

A **ATTORNEY-GENERAL**

v.

B **EMORI RASALALA**

[SUPREME COURT, 1964 (Knox-Mawer P.J.), 25th September, 13th November.]

C Appellate Jurisdiction

Criminal law—traffic offences—load exceeding permitted width—regulation 5(2) of Traffic (Construction and Use) Regulations 1955 intra vires—acts forbidden by such regulation misdemeanours by virtue of s.133 of the Penal Code—appropriate penalty—Traffic Ordinance (Cap. 235) ss.6(1), 38(1), 65—Traffic (Construction and Use) Regulations 1955, regs. 5(2), 57—Penal Code (Cap. 8) s.133—Interpretation and General Clauses Ordinance (Cap. 1) s.2(38).

Interpretation—regulation—whether ultra vires—whether offence disclosed—Traffic (Construction and Use) Regulations 1955, reg.5(2).

D The respondent was charged in the Magistrate's Court with carrying a wide load contrary to regulation 5(2) of the Traffic (Construction and Use) Regulations, 1955, and section 6 of the Traffic Ordinance. The magistrate dismissed the complaint on the grounds that regulation 5(2) was *ultra vires* section 38 of the Traffic Ordinance, and that the regulation disclosed no offence in law. The Attorney-General appealed.

E *Held:* 1. Regulation 5(2) can be and must be read as *intra vires* section 38 of the Traffic Ordinance.

F 2. Though neither section 6(1) nor section 65 of the Traffic Ordinance makes the act forbidden by regulation 5(2) an offence, the effect of section 133 of the Penal Code (read with section 2(38) of the Interpretation and General Clauses Ordinance) is to make such an act a misdemeanour.

G 3. It was the intention of the Legislature that the general penalty contained in section 65 of the Traffic Ordinance should be applicable to a breach of regulation 5(2).

4. As the charge did not aver a contravention of section 133 of the Penal Code it was wholly defective.

Traffic (Construction and Use) Regulations 1955, reg. 5(2), as made by the Traffic (Control and Use) (Amendment) Regulations 1959, reg. 3):—

H "The overall width of the load of a motor vehicle shall not exceed seven feet six inches; Provided that where a goods vehicle is transporting a load of only sugar cane the width of the load may exceed seven feet six inches, but shall not exceed ten feet."

Munyao Muu v. R. [1957] E.A. 894 applied.

Appeal against a decision of the Magistrate's Court.

B. A. Palmer for the appellant. A

Respondent in person.

KNOX-MAWER P.J.: [13th November, 1964]—

This is an appeal by the Crown against a decision of the Magistrate's Court of the First Class, Ba. B

The Respondent was charged with the following amended charge :-

“ STATEMENT OF OFFENCE

CARRYING WIDE LOAD: Contrary to regulation 5(2) of the Traffic (Construction and Use) Regulations, 1955, and section 6 of the Traffic Ordinance (Cap. 235). C

PARTICULARS OF OFFENCE

EMORI RASALALA on the 22nd day of April, 1964, at Tuvu, Ba, in the Western Division, did use Motor Vehicle No. 2786 on the King's Road carrying a load of timber which exceeded seven feet six inches in width.” D

The Respondent was unrepresented at the trial, but in the Respondent's own interest, the learned trial Magistrate very properly directed his mind to certain preliminary questions of law relating to the charge. In a careful judgment, the learned Magistrate concluded that Regulation 5(2) of the Traffic (Construction and Use) Regulations 1955 (as amended) was *ultra vires* section 38 of the Traffic Ordinance (Cap. 235). He further held that the regulation disclosed no offence in law. The learned trial Magistrate accordingly dismissed the complaint. E

Two grounds are set out in the Petition of Appeal, viz :—

“(a) That regulation 5(2) of the Traffic (Construction and Use) Regulations, 1955, is *intra vires* section 38 of the Traffic Ordinance (Chapter 235); and F

(b) That regulation 5(2) of the Traffic (Construction and Use) Regulations, 1955, is an offence in law, contrary to section 133 of the Penal Code (Chapter 8), and section 65 of the Traffic Ordinance (Chapter 235).” G

I shall deal firstly with Ground (a). In this connection, it will, I think, be helpful to set out the enabling words of section 38(1) of Cap. 235. They are as follows :—

“38. (1) The Governor in Council may make regulations . . . generally as to the use of motor vehicles and of trailers on roads . . . and the conditions under which they may be so used . . . and in particular but without prejudice to the generality of the foregoing may make regulations with respect to any of the following matters :— H

