IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 4 of 1966

Between:

PACIFIC MANUFACTURERS LIMITED Appellant

- and -

REGINAM Respondent

JUDGMENT

This is an appeal against a decision of the Supreme Court in exercise of its appellate jurisdiction dismissing an appeal by the appellant company against conviction on the 14th September, 1965, of an offence of prohibiting freedom of association of a female employee as a condition of her employment contrary to subsections (1) and (3) of section 62 of the Trade Unions Ordinance (No. 4 of 1964).

The facts were briefly as follows: The appellant company was at all material times carrying on a business of manufacturing matches. It employed up to about sixty workers both male and female. During 1964 and 1965 some of the workers appear to have become dissatisfied with their conditions and sought, in 1964, to form a branch of the Factory Workers' Union in the appellant company's factory. For one reason or another the three would-be officers of the branch were dismissed and the branch was never established. Early in 1965, instead of repeating the effort to form a branch union within the factory, a number of the workers joined or took steps to join the Factory Workers' Union itself. To this end application forms for membership were circulated among the workers in the factory. Shortly after this movement began in the factory a series of dismissals of workers took place for one purported reason or another. Between the 22nd February, 1965, and the 12th March, 1965, eight workers were dismissed. Finally on the 24th March, 1965, the workers came out on general strike.

Arising out of the above circumstances the appellant company was subsequently prosecuted before a Magistrate of the First Class in respect of the three alleged offences contrary to section 62(1) and (3) of the Trade Unions Ordinance, 1964. The company was acquitted on the first two charges but was convicted of the third which concerned the dismissal of a female worker by the name of Timaleti Muriwaqa on the 3rd March, 1965.

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During the course of the trial before the Magistrate, at the end of the case for the defence, Mr. Ramrakha, counsel for the company, applied to the Magistrate for an adjournment in order to produce as his last witness for the defence a Mr. Deoki, who was the chairman of the Board of Directors of the company. Mr. Palmer, for the Crown, resisted the application. The Magistrate rejected the application and called upon counsel for their submissions and finally convicted the company on the third charge.

The company appealed to the Supreme Court against the conviction on a number of grounds. The appeal was dismissed. The company has now appealed to this Court on two only of the previous grounds of appeal, namely:

> "1. having regard to all the circumstances of the case, the learned trial Magistrate erred in law in not granting an adjournment to the Defence to enable it to call Mr. A.I.N. Deoki as a witness, and thus there was a miscarriage of justice.
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> 2. the learned trial Magistrate erred in law in allowing the prosecution to lead evidence of other instances of alleged victimisation, since the appellant Company was charged with only three specific offences, and thus, there was a miscarriage of justice."

We will consider those two grounds of appeal in that order.

Mr. Ramrakha has urged in support of his first ground of appeal that subsection (2) of section 201 of the Criminal Procedure Code, although couched in permissive language, must be read in the circumstances of this case as mandatory. Section 201 reads as follows:

> "(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused and shall inform him that he has a right to call evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

"(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of such witnesses."

Mr. Ramrakha urges that in this case the appellant company was not in any way in default or neglect in failing to procure the presence of Mr. Deoki in Court on the 19th March, 1965, which was the date upon which the Court had been informed that Mr. Deoki would be available to give his evidence. He further urged that the evidence which Mr. Deoki could have given would have been not only material but also important to the case for the defence. In these circumstances, he says, subsection (2) of section 201 of the Ordinance must be read as mandatory, and the magistrate had no discretion to refuse the application for adjournment.

