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MOHAMMED HAKIM DEAN

v.

B

REGINAM

[Supreme Court, 1973 (Grant, Ag. C.J.), 7th December]

Appellate Jurisdiction

C

Industrial associations—failure of secretary to submit annual general statement to Registrar—Industrial Association Ordinance (Cap. 79) s. 11(1) (a) (b) (c)—penalty—Industrial Association Ordinance (Cap. 79) s. 29 (1) (a) (c).
Offences—continuing offences—categories thereof.

The secretary of an industrial association, the Bus Transport Union, was charged on 10th April 1972 with failing to transmit the annual general statement of his union affairs for the year ending 1970 to the Registrar by the 31st March 1971. The Industrial Association Ordinance (Cap. 79) s. 29(1) provided for a fixed penalty of \$50, and in addition a fine of \$10 per day during which the offence continued.

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The secretary was convicted and fined \$75.

On appeal it was held that by virtue of the Criminal Procedure Code (Cap. 14) s. 209, in the case of an offence carrying a single penalty, the charge must be laid within 6 months of the act complained of: but if a person is charged with having committed an offence which carries a daily penalty, there is no time limit as to when he may be charged but the number of days must fall within 6 months of the laying of the charge.

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Cases referred to:

Marshall v. Smith [1873] L.R. 8 C.P. 416.

Ex parte Burnby [1901] 2 K.B. 458.

R. v. Wooster (1959) 123 Can. Crim. Cas. 255.

R. v. Slade [1895] 2 Q.B. 247.

R. v. Chertsey Justices [1961] 2 W.L.R. 442.

London County Council v. Worley [1894] 2 Q.B. 826.

Vaughan v. Biggs [1960] 2 All E.R. 473.

Edwards v. Bull (1956) 54 L.C.R. 338 D.C.

Edwards v. Gubay [1956] Crim. L.R. 416.

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An appeal against conviction and sentence in the Magistrate's Court reported in particular for the observations by the Supreme Court on the categories of continuing offences.

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GRANT, Ag. C.J. [7th December 1973]—

On the 10th April 1972 the appellant was charged at Suva Magistrate's Court with the following offences:—

Statement of Offence

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Failing to Transmit Annual General Statement to the Registrar: Contrary to Section 11(1) (a) (b) (c) and 29(1) (c) of the Industrial Association Ordinance Cap. 79.

Particulars of Offence

A *Mohammed Hakim Dean s/o Shabud Dean*, between the 1st day of September 1971 and the 1st day of February 1972, at Suva, in the Central Division, being the Secretary of an industrial association namely Bus Transport Union, failed to transmit general statement of receipts, funds, effects, expenditure, and the number of members of such association to the Registrar for the year ending 31st December 1970.

B He was convicted after trial and on the 8th August 1972 was sentenced to a fine of \$75 in default of payment three months' imprisonment.

At the trial it was established to the satisfaction of the Court that the appellant was the secretary of the industrial association in question, having been appointed on the 2nd May 1971, and that no general statement for the year ended 31st December 1970 had been filed.

C Section 11(1) of the Industrial Association Ordinance provides as follows:—

“ A general statement of the receipts, funds, effects and expenditure of every industrial association shall be transmitted by the secretary of the association to the Registrar on or before the thirty-first day of March in every year in respect of the preceding year and shall show—

- D** (a) fully, the assets and liabilities at the thirty-first day of December of the preceding year and the receipts and expenditure during the preceding year;
- (b) separately, the expenditure for the preceding year in respect of the several objects of the association;
- E** (c) the number of members of the association at the thirty-first day of December of the preceding year and the number of such members whose subscriptions were then in arrear for a period exceeding three months.”

Section 29 (1) of the Industrial Associations Ordinance provides as follows:

F “ Any person who acts in contravention of or fails to comply with any of the provisions of the sections enumerated in this section shall be guilty of an offence under this Ordinance and shall be liable—

- (a) if the offence is one under the terms of section 5 (2), 5 (3), 5(5), 9 (1), 10, 11, 12, 16 (7), 22 (1), 24 or 25 of this Ordinance, to a fine of fifty dollars;
- (b)—
- G** (c) if the offence is one under the terms of section 5 or section 11 of this Ordinance, to an additional fine of ten dollars for each day during which the offence continues.”

