IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 73 of 1982

Between: R E G I N A Appellant

- and -

COYA (CONSTRUCTION) PTY. LIMITED Respondent

A. Gates for the Appellant
I. Khan for G.P. Shankar for the Respondent (leave to withdraw)

Date of Hearing: 6th July, 1983.
Date of Judgment:

JUDGMENT OF THE COURT

Speight J.A.

The Respondent Company was convicted in the Magistrate's Court at Lautoka of an offence under Regulation 100 of the Explosives Regulations Cap. 189. That regulation reads as follows:

> "100. No drilling shall be carried out in any face until all butts have been washed and cleaned and the face examined for misfires:
>
> Provided that holes may be drilled in a face at which any broken rock is left in position if all precautions are taken to ensure that the holes are not drilled within 600 mm of any concealed butt or misfire."

Regulation 115 is also relevant. It reads:

"115.-(1) Any person who contravenes or fails to comply with any of the provisions of this Part shall be guilty of an offence and shall be liable to a fine not exceeding two hundred dollars.

(2) In the event of any such contravention or non-compliance as aforesaid by any person whomsoever being proved, the manager or, in the case of civil engineering works where there is no manager, the foremon, sholl also be deemed guilty of on offence and sholl be liable to such fine as aforesaid, unless he proves that he has taken all reosonable means, by publishing and to the best of his power enforcing the said Regulotions to prevent such contravention or non-compliance."

The Information read :-

"COYA (CONSTRUCTIONS) PTY. LIMITED a limited liability company incorporated in Fiji on the 27th doy of May 1980 at Monosavu in the Western Division carried out drilling on the face without all butts hoving been woshed and cleaned and examined for misfires."

After conviction in the Magistrate's Court the Respondent Company appealed to the Supreme Court. The matter was heard at Loutoka and on 26th November 1982 the appeal was allowed. From that decision the Crown now appeals to this Court on the basis that the judgment of the learned Judge was based on certain error in law. When the case was called in this Court, we were advised that Mr. Shankar who had lodged the appeal in the Supreme Court had had his instructions withdrawn. Further enquiry disclosed that the Respondent did not wish to take any steps in the present proceedings. However the Crown wished to continue as the points involved are of general importance. Consequently we heard Mr. Gates submissions in full but were without assistonce from onything on behalf of the Respondent.

The grounds of appeal will be set out in more detail shortly but in the meantime it is helpful to give a brief outline of the prosecution evidence - for the Defence called none - and to summarise the reasons contained in the learned magistrate's judgment.

The events took place on the 27th May, 1980 at the workings for the Monasavu Hydro Scheme. As the learned Supreme Court Judge said in his judgment on Appeal the evidence was not well presented in the Magistrate's Court and there were certain omissions which had to be filled by inferences in certain instances. We feel that justified though the criticism was, there was enough material for those inferences of fact to have been drawn.

First the Respondent Company was not described in the Information by its correct name and the learned Judge was rightly critical of the prosecution for that. Secondly the prosecution failed to prove as conclusively as it should have that the Respondent Company was directly involved in the carrying out of the excavation and blasting work which led to the casualty, which in turn gave rise to the prosecution. One of the questions which arose was whether or not the men whose work was defective were employees acting on behalf of the Respondent Company and whether that company was responsible for their defaults. In such prosecutions Section 6 of the Explosives Act Cap. 189 expressly provides that the holder of the blasting licence is liable to penalties for acts committed by his agents or servants, and proof that the Respondent Company held a blasting licence would have simplified the proceedings at all stages of this case. However failure to give such proof is not fatal to a prosecution case because persons

may still be liable even if they do not hold a licence. Whether Respondent Company did or did not we do not know. Equally the employer/employee relationship can be proved by other evidence.

However that may be the Principal Inspector of Mines visited the tunnel where the accident had occurred shortly after, the event, and he found that an explosion had taken place injuring a number of men working at the face. The method being followed for blasting was that holes were drilled into a rock face, explosives placed and detonated to displace the material to be excavated and then the process was repeated on subsequent occosions. It is doubtless because drilling will occur on the successive occasions that regulation 100 requires that all the butts (the holes remaining after charges have been exploded in them) shall be washed and cleaned and the face examined for misfires. Apparently any left over explosives remaining in the bottom of a drill hole constitutes a danger and may set off a further explosion if there is further drilling in the close vicinity. That is what had happened on this occasion. The Principal Inspector found a number of very unsatisfactory conditions at the face. Lighting was poor making it difficult to examine the face let alone the inside of the butts. Some but not all of the workers had torches; none of the workers had lights on their helmets. The usual method of washing and cleaning a butt is by high pressure water hose but the water presssure was very poor. And finally the Inspector determined that the accident had occurred becouse drilling had taken place near to a butt which had not been properly cleaned out and still had some remnants of explosives in the bottom. He concluded that a fresh drill hole being bored had penetrated an old butt and had detonated residue explosive.

