require him to leave Zambia."

This language is directory only. The section tells an immigration officer what he may do (or if so required by the Minister, what he shall do); it does not require the prohibited immigrant to leave Zambia. Furthermore specific provision is made in s. 26 of consequences which flow from the failure of the prohibited immigrant to leave Zambia in terms of such notice; section 26 (3) reads:

> "(3) Any prohibited immigrant who-
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> (a) having been required under section *twenty-three* to leave Zambia, fails to do so within the prescribed period:
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> (b) . . .
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> may without warrant be arrested, detained and deported from Zambia by an immigration officer or police officer."

Hence, if the failure to comply with the requirements of a notice under s. 23 had not been specifically made an offence by s. 29 (1) it would for two reasons have been impossible to hold that such failure was an offence; first, the language of s. 23 is directory only, and second, another consequence, namely the power without warrant to arrest, detain and deport has been specifically provided.

Section 29 (2) makes it an offence to fail to comply with the provisions of s. 9 or s. 13. In view of the rather curious form of s. 29 (2) it is necessary to set out ss. 9 and 13 in full:

"9. (1) Every person who arrives in Zambia by air-

(a) at any prescribed airport and intends to leave the precincts of such airport shall forthwith appear before an immigration officer;

(b) at any place other than a prescribed airport shall forthwith proceed to and appear before the nearest immigration officer.

(2) Every person who enters Zambia by inland waters or overland shall forthwith proceed to and appear before the nearest immigration officer."

"13. (1) Every person departing from Zambia, except a direct transit through Zambia by air having not left the precincts of a prescribed airport, shall appear before an immigration officer.

(2) The immigration officer may require such person-

(a) to produce his passport and any permit issued to him under this Act and to surrender any such permit which is no longer valid;

(b) to make and sign such declaration as may be prescribed;

(c) in writing or otherwise to answer such questions relating to his identity or departure as may be put to him by the immigration officer."

Section 9 contains nothing but a mandatory requirement to appear before an immigration officer; the language is peremptory. Thus in accordance with the principle enunciated above a breach of this section would have been an offence without; the necessity to include it in s. 29. Section 13 however is in a different category; sub-s. (1) is similar to s. 9 and similar comments would apply, but sub-s. (2) contains directory provisions, and the failure to comply with a requirement of an immigration officer made pursuant to the authority contained in that subsection would not be an offence unless specifically so made. It is curious that ss. 9 and 13 were referred to compendiously in s. 29 (2); the suspicion is strong that what is now s. 10 was originally included in s. 9, and that the draftsman had in mind the directory provisions contained in s. 13 (2) and the corresponding provisions in what is now s. 10 (2). Be that as it may, the reference to s. 9 must be held to be support for Mr Yousuf's submissions because, as we have said, the breach of that section would, on the Director's argument, in any event have been an offence.

Section 29 (3) makes it an offence for any person within Class C of the Second Schedule to return

to Zambia. There is no other provision in the Act which prohibits such return, which would not therefore be an offence unless specifically made so.

Section 29 (4) makes it an offence to fail to comply with any lawful requirements made in accordance with the provisions of s. 7, which reads:

> "7. For the purpose of discharging his functions under this Act, an immigration officer may-
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> (a) without warred stop, enter and search any aircraft, train, vehicle or vessel in Zambia,
> (b) require the person in charge of any aircraft, train vehicle or vessel arriving in Zambia to furnish a list of the names of all persons in the aircraft, train, vehicle or vessel, as the case may be, and such other prescribed information as it is within the power of such person to furnish."

Once again this provision is directory. It states what an immigration officer may do but does not directly require the person in charge of the aircraft, etc., to furnish the information referred to. Hence the failure to

comply with a requirement of an immigration officer to furnish such information would not have been an offence had it not been specifically so made.

