EVANS

v.

REGINAM

[SUPREME COURT, 1965 (Mills-Owens C.J.), 15th January, 5th February]

Appellate Jurisdiction

Shipping—vessel neither registered nor licensed under Marine Board Ordinance (Cap. 226)—ascertainment of tonnage of—Marine Board Ordinance (Cap.226) ss.2, 44,47,57—Merchant Shipping Act 1854 (17 & 18 Vict. c.104) (Imp.)—Merchant Shipping Act 1894 (57 & 58 Vict. c.60) (Imp.) s.72.

Shipping—uncertificated voyage—passengers and cargo carried gratuitously—whether certificate required—Marine Board Ordinance (Cap. 226) ss.2,44,47,57, 2nd Schedule, 3rd Schedule—Merchant Shipping Act 1854 (17 & 18 Vict. c.104) (Imp.).

Interpretation—Ordinance—ejusdem generis construction—penal enactment—Marine Board Ordinance (Cap. 226) s.44.

The appellant was convicted of being the owner of a vessel of over two tons when it proceeded on a voyage with passengers and cargo without a certificate issued by the Fiji Marine Board contrary to section 47 of the Marine Board Ordinance. The vessel was neither registered not licensed under the Ordinance but there was undisputed evidence that it was over two tons nett in terms of the Merchant Shipping Acts. The circumstances were that the vessel proceeded from Gau to Suva carrying passengers with their effects gratuitously for the purpose of their attending a religious celebration. The word "ton" means for the purpose of the Ordinance (unless the context otherwise requires) "ton registered or, in unregistered vessels, licensed ton".

Held: 1. The Ordinance had provided its own dictionary for the meaning of the term "ton" but in the circumstances a defective dictionary and where a vessel is neither registered nor licensed it is permissible to have regard to the general object of Part V of the Ordinance (namely, the securing of the safety at sea of vessels large enough to carry a number of passengers) and to ascertain the nett tonnage by reference to the Merchant Shipping Acts.

2. The power to grant the certificate referred to in section 47 of the Ordinance is to be found in section 44, which contains the words, "The Board may grant to vessels engaged in trade, passenger traffic or otherwise certificates . . .". Reading the Ordinance as a whole the words "or otherwise" are properly to be construed as *ejusdem generis* with the preceding words in section 44 and to receive the interpretation which will avoid the penalty imposed by the Ordinance.

Cases referred to: *Thompson v. Goold & Co.* [1910] A.C. 409: *R. v. Edmundson* (1859) 28 L.J.M.C. 213; 8 Cox C.C. 212: *Hooker v. Hedges* (1889) 60 L.T. 822; 53 J.P. 613; (sub nom. *R. v. Ipswich*

Justices 5 T.L.R. 405): *R. v. Southport (Mayor) and Morris* [1893] 1 Q.B. 359; 62 L.J.M.C. 47: *Re H.P.C. Productions Ltd.* [1962] 1 All E.R. 37; [1962] 1 Ch. 466.

A Appeal against conviction and sentence.

R. A. Kearsley for the appellant.

G. N. Mishra for the respondent.

The facts sufficiently appear from the judgment.

B MILLS-OWENS C.J.: [5th February, 1965]—

The appellant appeals against conviction and sentence on a charge of being the owner of a vessel, the auxilliary cutter "Mary" of over two tons, when it proceeded on a voyage with passengers and cargo without a certificate issued by the Fiji Marine Board, contrary to section 47 of the Marine Board Ordinance (Cap. 226). The circumstances of the charge were that the vessel proceeded from Gau to C Suva on the 4th July, 1964, carrying passengers coming here to attend a religious celebration. It was the case for the prosecution that a certificate was necessary notwithstanding that the passengers were carried gratuitously and that the cargo consisted solely of the passengers' effects. The question thus raised is said to be of considerable importance to owners of private vessels.

D Section 47, so far as material, is as follows —

> "It shall not be lawful for any vessel of two tons and upwards, whatever its means of propulsion, to proceed upon any voyage or excursion with any passengers or cargo on board unless such vessel has a certificate issued by the Fiji Marine Board or other competent authority . . ."

E Counsel for the appellant, if not also Counsel for the Crown, ascribes the power of the Board to issue certificates, valid for the purposes of section 47, to section 44 of the Ordinance which is as follows —

> "The Board may grant to vessels engaged in trade, passenger traffic or otherwise certificates in form of the Second and Third F Schedules hereto or as near thereto as circumstances will permit and such certificate shall be liable to be revoked at any time on good cause by the Board. Such certificate shall state whether the vessel to which any certificate is given is to be employed in the interinsular trade or for foreign-going purposes or both, or for harbour and river or for short-coasting service, the name of the master, the number of passengers which the vessel may carry G under different circumstances, the period during which the vessel may ply and the date at which the certificate will expire."