A number of men who had been in the gang working at the face gave evidence.

PW2 said that at the time he was working for the Respondent Company. He said he was told to go to the face and that the shift supervisor was Mario Poligon. He said that the face was clean but that the water pressure was low and the light was poor making it difficult to see all the butt holes. He was injured in the subsequent explosion. He also mentioned another man who had given him orders, a man named Micky who was the tunnel superintendent and it appears from this and from other evidence that the two men Mario and Micky were the supervisors, and were employees of the Respondent Company.

PW3 also an employee for the Respondent Company was drilling. He checked the butt holes but he too says that water presssure was low and the lighting was poor and he blamed his inability to find explosives in one of the butt holes on the poor lighting. He too was injured in the explosion and he named Micky and Mario as the supervisors. He said that before he drilled no-one had come to check that the butts were cleaned.

PW4 gave evidence somewhat at variance with the other witnesses. In particular he said that Micky and Mario checked the butts for misfires before giving permission for work to continue.

PW5 and PW6 gave evidence similar to PW2 and PW3 namely as to poor lighting, poor water pressure and no checking by the supervisors.

No evidence was called on behalf of the Defendant Company.

In his judgment the learned Magistrate considered the position of the Respondent Company, which alone had been charged. He quite properly mentioned that the men working at the face were really accomplices and he cautioned himself concerning their evidence. He concentroted his attention however very much on the Senior Inspector of Mines who was of course an independent witness. He discussed the difference in the evidence of PW4 as agoinst others and concluded because of the conflict thot that witness was either mistaken, confused or lying. He therefore accepted the evidence concerning defective lighting and water presssure and the failure of the supervisors to examine the face for misfires before allawing further drilling. He concluded that his task could have been made easier by proper prosecution but that the Respondent Company was carrying out the drilling and blasting work.

The learned Judge on appeal did not differ from this conclusion, and in our opinian quite properly so, for there was some evidence from the Senior Inspector thot the Respondent Company was the drilling ond blasting sub-contractor and there was no evidence to contradict that. The learned magistrate concluded thot the explosion was due to undetonated explosive in one of the butts and that if there had been, os was soid, some woshing and cleaning and examination, it had not been done properly. He also found against the Respondent Company that there had been inodequate equipment and procedures and attributed this to the Respondent's hurry to get the job done. On this factual basis he exomined the low and in particular the

question of whether or not the Respondent Company was liable for the drilling carried out in prohibited circumstances. This involved a consideration of such legal topics as absolute and vicarious liability.

With respect we do not think the question of vicarious liability can be discussed, or indeed is relevant until one has considered whether in a given case the offence charged, allegedly committed by an employer, is one in which mens rea is an ingredient.

We look first at the primary question:- If the drilling was done by employees in the course of their employment when certain precautions had not been taken, is the employer liable regardless of fault on his behalf?

The magistrate considered this problem.

He referred to the well known case of Sweet v. Parsley 1970 A.C. 132 to the effect that there is a presumption that mens rea is an ingredient of every offence unless some reason can be found, based on the wording or purpose of the statute indicating absolute liability. On this question of purpose, it has frequently been said that absolute liability will often be assumed if questions of public welfare or good are involved - such as pure food and drug cases - the protection of public revenue - some road traffic laws - and, most relevantly, safety in industry. Dixon J. (as he then was) in Proudman v. Dayman 1943 67 C.L.R. 536 referred to these as "social and industrial regulations."

Having referred to the generol principle the learned mogistrotc went on to quote from what is now the leading authority of Lim Chin Aik v. Reginam 1963 A.C. 160.

In thot cose the Privy Council said that the existence of o great sociol evil, or o matter of public welfore wos not the only test. One must ask in addition whether the imposition of absolute liobility will increose the likelihood of compliance with Stotutory requirements, by encouraging persons engaged in potentially harmful activities to observe very high stondords ond toke extreme care.

On this basis the learned magistrote held thot the offence creoted in Regulotion 100 wos on absolute one, ond he convicted the Company.

