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RAM KIRPAL HIRA

v.

REGINAM

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[SUPREME COURT, 1967 (Mills-Owens C.J.), 8th, 26th September]

Appellate Jurisdiction

Revenue—income tax—demand by Commissioner to furnish return—prosecution for non-compliance—necessity for personal signature of demand—signature by person purporting to be Commissioner but proved not to be Commissioner—reference to Gazette showing appointment of Deputy Commissioner—Gazette not put in evidence—lack of proof of identity of person signing—Income Tax Ordinance 1964 ss.4(2), 60(1), 100(1)—Interpretation Ordinance (Cap. 1) ss.9, 10.

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Evidence—Gazette—proof of appointment appearing therein—necessity for Gazette to be put formally in evidence.

Evidence—maxim "omnia praesumuntur rite esse acta"—no room for operation of maxim where facts to the contrary become known.

Interpretation—Ordinance—delegation—power to make demand under s.60 of the Income Tax Ordinance 1964 not susceptible to delegation—to be exercised personally by Commissioner or Deputy Commissioner.

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A demand to the appellant under section 60(1) of the Income Tax Ordinance, 1964, for (inter alia) a return of income for the year 1965, was signed "B. A. Ferguson" over the cyclostyled words "Commissioner of Inland Revenue". On the prosecution of the appellant for failure to comply with the demand, it was proved, by cross examination of a witness for the prosecution, that the Commissioner of Inland Revenue at the material time was Mr. D. J. Barnes. A submission of no case to answer on the ground that the demand was not signed by the Commissioner, was followed by an adjournment. At the resumed hearing the magistrate was referred by the prosecutor to a notice in the Gazette showing the appointment of "B. A. Ferguson" as Deputy Commissioner of Inland Revenue. Under section 4(2) of the Income Tax Ordinance, 1964, the Deputy Commissioner, exercising any power of the Commissioner is deemed for all purposes to be authorised to exercise or perform the same.

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Held: 1. The powers conferred by section 60(1) of the Income Tax Ordinance, 1964, must be exercised by the Commissioner personally or by the Deputy Commissioner personally.

2. As the signature of B. A. Ferguson appeared over the title "Commissioner," and it was proved that he was not the Commissioner, the maxim *"omnia praesumuntur rite esse acta"* could not operate, and in those circumstances it must be strictly proved that the power had been exercised personally by the Commissioner or Deputy Commissioner.

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3. Under section 10 of the Interpretation Ordinance it is provided that the Gazette shall be admissible in evidence without formal proof that it is published by authority, and shall be accepted as evidence of its contents: the copy of the Gazette in question had never been formally adduced in evidence but had merely been referred to after the close of the case of the prosecution.

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4. There was accordingly complete lack of proof of the appointment of B. A. Ferguson and the appeal would be allowed.

Cases referred to: *R. v. McGregor* [1968] 1 Q.B. 371; [1967] 2 All E.R. 267: *R. v. Ballysingh* (1953) 37 Cr.App.R. 28: *Shiu Charan v. Police* (1955) 4 F.L.R. 165: *Carltona Ltd. v. Works Commissioners* [1943] 2 All E.R. 560: *Barnard v. National Dock Labour Board* [1953] 2 Q.B. 18; [1953] 1 All E.R. 1113: *Allingham v. Minister of Agriculture and Fisheries* [1948] 1 All E.R. 780; 64 T.L.R. 290: *Vine v. National Dock Labour Board* [1957] A.C. 488; [1956] 3 All E.R. 939:

Appeal from a conviction in the Magistrate's Court.

K. C. Ramrakha for the appellant.

T. U. Tuivaga for the respondent.

The facts sufficiently appear from the judgment.