Section 29 (6) makes it an offence for any person to employ another knowing that that other person is prohibited under s.19 (1) from engaging in his employ. Mr Yousuf argues from this provision that whereas the legislature has chosen specifically to make a breach of s.19 (1) an offence on the part of the employer it has specifically declined to do so in the case of the employee. This argument is fallacious. Section 19 (1) specifically prohibits the employee from engaging in employment save under a permit; nowhere In the Act save in s. 29 (6) is there any corresponding prohibition on an employer.

Section 29 (7) makes it an offence for any person wilfully and with intent to conceal his identity, citizenship or country of origin to fail to comply with certain requirements made under s. 26 (6) or to make any false representation when asked any questions under that subsection.

Once again the provision in question is directory only and sets out what an immigration officer may require that person to do; it does not directly require that person to comply with the requirements of the immigration officer, and a failure to comply with such requirements would not apart from s. 29 (7) be an offence.

Thus it will be seen that, with the exception of the reference in s.29 (2) to s. 9, none of the offences created by s. 29 would have been an offence but for its inclusion in that section.

We turn now to consider certain other provisions in the Act which are on the one hand directory and on the other peremptory in form. Section 10 gives an immigration officer power to examine any person appearing before him in accordance with the provisions of s. 9 and any person whom he

reasonably suspects to be a prohibited immigrant, and in sub-s. (3) empowers him to require that person to produce his passport, make a declaration and so on, very much on the lines of the provisions of s. 13 (2) which we have quoted above. Section 11 authorises an immigration officer to require any person, not being the holder of a permit to remain in Zambia or a visiting permit issued under s. 15, to appear before an immigration officer. The language of these provisions is directory.

Section 14 deals with entry permits and sub-s. (3) reads:

> "14. (3) The holder of an entry permit shall not for gain engage in any occupation other than an occupation specified in such permit."

This is certainly a peremptory prohibition. Section 15 deals with visiting permits, s. 16 with study permits, s. 17 with temporary permits and s. 18 with employment permits; none of these sections contains a provision similar to that contained in s. 14 (3).

Section 19, set out above, contains the three separate prohibitions dealt with in the three subsections; they are in peremptory terms. If the proposition be valid that s. 29 is exhaustive of offences then it follows that

a breach of one of the four provisions in question, i.e. s. 14 (3), s. 19 (1), s. 19 (2) and s. 19 (3), is an offence. If that be so it is difficult to see what purpose was served by including those provisions in the Act. Save for the one case under s. 19 (1) to which we will return in a moment, every breach is also a breach of a condition attaching to a permit and would result in the holder of such permit either becoming a prohibited immigrant automatically or being liable to have his permit revoked under s. 21 of the Act. Hence unless the legislature intended something else to flow from a breach of these various prohibitions they serve no purpose. Mr Yousuf argued that the legislature, by omitting these provisions from s. 29, indicated that it regarded the consequence of deportation as sufficient. This argument assumes that being found guilty of an offence is a more serious consequence than deportation; but the maximum penalties prescribed in s. 30 are a fine of K500 or imprisonment for one year both, and we can envisage many circumstances in which a person might regard it as for more serious to be deported. By the same token, the authorities might feel that the circumstances of a particular breach are not so serious as to warrant revocation of the permit and deportation, but cannot be overlooked; such a breach would appropriately be dealt with by charging the person with an offence.

The single case to which we have referred arises under s. 19 (1). If a person is a visitor for a period of less than three months he does not require any permit to remain in Zambia during that period, and theoretically he could engage in paid employment. It could be argued that s. 19 (1) is necessary to cover this case since for such a person to engage in paid employment is not a contravention of any other provision in the Act and that only by virtue of the breach of this provision does such a visitor fall within para (ii) of Class E of the Second Schedule. But this argument assumes once again that being found guilty of an offence is a more serious consequence

than deportation.

We have not overlooked that a visitor for less than three months could possibly in theory engage in a prescribed trade, business or other occupation or commence a course of study at an educational institution. Bearing in mind particularly the necessity to obtain a licence to trade, etc., or a place at the institution in question, as the case may be such situations may not be even theoretically possible, but in practice must certainly be dismissed as fanciful.