In this context it is interesting to note the different persons who may be proceeded against under the Regulations.

Regulation 115 hos been recited above.

It appeors from thot Regulation that 3 classes of persons may be proceeded against.

(o) The drilling and blosting contractor - who will usuolly be an employer - and frequently will be o corporote person

(b) The monoger or foreman

(c) The drill operotor or other defoulting workmon.

Now under Regulation 115(2) the manager (or foreman) in class (b) has a defence - with the onus of proof at the civil standard on him - of showing that all reasonable care has been taken.

No such proviso benefits other persons liable, and this too on the expressio unius principle gives support to the view that absolute liability rests on the workman and on the employer.

If one adds the factors already mentioned, namely the protection of the workers, and the likelihood that absolute liability will force employers to a high standard of care, then the conclusion that this is an absolute liability provision becomes almost irresistible.

If that is so than no question as to vicarious liability arises - for considerotion of how high up in the hierarchy an employee is, is only of relevance when considering whether the knowledge and intentions of the employee become the knowledge and intentions of the corporate person employing him.

See the observations of Denning L.J. in H.R. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd. 1957 1 Q.B. 159 at 172, approved by the House of Lords in Tesco Supermarkets Ltd. v. Nattross 1971 2 W.L.R. 1166.

The mind of the offender is of no relevance in the so called absolute liability cases - the question is simply whether at any level employees acting in the course of their employment did the proscribed act - in

which case the maxim "qui facit per alium facit per se" makes it the act of the employer.

Considerations of public welfare vis-a-vis hardship to non-culpable defendants have led to many debates in these regulatory cases - and a middle ground, or as it is sometime called "a half way house" situation has often appeared to provide a just solution.

That is to say that the prosecution establishes a prima facie case by proving the occurrence of the forbidden act. And the onus then shifts to the defendant to prove on the balance of probabilities any available defence. But beyond this class there are offences in which, perhaps empirically, decisions have been taken that reasonable, indeed great care is of no avail as a defence.

So three categories have emerged. Among recent decision there appears to be a relevant case in the Supreme Court of Canada -

R. v. City of Sault Ste Marie (1978) 85 D.L.R. (3d) 161. That report is not currently available to this Court but its effect is referred to in the judgment of Cooke J. in the New Zealand Court of Appeal in Ministry of Transport v. Burnetts Motors Ltd. 1980 1 N.Z.L.R. 51 at 57.

The relevant passage reads:-

> ".... The considerations which led us to that view and some of the lines of authority and academic writing there discussed are among the factors that have since contributed to produce in the Supreme Court of Canada a decision by a Court of nine Judges, delivered by Dickson J,

that to a charge of what they called the 'public welfare' offence of causing or permitting pollution of a creek it is a defence to prove that the defendant took all reasonable care: R. v. City of Sault Ste Marie (1978) 85 DLR (3d) 161.

Creedon was not cited in the Canadian judgment, although the older New Zealand cases of R v. Strawbridge (1970) NZLR 909 and R v. Ewart (1905) 25 NZLR 709 were cited. It is perhaps of some significonce thot in the latter nineteen-seventies appellote Courts in Canodo and New Zealand have come independently to favour a broadly similar approach in this field within a few years of each other; and both hove been encouraged in that direction by Australian judgments. But certainly in one woy and possibly in two ways the Canadian solution differs from Creedon. Certoinly it is different as to onus of proof; possibly it ploces less emphosis than we did in Creedon on the high standard of conduct required of a defendant even though liability is not absolute. I would not wish to qualify the Creedon emphasis; but on onus it may be os well to mention that the approach in Creedon may require reconsideration.

In the Soult Ste Marie cose the Supreme Court of Canada recognised three categories of offences: (1) those in which mens rea such as intent, knowledge or recklessness must be proved by the prosecution; (2) those in which the prosecution need not prove mens rea but the accused may avoid liability by proving all reasonable care ('strict liability'); (3) absolute liobility."

Now this division into three cotegories is not new.

It was formulated as long ago as 1905 in R v. Ewart 1905 25 NZLR 709 (C.A.) but the phraseology used by the Canadian Court appears apt.

In many cases, os just described, a statute puts an onus on a defendant to show o proved failure could not be avoided by very considerable care. There are many statutory examples in the field of food and

drug legislation, and Regulation 115(2) is an example in this legislation. And the same conclusion can be reached although not provided by statute. See R v. Strawbridge and Ewart (supra).