MILLS-OWENS C.J.: [26th September, 1967]—

The appellant appeals against conviction for failure to comply with a demand alleged to have been made by the Commissioner of Inland Revenue under section 60 (1) of the Income Tax Ordinance, 1964. The section empowers the Commissioner to require any person who has not made a return, or a complete return, to furnish any information additional information or return which the Commissioner desires in order to enable him to make an assessment or for any other purpose. The demand was made in a cyclostyled form commencing: "In accordance with the provisions of section 60 of the Income Tax Ordinance, 1964, it is hereby demanded". The form went on to require (1) returns of income for the years 1964 and 1965 and (2) complete and detailed statements of the assets and liabilities, both business and personal, in and outside the Colony of Fiji, of the appellant, his wife and family as at 31st December, 1964 and 1965. It concluded with the words "Yours faithfully . . . . . Commissioner of Inland Revenue", leaving a space for signature. The manuscript signature was "B. A. Ferguson". The charge before the Magistrate's Court recited a demand for a return and statement for the year 1965 but averred only a failure to furnish a return for that year. Mr. McKeon, a Senior Assessor, produced an affidavit to prove the demand and failure, as is permissible under section 60 (1), exhibiting thereto a copy of the demand. He was cross-examined to the effect that the appellant had sent a return within the stipulated period; he denied this, but agreed that a letter had been received by the department from the appellant stating that he had done so. Mr. McKeon also stated in cross-examination that the Commissioner, at the material time, was Mr. D. J. Barnes. The prosecution closed its case and Counsel for the appellant then made a submission of no case to answer on the ground that the demand was not signed by the Commissioner. The prosecutor was granted an adjournment to consider the position; on the resumed hearing he referred the Senior Magistrate to a notice in the Fiji Royal Gazette for the 21st March, 1958 to the following effect: "Ferguson, B. A. to be Deputy Commissioner of Inland Revenue . . . " The prosecutor, relying on section 9 of the Interpretation Ordinance (Cap. 1), asked that judicial notice be taken of this appointment. The defence called no evidence and relied on the submission already made. The learned Magistrate considered the submission to be without substance and convicted.

On this appeal additional points have been raised but it remains a substantial contention that a valid demand was not proved. I deal first with some of the additional points raised.

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It was contended before me for the appellant that as the learned Magistrate, although expressly finding the charge proved beyond a reasonable doubt, had said in his judgment that he doubted whether the appellant had sent in his return in good time, as alleged in the letter written to the department, he ought not to have convicted. I see no substance in this contention. No evidence was called for the defence; all that had been said by Mr. McKeon in this respect in the course of the proceedings was that the appellant in an extra-judicial statement, namely in the letter, had stated that he had duly sent a return. That could be no evidence of the fact, if it was a fact; it was merely a self-serving statement made otherwise than in the proceedings and accordingly inadmissible as hearsay. It would have been different if the prosecution had relied on the letter as constituting some admission by the appellant; in such circumstances, it appears, the whole of such a statement must go in, as an exception to the hearsay rule (*vide* the recent case of *R. v. McGregor* [1967] 2 All E.R. 267).

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Then it was contended that the charge was bad for duplicity, reliance being placed on *R. v. Ballysingh* (1953) 37 Cr.App.R. 28, where it was held that separate counts ought, strictly, to have been laid for several "shop-liftings" committed in a departmental store on one visit to the store. I find it difficult to follow this contention. The charge alleged a failure to comply with the demand in one single respect, namely failure to deliver a return for 1965. The fact that the demand required returns for the year 1964 as well, and also additional information, could not affect the terms of the charge. What was really being urged was that the demand itself was bad for duplicity in requiring more than a single return, or information in addition to returns; bad as making more than one requirement. Here it must always, as Crown Counsel said, be a matter of interpretation whether a statute using the word "or" intends it to be construed disjunctively or conjunctively; whether, in the present context, section 60 in empowering the Commissioner to demand "such information, additional information *or* return" empowers him to require both information and a return or returns. The language of the section is not consistent; subsection (2) refers to "letters, accounts, ... *and* other documents"; subsection (3) to "letters, accounts . . . . *or* other documents", I do not find it necessary to make a final determination on the matter of the validity of the demand in this respect. Clearly it is not a question of "duplicity" in the technical sense applying to indictments or informations. It may well be that the demand which is authorised to be made by the Commissioner is conditioned by the purpose to be served, as to which the affidavit in the present case is silent, but I see no reason to doubt that the Commissioner may combine in one letter or instrument, any demands which he may lawfully make separately.

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The main ground, as I have indicated, was that the demand was bad as not being proved to emanate from the Commissioner. Here the argument for the appellant was mainly on the matter of identity of the "B. A. Ferguson" signing the demand; ex facie he had signed as "Commissioner of Inland Revenue", whereas it had been given in evidence that the Commissioner was Mr. Barnes; there must be strict proof of identity in such a case (see *Shiu Charan* (1955) 4 Fiji L.R. 165); "Commissioner" is

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defined by section 2 to include "any person authorised . . . . . to act in his stead", but no such authority was proved. Mr. K. C. Ramrakha, for the appellant, went on to argue on the terms of section 4(2), which provides that —

> "The Deputy Commissioner exercising or performing any power . . . . . of the Commissioner . . . . . shall be deemed for all purposes to be authorised to exercise or perform the same."

Here again, it was contended, strict proof of identity was required; it had not been given in evidence that the "B. A. Ferguson" signing the demand was the same person as the person named in the Gazette. Crown Counsel, Mr. Tuivaga, relied mainly on the maxim *"omnia praesumuntur rite esse acta"*.