The picture which emerges from this analysis of the Act is one which, putting the matter at the highest in favour of the respondent, is not entirely clear; it would have been quite clear were it not for the inclusion in s. 29 (2) of the reference to s. The respondent's case around then have been unarguable. On the other hand, if the reason for omitting from s. 29 any reference to ss. 14 (3), 19 (1), 19 (2) or 19 (3) was because it was not intended to make their breach an offence, the inclusion in the Act of these prohibitions was, save for the isolated and somewhat improbable case arising under s. 19 (1), unnecessary. The courts will normally be slow to conclude that the draftsman has erred, but in the present case this conclusion is irresistible; in one respect or the other he has made a mistake.

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It is unnecessary to speculate as to which of the two mistakes the draftsman made, or to draw from the fact that on the one construction he included unnecessarily in s. 29 a reference to a single provision, whereas on the other construction he included unnecessarily in the Act at least three and perhaps four substantive prohibitions. The matter is concluded by the principle stated in Hawkins's *Pleas of the Crown* and accepted in all the English cases from that day to this, and the present case falls squarely within that principle. We have here a prohibition expressed in unambiguous gild imperative terms and the matter is one of "public grievance"; a breach of such a prohibition must be held to be an offence unless the contrary intention manifestly appears. This cannot in our judgment be said.

The appeal will be allowed and the conviction entered by the magistrate restored.

12th July, 1974

On the question of sentence Mr Yousuf submits that four months' imprisonment with hard labour is excessive in all the circumstances. Section 30 of the Act prescribes a penalty of twelve months' imprisonment with hard labour or a fine of K500 or both. In passing the sentence the magistrate said only this:

> "You are a first offender and entitled to leniency. This is a serious offence."

It is a well established principle that where the legislature has prescribed a fine as an alternative to imprisonment a first offender should not be sent to prison without the option of a fine unless the latter punishment is in the circumstances clearly inadequate or inappropriate. In overlooking this principle the magistrate has erred. It is not sufficient to consider simply the seriousness of the

offence; the legislature had this consideration in mind when it fixed the penalty.

The question then is whether in the circumstances of this case a fine would be an adequate penalty. The statement of facts discloses that the respondent came to Zambia originally in 1965 under a three-year employment permit; in 1968 he obtained an extension for one year and in 1969 a further extension for one year. This second extension was due to expire in April, 1970. In January, 1970, he charged his employment and joined the firm by which he was thereafter continuously employed until the circumstances came to the attention of the immigration authorities as result of a traffic accident in which the respondent is as involved.

These facts disclose a blatant and deliberate disregard of the law. The conclusion is inescapable that the respondent did not apply for a permit authorising him to change his employment and for an extension of his employment permit because he feared that his application might not be granted. There is no possibility here that the respondent might inadvertently have failed to apply for the necessary extensions. This case therefore represents a serious example of this particular offence.

The first principle by which a court should be guided in considering what is an appropriate sentence is the public interest. This offence has

been created specifically for the protection of Zambian workers and it is the duty of the court to ensure that that protection is an effective one. It would not in our view be effective if a custodial sentence were not imposed in this case; it would be no great deterrent if a person were to know that if he revere unfortunate enough to be found out and convicted of this offence, he would as a first offender be punished merely by a fine of up to a maximum of K500. Although basically therefore in accordance with the principle we have referred to the court should endeavour to avoid sending flat offender to prison where an alternative exists, we are satisfied that a sentence of a fine would be inadequate in the present circumstances and that tie public interest demands that there be in additions a custodial sentence.

The order of the court is that the respondent will serve one month's imprisonment with hard labour; in addition he will pay a fine of K500 or in default of payment will serve two months' simple imprisonment. The period from the 26th March to the 16th April, during which the respondent has been in custody in connection with the facts giving rise to this offence, will be taken into account.

Order accordingly