It is however the nomencloture adopted by the Canadian Supreme Court which has appeal. Frequently in the past "strict" liability and "absolute" liability have been regarded as synonymous. But they are not so semantically. "Absolute" admits of no exception. "Strict" merely means stringent or rigorous. One will look with interest to see if these useful designations will be more widely adopted.

We turn now to the appeals from the Magistrate and to this Court.

Put briefly the learned Magistrate had held:-

(a) That the offence was one of absolute liability

(b) That the Company had failed to provide adequate lighting and water pressure

(c) That the Company had immediate responsibility for the employment of the men at the face

(d) That the words "wash" "clean" and "examine" in Regulation 100 needed to be interpreted with the addition by implicotion of the word "properly"

(e) That the company's policy was characterised by haste to have the work done quickly regardless of proper procedures

(f) That the butts had not been washed or cleaned properly

(g) That the Company's two supervisors had not examined the face properly.

On appeal to the Supreme Court, the learned Judge had held

(a) That the offence was not one of strict (sic - meaning absolute) liability as far as the Company was concerned

(b) The Magistrate was not entitled to disbelieve a prosecution witness - PW4 - who had said that the supervisors had inspected

(c) That the word "properly" could not be reod into obligations in Regulation 100 and hence the evidence of some washing, cleaning and inspection sufficed as a defence

(d) That the evidence did not justify the findings about poor lighting and water supply.

The grounds of appeal to this Court are as follows:-

"4. THE Appellant appeals on the following grounds:

(a) that the learned Appellote Judge erred in law in holding that the learned trial Magistrate could not reject the evidence of a prosecution witness;

(b) that the learned Appellate Judge erred in law in holding that Regulation 100 of the Explosives Regulotions, Cop. 189, did not create an offence of strict liability;

(c) that the learned Appellate Judge erred in law in holding that the washing, cleaning and examining prescribed by the soid Regulation 100 did not hove to be done "properly" or with any degree of care;

(d) that the learned Appellote Judge erred in law in holding that the learned Magistrate's findings "that the lighting was poor and the water-pressure was low" and "that the (Respondent's) main concern was to get

the work done irrespective of whether the proper procedure was followed or not" did not amount to vicarious liability of the Respondent for the offence;

(e) that the learned Appellote Judge erred in law in not holding that it was immaterial whether or not the learned trial Magistrate erred in rejecting the evidence of PW4, because:-

(i) if the face was not examined for misfires by the supervisors (as was held by the learned trial Magistrate), they acted with gross negligence or recklessness in telling the drilling crew that it was safe to drill; and

(ii) if the face was examined for misfires by the supervisors, then it was not examined properly or sufficiently."

Having considered the learned Judge's views and the submissions of Mr. Gates we hold:

As to Ground 4(a) There is no principle of law or practice that says a Tribunal may not choose what evidence to believe or disbelieve - and this regardless of the party tendering the same. It may often happen that there are contradictions between witnesses called by one side, in this case by the prosecution, and the Court's duty is to assess whot evidence it accepts and what evidence it rejects.

4(b) We have already discussed the question of absolute liability at length and have concluded thot this Regulotion imposes absolute liability on an employer if drilling takes place in

operations carried out by employees on its behalf and the requisite precautions have not been taken.

4(c) In statutory provisions it is sometimes legitimate and necessary to read in a word to give meaning to the apparent intention, and thot would have been permissible here. But in any event even that step was not necessory. It is apparent that the Regulations as a whole are designed to promote safety, and this in particular relates to the removal of unexploded residue. In such a context the word "clean" must mean "to make clean" - and if residue is left in the hole then, put quite simply, it has not been cleaned. Similarly with "washing" and "examining". If residue remains then the specified process has not been carried out.

4(d) In view of the finding obove that this is an offence of absolute liability questions of vicarious liability do not arise for that relates to whether in a mens rea offence the "brain" of the company has been associated with the "hand" of the workman. But had it been such a case it would have been hard to resist the conclusion that management's failure to provide proper equipment, and to institute proper methods of work amounted to "knowing" default on the part of the Company.

4(e) This ground has already been dealt with under 4(c) and the observations made there apply.

We therefore conclude that the grounds of appeal to this Court have been made out in respect of all the errors of law alleged by Appellant.

Accordingly the appeal is allowed and the conviction and fine entered in the Magistrate's Court are restored.

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Judge of Appeal

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Judge of Appeal

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Judge of Appeal