We are unable to agree entirely with that submission. It is to be noted that throughout subsection (1) the mandatory word "shall" is used but that in contradistinction in subsection (2) the permissive word "may" is used. We think that that section does no more than require by subsection (1) that the Court shall make clear to the accused person his right to call evidence and, upon due consideration of the two criteria specified in subsection (2), may exercise its discretion to grant such adjournments as may be necessary to enable evidence not immediately available to be called. However, even on the construction put upon the section by counsel for the appellant, it appears to us that the magistrate was justified in exercising his discretion in the way in which he did having regard to the facts relevant to the two criteria mentioned in the section. From the facts disclosed by the record it is clear that Mr. Deoki returned from the United Kingdom to the Colony on the night of the 17th/18th August, 1965, and was in the Colony on the 19th August when his presence was required before the Magistrate in Suva. It is also clear that Mr. Deoki was well aware of the trial in progress and that his presence was required in Suva on that day. For reasons which have not been explained Mr. Deoki, instead of coming to Suva on the evening of the 18th August went to Ba and apparently made no effort to come to Suva on the 19th August, which, we are told, he could have done. Having regard to the fact that Mr. Deoki was the chairman of the Board of Directors of the company, and therefore its most senior officer, we are unable to agree that his absence from the Court was not due to fault or neglect on the part of the defendant company. As regards the likelihood of the evidence of Mr. Deoki being of substance to the defendant company's case, we have nothing before us except what may be inferred from the record. It is to be noted that both the learned trial magistrate and the Judge on appeal in the Supreme Court also had no more to go upon. From a reading of the record we are disposed

to agree with the learned Judge on appeal that it does not appear that Mr. Deoki was in any way intimately acquainted with the day-to-day management of the company. There is nothing before us to show that Mr. Deoki could have given any material evidence relating to the reasons for the dismissal of individual workers which was directly the concern of Mr. Emery, in his capacity as Managing Director of the company whose evidence was heard. The evidence of Mr. Akbar, a director of the company and its Sales Manager was also heard. There is nothing to show that Mr. Deoki could have added to the evidence in this matter of those two senior executives, both of whom were more immediately concerned with the details of the management of the company than was Mr. Deoki. It would appear from the record likely that the evidence of Mr. Deoki would have been directed to background evidence relating primarily to the existence of tension between the company and the Factory Workers' Union as such, which was indeed already clear from the evidence of the other two directors, rather than to the particular reasons for which this or that individual worker was dismissed.

For these reasons we find that the learned trial magistrate was justified in exercising his discretion in the way in which he did, and this ground of appeal fails. We would add that though counsel treated this question as falling within the ambit of section 201(2) we are of opinion that that subsection is intended to have effect at the close of the case for the prosecution. There is a note in the record at that stage: "Section 201 of the C.P. Code complied with". The application for adjournment which is under consideration was at a later stage and fell, in our view, to be dealt with as a matter of judicial discretion apart from section 201(2). The criteria mentioned in that subsection would, however, be relevant considerations, in the exercise of the discretion.

The second ground of appeal complains of the admission of evidence relating to dismissals by the company of workers other than those in respect of which charges were laid.

Mr. Ramrakha contended that the evidence objected to was not admissible as probative of the offence of which the company was convicted and was highly prejudicial to the company. He cited a number of authorities dealing with the circumstances in which evidence of other similar offences may be admitted in proof of an offence charged and urged that in this case there was no sufficient similarity of circumstances to justify the admission of any such evidence.

We think the short answer is, as contended by Mr. Palmer for the Crown, that the evidence relating to those other instances of dismissals is directly relevant and admissible to prove the relationship between the witness Mrs. Dean and the management of the company, the scope of her authority and the extent to which her conduct implemented the policy of the company. At the trial before the magistrate the company maintained that Mrs. Dean, who was the woman supervisor and a minor official of the company,

was acting outside the scope of her authority when she issued the warning to the worker Timaleti Muriwaqa that if she paid her union fee and became a member of the Factory Workers' Union she would be dismissed. To show the contrary was clearly a vital part of the prosecution's case, and in our opinion the evidence complained of was directly relevant to this issue.

There may well be other grounds upon which this evidence could be shown to be admissible but for the above reason alone we are satisfied that the evidence complained of on this appeal was both relevant and admissible. The second ground of appeal therefore fails.

For the above reasons the appeal is dismissed.

C.J. HAMMETT

PRESIDENT.

T.J. GOULD

JUDGE OF APPEAL.

J. BODILLY

JUDGE OF APPEAL.

SUVA,

13th June, 1966.