It is necessary to refer to some of the definitions contained in the Ordinance; thus, unless the context otherwise requires, —

> "interinsular vessel" means any vessel engaged in trading or pas- H senger traffic between any two ports or places in the Colony beyond the protection of reefs not, however, including the island of Rotuma;

"sea-going service" means service beyond the protection of land or reefs;

"ton" means ton registered or, in unregistered vessels, licensed ton;

"passenger" means any person carried in any vessel other than the master and crew.

It is not disputed that the vessel was neither registered nor licensed, but there was uncontradicted evidence that it was over two tons nett in terms of the Merchant Shipping Acts. Previously the appellant had held a certificate under section 47. In that certificate the following appears: "*Sight-Survey* 10.5 net tons". This certificate expired in November 1963 and no renewal was sought, no doubt because the appellant intended thenceforth to use the vessel for private purposes.

The argument for the appellant was based on two grounds, both of which were put forward at the trial. First, in the absence of registration or licensing the vessel could not be shewn to be of the requisite tonnage as the term "ton" is defined. Secondly, section 47, in the context of the Ordinance as a whole, applies only to vessels carrying passengers for hire or reward. The second point depended mainly on the meaning to be given to the words "or otherwise" in the expression "trade, passenger or otherwise", appearing in section 44. It was argued that the *ejusdem generis* rule applied, that is to say, that the words "or otherwise" imply some pursuit in the nature of trade or passenger traffic and so do not extend to private user, as when passengers are carried gratuitously.

The learned Magistrate was of opinion that section 47 applied to a vessel having neither a registered nor a licensed tonnage if, were the tonnage of the vessel to be ascertained for the purpose of registration or licensing, such tonnage would be two tons or upwards; the expression "registered ton" was to be understood in the light of the Merchant Shipping Acts of the United Kingdom, and the evidence shewed the vessel to be of or over two tons in that sense. Section 47 made no reference to carriage for reward and he saw no occasion to refer back to section 44; even if it were necessary to do so the words "or otherwise" appearing in the expression "trade, passenger traffic, or otherwise" in section 44 did not attract the *ejusdem generis* rule. Section 44 therefore, he said, contemplated the issue of certificates to vessels carrying passengers gratuitously, and section 47 contained no qualification to the contrary.

Both grounds of appeal raise questions of construction of some difficulty.

It will be observed that the definition of "ton" contained in section 2 of the Ordinance and quoted above contemplates two classes only of vessel tonnage, registered tonnage and licensed tonnage. I would agree that registered tonnage is to be ascertained by reference to the Merchant Shipping Acts in a case where a vessel is in fact registered under those Acts and not under any local provision for registration. The question is whether reference can be had to those Acts in a case such as this where the Ordinance itself expressly contemplates the

case of unregistered vessels and prescribes another mode of ascertainment of tonnage, namely licensed tonnage. According to the definition, in the case of unregistered vessels resort must be had to the licensed tonnage. But here the vessel was neither registered nor licensed. Indeed the Ordinance makes no provision for licensing vessels, but only for licensing mariners in relation to vessels. The Ordinance has provided its own dictionary, as it were, for the meaning of the term "Ton" but, in the circumstances, a defective dictionary. May the Court correct the error or supply the omission? Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. On the other hand it is "a strong thing to read into an Act of Parliament words which are not there, and, in the absence of clear necessity, it is a wrong thing to do". *(Thompson v. Goold* [1910] A.C. 409, 420 per Lord Mersey). The Merchant Shipping Act, 1894 deals with the case of unregistered ships by specifically applying certain of its provisions to such ships. Thus, under section 72, it is enacted that, with regard to the payment of dues, the liability to fines and fortfeiture, and the punishment of offences committed on board, an unregistered ship is to be dealt with in all respects as if she were a recognised British ship. In effect, a similar provision is sought to be read into the definition of "ton" in the present case, by implying some such words as: "or, in the case of unregistered and unlicensed vessels, net ton as ascertained by reference to the Merchant Shipping Acts". This must surely be to approach the very limits of judicial interpretation. On the one hand, it may be said the Ordinance itself has contemplated the case of an unregistered vessel and provided for it, albeit defectively. On the other hand, it may be said it has not dealt with the case of a vessel which is both unregistered and unlicensed and that is something different from an unregistered vessel; that being so, it is permissible to have regard to the general object of Part V of the Ordinance, namely the securing of the safety at sea of vessels large enough to be likely to carry a number of passengers. Then it is a consideration that it is not the substantive provisions that are defective, that is to say the provisions of section 47. If there were no definition of "ton" in the Ordinance at all it is very likely that a definition by reference to the well-known provisions of the Merchant Shipping Acts for the ascertainment of tonnage would be accepted. Unless the Ordinance is to be taken as applying to registered or licensed vessels only, some meaning must be found for the word "ton", when the definition fails. It is for the Court to make sense of ambiguous language and not to treat it as unmeaning. Having regard to the object of Part V of the Ordinance it would not be right, in my view, to allow it to fail by reason only of a defect in drafting. I therefore agree that the learned Magistrate was justified on the evidence in finding that the vessel "Mary" was of two tons or upwards for the purposes of section 47.