The appellant has appealed against conviction and sentence on the following grounds:

- H** (i) That the learned trial Magistrate erred in law in not holding that charge was bad for duplicity.
- H** (ii) That the learned trial Magistrate erred in law in not holding that Section 11 of the Industrial Association Ordinance Cap. 79 imposed an obligation on the Secretary of an Industrial Association and that this obligation had to be discharged before the 31st day of March in every year.

- (iii) That the learned trial Magistrate erred in law in not holding that the continuing offence created and envisaged by Section 29 (1) (c) of the Industrial Association Ordinance Cap. 79 was aimed at the Secretary of an Industrial Association and that conviction for such continuing offence was only possible if such Secretary was first lawfully convicted for failure to comply with his obligation in breach of Section 11 and Section 29 (1) (a) of the Industrial Association Ordinance Cap. 79. A
- (iv) That the learned trial Magistrate erred in law in not holding that inasmuch as Section 209 of the Criminal Procedure Code Cap. 14 placed limitation as to time within which proceedings for certain criminal offences may be brought in a Court, the substantive offence created by Section 29 of the Industrial Association Ordinance Cap. 79 was caught by such limitation and that therefore the continuing offence created by Section 29 (1) (c) of the Industrial Association Ordinance Cap. 79 could not be proceeded with in law. B
- (v) That the learned trial Magistrate erred in law in construing that the charge was aimed at continuing offence for each day between 1st day of September 1971 and the 1st day of February 1972. In the alternative your Petitioner submits that if the learned trial Magistrate was correct in this point then the charge is bad in law for want of compliance with the provisions of Section 123 of the Criminal Procedure Code Cap. 14. If the learned trial Magistrate is wrong on this point then he has erred in law in imposing a sentence on your Petitioner for a single offence beyond the powers conferred upon him by Section 29 (1) (a) of the Industrial Associations Ordinance Cap. 79 and that such sentence is unlawful in law. C
- (vi) That the learned trial Magistrate erred in law in not holding that Section 29 (1) (c) of the Industrial Association Ordinance, Cap. 79 merely prescribed additional fine for each day during which the original offence created by Section 11 of the said Ordinance continued and that it did not create any new offence nor did it create any offence in respect of any person who subsequent to the 31st March in each calendar year, took the office of Secretaryship of the Industrial Association and neglected and failed to comply with the obligations imposed on the Secretary of the Industrial Association under Section 11 of the said Ordinance. D
- (vii) That the learned trial Magistrate misdirected himself in law in not construing that Section 29 of the said Ordinance in relation to Section 11 thereof created an offence against any person holding the office of the Secretaryship of an Industrial Association who personally contravened or failed to comply with the provisions thereof and that there was no room for importing into the Statute the doctrine of vicarious or transfer of liability on the part of any person for a criminal offence committed by another. E
- (viii) That the sentence is harsh and excessive having regard to all the circumstances of the case. F

Having given full consideration to the submissions of counsel and the authorities referred to I have come to the following conclusions. G

The duties of a secretary of an industrial association attach to the office and devolve on whomsoever is holder at any particular time. As counsel for the Crown pointed out this is given statutory recognition by section 37 of the Interpretation Ordinance. Thus the question of transfer of liability mooted in *Marshall v. Smith* (1873) L.R. 8 C.P. 416 does not arise. H

A As to the nature of the offence, counsel for the appellant contended that by way of contrast to Section 29 (1) a continuing offence was clearly created by Section 29 (2) of the Industrial Associations Ordinance which reads:

“ Any person who acts in contravention of or fails to comply with any order of the Registrar made under subsection (1) or under paragraph (b) of subsection (9) of section 14 of this Ordinance shall be guilty of an offence and shall be liable to a fine not exceeding fifty dollars and to an additional fine not exceeding four dollars for each day during which the offence continues. ”

B However, I fail to see any difference in effect between Section 29 (1) (a) and (c) read together, and Section 29 (2). Paragraph (c) of subsection (1) of Section 29 is separate from paragraph (a) of subsection (1) of Section 29 only because paragraph (a) for the sake of convenience lumps together a number of offences which carry the same initial penalty and paragraph (c) then particularises which of those offences carries an additional daily penalty. So far as a contravention of Section 11 of the Ordinance is concerned Section 29 (1) (a) and (c) read together and stripped of surplusage provided that any person (which includes the Secretary for the time being —see Section 18(2) of the Ordinance) who acts in contravention of or fails to comply with any of the provisions of Section 11 shall be guilty of an offence and shall be liable to a fine of \$50 and to an additional fine of \$10 for each day during which the offence continues.