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- (b) the width, height and length of motor vehicles and of trailers and the load carried thereby, the diameter of wheels and the width, nature and condition of types of motor vehicles and of trailers;

A

Thus sub-paragraph (b) above particularizes one of the matters in respect of which the Governor in Council is generally empowered by the opening paragraph of the sub-section to make regulations "as to the use of motor vehicles . . . on roads". Regulation 5(2) is such a regulation, and the matter which it regulates (overall load-width) is necessarily restricted to loads carried by motor vehicles (or trailers) when used on roads. Certainly, as the learned Magistrate has reasoned, the draftsman could have made this absolutely clear by inserting the words "on a road" into Regulation 5(2), but this reasoning does not justify a wider construction of the Regulation (i.e. though it covered loads on motor vehicles used "anywhere") than the enabling words of section 38 permit. Had the draftsman purported to insert the word "anywhere" in Regulation 5(2) this would have been *ultra vires* the enabling words of section 38. As it stands, Regulation 5(2) of the Traffic (Construction and Use) Regulations 1955 can be read and must be read as *intra vires* section 38 of the Traffic Ordinance (Cap. 235). I therefore uphold the submission of the Crown in respect of ground of appeal (a) and declare that the Regulation is *intra vires* section 38 of Cap. 235.

B

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D

Turning now to the second ground of appeal, it is true that Regulation 5(2), while forbidding a load exceeding seven feet six inches in width, does not specifically make the carrying of a load in excess thereof an offence.

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Regulation 57 of the Traffic (Construction and Use) Regulations 1955 provides that any person using a motor vehicle in contravention of any regulations contained in Part III shall be guilty of an offence. However, as the learned trial Magistrate correctly pointed out, Regulation 5 is not contained in Part III of the Regulations. Again, the learned trial Magistrate correctly held that section 6 (1) of the Traffic Ordinance does not serve to make the act forbidden by Regulation 5 (2) an offence. The relevant words of section 6 (1) read :—

F

"Subject as hereinafter provided it shall not be lawful to use on any road a motor vehicle or trailer which does not comply with the regulations applicable to the class or description of vehicle to which the vehicle belongs, as to construction, weight and equipment thereof: "

G

Regulation 5(2) is not a regulation "as to construction, weight and equipment" of a vehicle.

Moreover, section 65 of the Traffic Ordinance, which provides a general penalty in respect of any offence under the Ordinance for which no special penalty is provided, does not *per se* make a breach of Regulation 5(2) an offence.

H

So far, therefore, in respect of this second ground of appeal, I am in entire agreement with the reasoning of the learned trial Magistrate.

However, I must, with respect, differ from him in his further conclusion that a breach of Regulation 5(2) is not an offence in law. Had the learned Magistrate's attention been drawn to section 133 of the Penal Code, I think he would have reached a different conclusion here. Section 133 of the Penal Code reads as follows :—

“Everyone who wilfully disobeys any Ordinance by doing any act which it forbids, or by omitting to do any act which it requires to be done, and which concerns the public or any part of the public, is guilty of a misdemeanour, and is liable, unless it appears from the Ordinance that it was the intention of the Legislature to provide some other penalty for such disobedience, to imprisonment for two years.”

Under the Interpretation and General Clauses Ordinance (Cap. 1) section 2 (38), the word “Ordinance” includes Regulations made in pursuance of any Ordinance. It follows, therefore, that everyone who wilfully disobeys any regulation by doing any act which it forbids is guilty of a misdemeanour. As for the penalty, (following the wording of section 133 (supra)), it clearly appears that it was the intention of the Legislature to provide the general penalty contained in section 65 of the Traffic Ordinance (Cap. 235) for the disobedience of Regulation 5(2). I hold, therefore, that the contravention of Regulation 5(2) of the Traffic (Construction and Use) Regulations 1955 is an offence contrary to section 133 of the Penal Code, punishable under section 65 of the Traffic Ordinance.

However, since the amended charge did not aver a contravention of section 133 of the Penal Code, it was wholly defective and the complaint should, for this reason, be dismissed. (See *Munyao Muu v. R.* [1957] E.A. 894).

It follows, therefore, that this appeal cannot, as I have already indicated, succeed. This was indeed conceded by Mr. Palmer, learned Crown counsel, whose most able argument in this appeal the Court wishes to acknowledge.

Appeal dismissed.