POLICE v TUI

High Court Apia
22 February 1940
Harley CJ

REGULATIONS (Breach of) - Defences - A regulation made within the scope of its enabling enactment and in the exercise of the power thereby conferred cannot be attacked on the ground that it is unreasonable and therefore ultra vires: vide Wilson v. Weber County [1939] N.Z.L.R. 232.

The Board of Health Regulations, No. 12 made pursuant to s 19 of the Samoa Health Order 1921 prohibiting construction of a Samoan fale on European land held a proper exercise of the power conferred: Kruse v. Johnson, [1898] 2 Q.B. 91; Twickenham Corpn. v. Solosigns [1939] 3 All E.R. 246; Robert Baird Ltd. v. Glasgow Corpn. [1936] A.C. 32, referred to.

PROSECUTION for breach of The Board of Health Regulations, No. 12

Herd for Police.
Olive Nelson for Tui.

HARLEY CJ. This is an information laid under the provisions of The Board of Health Regulations, No. 12, (The Western Samoa Gazette, 21 December 1938, p. 626) against one Tui for erecting a Samoan fale on European land without first getting the permission of the Chief Medical Officer.

The operative words of the section dealing with the matter are, "Without the consent of the Chief Medical Officer in writing first had and obtained no person 'shall' erect construct, or make . . . upon any European land any Samoan fale."

In the course of the hearing it was admitted by counsel for the defendant that a Samoan fale as defined by The Revenue Amendment Ordinance, 1937 had been erected by the defendant on European land as defined by the Samoa Act, 1921, and that the permission of the C.M.O. had not been obtained. Evidence was also given that the C.M.O. had told the defendant several times during the course of construction of the fale that permission would not be given, and also that the Native Office had unsuccessfully interceded on behalf of the defendant and had endeavoured to get the C.M.O. to give his permission, subject to certain conditions as to sanitation.

Counsel for the defendant attacks the Regulation itself and says that it is ultra vires and unenforceable on two main grounds:-

(a) that it goes further than is authorised or intended by the enabling section, which is section 19 of the Samoa Health Order 1921; and

(b) that in any case the Regulation as drawn is unreasonable.

Counsel further says that the Regulation is an infringement of the inherent rights of private property and mentions the Bill of Rights. She says that the power, if it exists, has been unreasonably exercised.

In his reply, Mr. Herd quoted the case of Kruse v. Johnson, [1898] 2 Q.B. 91, and Robert Baird Ltd. v. Glasgow Corpn. [1936] A.C. 32. These are both by-law cases.

I think it will clear the ground if I deal first with what may be termed the "obiter dicta" of counsel in regard to the inherent rights of private property and the Bill of Rights. The question has been ably discussed by Mr. A.P. Herbert in his Misleading Cases and these, although

not authoritative, set out most clearly and ably the leading principles of the law, and Mr. Herbert concludes that any individual rights which may have resulted from the Bill of Rights have long since disappeared. The Bill of Rights primarily set out the terms upon which the then ruling class of England would permit King William to assume the throne. It mentioned some of the things which he would not be permitted to do, but it did not, and was not intended to restrict the powers of the legislature over the individual subject; so that no subject got any personal rights out of it all unless perhaps a negative right not to be interfered with by the King. Just how much inherent right the individual subject has within his fences today may be illustrated by the position in New Zealand, (and after all New Zealand is even more likely to be enjoying the privileges conferred by the Bill of Rights than we are here), where at least twelve official and semi-official people have legal rights to trespass on private land at any time, and several have the right to invade the citizen's bedroom if they feel sufficiently interested. After that I think we may well stop talking about the inherent rights of the subject as against the legislature.

The question as to whether regulations must be reasonable is discussed in an article in The New Zealand Law Journal 1939 at page 128. From the cases there cited the author seems to conclude firstly, that both regulations and by-laws must deal with matters within the scope of the enabling enactment; secondly, it does not matter whether regulations are reasonable or not so long as they are clearly within the intended scope; and thirdly, that in the case of by-laws as distinct from regulations unreasonableness may be put forward not as an argument for invalidity per se but to show that the by-law is ultra vires. Put another way, the enabling power is to be construed as a power to make by-laws that are reasonable: Kruse v. Johnson, [1898] 2 Q.B. 91, referred to in Twickenham Corpn. v. Solosigns Ltd. [1939] 3 All E.R. 246.

A perusal of the authorities makes it clear that in a case where a regulation is attacked this Court in arriving at a decision has to consider two matters only, is there a power to make the regulation, and secondly, is the regulation made within the scope and in exercise of the power? The attitude adopted by the Supreme Court in New Zealand in dealing with the question is clearly set out in the Judgment of Ostler J. in Wilson v. Weber County [1939] N.Z.L.R. 232.

Having decided these points we can pass to the Regulation now under consideration, which is called No. 12 of The Board of Health Regulations, 1938 published in The Western Samoa Gazette of the 21st December 1938. This was made in pursuance of the provisions of section 19 of the Samoa Health Order published in the New Zealand Gazette of 16th February, 1921. The operative words are, "The Administrator on the advice of the Board of Health may from time to time make regulations . . . for the conservation and promotion of the public health." Following this, Regulation No. 12 says:-

> Without the consent of the Chief Medical Officer in writing first had and obtained . . . no person shall erect construct or make . . . upon any European land any Samoan fale.

This power is conferred on the C.M.O. because of the concluding phrase of section 11 of the Health Order, supra, which sets out among the matters to be dealt with by the C.M.O.,"such general measures for the preventive treatment of disease as may be decided on by the Board of Health."

There then is the power, and there is the Regulation, clearly within the scope and in exercise of the power. With its reasonableness I have no concern, but I cannot say that it seems unreasonable. It is suggested by Miss Nelson that the refusal of the C.M.O. to give his permission in this case is unreasonable. That may or may not be so, but an attempt to upset the Regulation is not the way to settle that point.

For the above reasons I hold that the defendant must be convicted. Fined £1 and costs 13/-.