D While every case turns on a proper construction of the relevant statutory provision, continuing offences may be divided into four main categories:—

1. A continuing offence for which only a single penalty is laid down (e.g. Section 15 of the Licensing Act 1872 (England) *ex parte Burnby* [1901] L.R. 2 K.B. 458).

E A charge which is so framed as to cover more than one day in the case of such an offence is not duplex, and does not contravene Section 10 of the Summary Jurisdiction Act 1848 (England) which provided that every information should be for one offence only and which was replaced by rule 12 of the Magistrates' Courts Rules 1968 to the same effect, nor does it contravene Section 121 (2) of the Criminal Procedure Code (Fiji) which requires separate counts for separate offences.

However, as to limitation of time for summary trials, Section 209 of the Criminal Procedure Code provides:

F “ Except where a longer time is specially allowed by law, no offence, the maximum punishment for which does not exceed imprisonment for six months or a fine of \$100 or both, shall be triable by a magistrates' court, unless the charge or complaint relating to it is laid within six months from the time when the matter of such charge or complaint arose. ”

G Consequently if the prescribed maximum penalty was to fall within the ambit of Section 209 of the Criminal Procedure Code i.e. it did not exceed six months' imprisonment and/or a fine of \$100, the days charged would have to be confined to within six months of the laying of the charge. Should any part of the period charged extend beyond six months I would adopt the reasoning of the Canadian Court in *R. v. Wooster* (1959) 123 Can. Crim. Cas. 255 that where an offence is alleged between two different dates there is jurisdiction to hear and determine the matter if any part of the time so limited falls within a period not barred by a limitation period—a court in such circumstances confining itself to those days falling within the period.

H 2. A continuing offence which carries a daily penalty from the outset e.g. Sections 110 (4) and 343 (1) of the Companies Ordinance Cap. 216 (Fiji).

Despite the difference in wording between Section 11 of the Summary Jurisdiction Act 1848 (England) now replaced by Section 104 of the Magistrates' Court Act 1952, and Section 209 of the Criminal Procedure Code (Fiji), I am of the view that an offence which carries a daily penalty is a continuing offence which occurs from day to day (*R. v. Slade* [1895] L.R. 2 Q.B. 247; *R. v. Chertsey Justices* [1961] 2 W.L.R. 442) and that it is the maximum daily penalty which may be imposed that determines whether or not the offence falls within the ambit of Section 209 of the Criminal Procedure Code. If the daily penalty does not exceed \$100 then the continuing offence is caught by Section 209 of the Criminal Procedure Code to the extent that the days charged must be limited to the period of six months from the laying of the charge. However, if the days charged extend beyond the period of six months and the Magistrate fails to confine himself to that period this is not necessarily fatal on appeal, in view of the powers conferred on the appellate court by Section 300 (1) of the Criminal Procedure Code, powers not possessed by the Divisional Court of England.

3. An offence in respect of which the original act which is prohibited is a non-continuing offence, but subsequent conduct is of a continuing nature e.g. erecting a building to a prohibited height, and thereafter continuing the building at such a height after notice, contrary to Section 85 of the Metropolis Management Amendment Act 1862 (England) *London County Council v. Worley* [1894] L.R. 2 Q.B. 826 (c.f. *Vaughan v. Biggs* [1960] 2 All E.R. 473).

I do not think it necessary to comment on this somewhat rare hybrid, except to mention that, depending on the wording of the relevant enactment, a person committing the subsequent prohibited conduct may be charged even although he is a different person to the one who committed the original prohibited act.