The second ground of appeal raises a problem which is not, in my opinion, to be solved by reference to the general object of Part V of the Ordinance. It is the very extent of the object of Part V which

is in question on the point whether passengers must be fare-paying passengers before it can be said that a certificate is required under section 47. Clearly, the power to grant the certificate referred to in section 47 is to be found in section 44. Section 44 makes express provision for the grant of such certificates as is made plain by reference to the forms of certificates in the 2nd and 3rd Schedules. It is not easy to give an interpretation to the words "or otherwise", appearing in the expression "trade, passenger traffic or otherwise" in section 44. As Mr. Kearsley has pointed out, why was it necessary to refer to trade or passenger traffic at all if the words "or otherwise" were to cover every other form of user. Crown Counsel supports the conclusion of the learned Magistrate that the words "or otherwise" imply any form of user different from trade or passenger traffic; in other words that it is not a case where the ejusdem generis rule applies. The rule has been referred to as "the principle ... that, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified" (*R. v. Edmundson* (1859) 28 L.J. M.C. 213). *Stroud's Judicial Dictionary* gives some fifty examples of cases where the word "otherwise" has been considered in the light of the rule. Speaking generally, it would appear that when following an enumeration it should receive an *ejusdem generis* interpretation. As has been pointed out in the present case, to give an unlimited meaning to the general words "or otherwise" would be to deprive the specific words "trade, passenger traffic" of any real significance. Yet the specific words are there and must have significance. As it appears to me, the case for giving a limited meaning to the words "or otherwise" is borne out by other provisions of the Ordinance. The form of certificate given in the 2nd Schedule refers to the vessel as: "employed in the... trade" (leaving the blank space to be completed on issue); in the case of the 3rd Schedule, the form includes the following: "To be employed in the interinsular or foreign-going trade". The forms follow the wording of the second sentence of section 44. Further, that sentence goes on to provide that the certificate shall state the period during which the vessel "may ply". "Ply" is a word which ordinarily is treated as meaning ply for hire or reward (*R. v. Ipswich Justices* 5 T.L.R. 405; *R. v. Southport* [1893] 1 Q.B. 359). In *Hooker v. Hedges* (1889) 60 L.T. 822, a case under the Merchant Shipping Act 1854, the owners of a steamer were charged with plying on the river Oswell with certain passengers on board, without a certificate. The passengers were members of a Wesleyan choir and their friends and no charge was made by the owners. It was held that no offence was committed; the vessel did not "ply" within the meaning of the Act. The reference in section 44 to "service" (harbour and river service or short-coasting service as the case may be) also support the view that a form of user in the nature of trade or passenger traffic is contemplated. The definition, in section 2, of the term "interinsular vessel" specifically refers to trading or passenger traffic.

The case for the prosecution derives some support, however, from the terms of section 57, which provides that except with respect to the regulations regarding lights to be shown, signals and sailing rules, the "foregoing provisions of this Ordinance shall not apply to vessels employed on short-coasting or harbour and

river service and not carrying cargo or passengers for hire.". This section may be taken as implying that in the case of sea-going vessels it is immaterial whether passengers are carried for hire or carried gratuitously; further that "service" does not necessarily mean by way of trade or hire. Such a construction would be in line with the Merchant Shipping Act 1854 which requires a certificate where the vessel attempts either to ply or to go to sea. But it would be going very far to regard the preceding provisions of the Ordinance, and of the Schedules, as overriden by an implication drawn from a general section expressed in negative terms. Moreover, the section appears to envisage vessels engaged in a regular service, as also does section 47.

At the least there is very considerable ambiguity as to whether Part V of the Ordinance extends to pleasure craft. The rule that penal statutes are to be construed strictly is no longer of such force as formerly, but where the language of a statute creating an offence is equivocal and there are two reasonable meanings of it, the interpretation which will avoid the penalty is to be adopted *(Re H.P.C. Productions Ltd.* [1962] 1 All E.R. 37). In these circumstances I must allow the appeal against conviction and order that the fine imposed be refunded.

Appeal against conviction allowed.