4. An offence which is intrinsically continuous but which only carries a single penalty until the happening of a particular event, after which it carries a daily penalty e.g. Section 134 and Section 4 of the Rhyl Urban District Council Act (Wales) *Edwards v. Bull* (1956) 54 L.C.R. 338 D.C. (Eng. and Empire Digest Contin. Vol. A. para 3783a); Section 24(3) of the Town and Country Planning Act 1947 (England) *R. v. Chertsey Justices* (*supra*); and Section 82 (1) of the Factories Act 1971 (Fiji); where it is expressly provided that the daily penalty applies if the contravention is continued after conviction.

In such a case if a person is charged with having committed the offence which carries the single penalty the charge must, by virtue of Section 209 of the Criminal Procedure Code, be laid within six months of the act complained of if the single penalty does not exceed six months imprisonment and/or a fine of \$100; but if a person is charged with having committed the offence which carries a daily penalty there is, as explained under the second category, no time limit as to when he may be charged, but the number of days charged must fall within six months of the laying of the charge if the daily penalty does not exceed \$100.

Moreover, if a person was to be charged with having committed the continuing offence on any day or days prior to the date on which he has been already convicted (or acquitted) he could successfully plead *autrefois* convict (or *autrefois* acquit) in respect of those days (*Edwards v. Bull* (*supra*)); also briefly reported as *Edwards v. Gubay* [1956] Crim. L.R. 416 where the point is lost as the date of the previous conviction is not given. Even in the English and Empire Digest report the position is confused by the fact that the defendant entered a plea of guilty to one of the 96 informations which apparently he need not have done, as it related to a date prior to his previous conviction, but the principle as laid down by the Divisional Court is there clearly expressed. However he could not plead *autrefois* convict (or *autrefois* acquit) in respect of any day or days subsequent to the date of his previous conviction (*R. v. Chertsey Justices*, *supra*).

A I consider that the offence which is the subject matter of this appeal comes within the fourth category, but in view of the wording of Section 29 of the Industrial Associations Ordinance a conviction under Section 29 (1) (a) is not a condition precedent to the operation of Section 29 (1) (c).

B Section 11 (1) of the Ordinance provides that the annual general statement must be transmitted on or before the 31st March and consequently, if it is not, the offence which carries the single penalty of \$50 under Section 29 (1) (a) is committed on the 1st April, as a belated transmission of the annual general statement is not a compliance with Section 11 (1) and would not purge the offence already committed. A charge in respect thereof must be laid within six months thereof as the penalty of \$50 falls within the limitation imposed by Section 209 of the Criminal Procedure Code.

C For every day after the 1st April on which there is a failure to transmit the annual general statement a charge may be laid under Section 29 (1) (c), there being no time limit in regard thereto so long as the number of days charged does not exceed six months from the time that the charge is laid. Being a continuing offence the fact that more than one day is included in a single count does not make the charge bad for duplicity nor does it offend Section 121 (2) or Section 123 of the Criminal Procedure Code.

D If after having been convicted (or acquitted) of an offence under Section 29 (1) (a) or Section 29 (1) (c) of the Ordinance a person was to be subsequently charged under Section 29 (1) (c) with having continued the offence on any day or days prior to the date on which he has already been convicted (or acquitted) he could successfully plead *autrefois convict* (or *autrefois acquit*) in respect of those days; but not in respect of any day or days subsequent to the date of conviction.

E The grounds of appeal relating to conviction accordingly fail except that, as the Crown concedes, thirty nine days of the period to which the conviction relates are *ultra vires* by virtue of Section 209 of the Criminal Procedure Code, the Magistrate's Court being empowered to try the offence committed only from the 10th October 1971, that is six months prior to the date the charge was laid, and not from the 1st September 1971.

F As to sentence, the fine should be expressed as a daily sum rather than a lump sum as conceded by the Crown. The total fine of \$75 which was imposed related to 154 days, that is 49c. a day which, in all the circumstances including the fact that the appellant was not the original culprit, I consider too severe for a first offence.

I accordingly vary the decision of the Magistrate's Court by substituting a conviction for failing to transmit the annual general statement each day during the period 10th October 1971 to 1st February 1972 and I quash the sentence and in lieu thereof impose a fine of 26c. a day for 115 days, a total of \$29.90.

G *Appeal against conviction dismissed; sentence reduced.*

H