Strictly, as it appears to me, there was no formal proof of the appointment of the Deputy Commissioner. Section 9 of Cap. 1 provides that the Court shall take judicial notice of various matters published in the Gazette, but this is in reference to matters having legislative effect. Other matters, such as appointments, are dealt with by section 10 which provides that the Gazette shall be admissible in evidence without formal proof that it is published by authority, and shall be accepted as evidence of the contents. Clearly, in any proceedings where it is sought to take advantage of section 10, the relevant issue of the Gazette must be tendered in evidence. Here it was merely referred to, although possibly also handed in; but by the prosecutor acting as such and after the close of the case. It was never in fact formally adduced in evidence. Accordingly there was a complete lack of proof of the appointment. Crown Counsel said it was common practice to 'prove' such matters by mere production of the Gazette by counsel, party or prosecutor, but such a practice cannot override the rules of evidence or the provisions of the Ordinance.

The maxim *"omnia praesumuntur"* would not appear to assist the respondent. Possibly if it had not been proved that Mr. Barnes was the Commissioner the maxim would have operated; possibly, likewise, if the title of the signatory of the demand had been expressed to be "Deputy Commissioner"; but the maxim could not operate to presume a proper exercise of authority by the Deputy Commissioner when the signature appeared over the title "Commissioner", which it was proved "B. A. Ferguson" was not. It appears to me to be impossible to contend first that it is to be presumed that "B. A. Ferguson" is the Commissioner and then, when it is proved he is not, to presume that he is the Deputy although signing as Commissioner. In other words there is no room for the maxim to operate when facts to the contrary became known.

The foregoing does not, perhaps, conclude the matter. Is the power to make a demand under section 60 one exercisable only by the Commissioner in person (or by the Deputy Commissioner personally, acting under section 4 (2)), or is it a power capable of delegation. Delegation by Ministers of the Crown was dealt with in the leading case of *Carltona Ltd. v. Works Commissioners* [1943] 2 All E.R. 560; Lord Greene M.R. giving the main judgment said, at p.563 —

> "In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions

so multifarious that no minister could ever personally attend to them. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible." A

But on the other hand, if specific executive functions are committed to a Minister, he cannot, without authority, entrust them to a deputy of his own choice; this is stated by Sir Carleton Allen to emerge from the decisions in *Allingham v. Minister of Agriculture* [1948] 1 All E.R. 780 and *Barnard v. National Dock Labour Board* [1953] 2 Q.B. 18 (see *"Law and Orders"* (3rd Edn.) p.177). B

Professor de Smith takes a somewhat different view; he states —

"In general, therefore, a Minister is not obliged to bring his own mind to bear upon a matter entrusted to him by statute but may act through a duly authorised officer of his department. The officer's authority need not be conferred upon him by the Minister personally; it may be conveyed generally and informally by the officer's hierarchical superiors. Whether it is necessary for the authorised officer explicitly to profess to act on behalf of the Minister is not certain. Some matters, however, are so important that the Minister must address himself to them personally." (*Judicial Review of Administrative Action* 1st Edition pp.180-1). C D

In *Vine v. National Dock Labour Board* [1956] 3 All E.R. 939, at p.951, Lord Somervell said —

"In deciding whether a "person" has power to delegate, one has to consider the nature of the duty and character of the person . . . . There are . . . many administrative duties which cannot be delegated." E

And de Smith (at pp.179-180) says —

"Where the exercise of a discretionary power is entrusted to a named officer — e.g., a chief officer of police, a medical officer of health, a town clerk or an inspector — another officer cannot exercise his powers in his stead unless express statutory provision has been made for the appointment of a deputy or unless in the circumstances the administrative convenience of allowing a deputy to act as an authorised agent clearly outweighs the desirability of maintaining the principle that the officer designated by statute should act personally." F

The authorities relied on for this statement include a number of cases establishing the principle that prosecutions are to be instituted only by the officer specifically designated. G

It appears that a broad distinction is to be drawn between the capacity of a Minister to delegate the exercise of a statutory power conferred on him and the capacity of a specified officer to do so. Further, it is questionable whether the principle established by the *Carltona* case in the United Kingdom applies in a smaller country such as Fiji. It is significant also that the Income Tax Ordinance makes specific provision for exercise of the Commissioner's powers by the Deputy Commissioner; this, in my view, attracts the rule of "expressio unius, exclusio alterius." It may be noted H

in passing that Australian legislation (vide *Gunn's Commonwealth Income Tax* (6th Edn.) para. 183) makes especially meticulous provision for delegation of the Commissioner's powers, no doubt on the view that in the absence of such provision delegation is not permissible. Accordingly I come to the view that the powers conferred by section 60(1) must be exercised either by the Commissioner personally or by the Deputy Commissioner personally, and that in a case such as this, where the circumstances preclude reliance on the maxim "*omnia praesumuntur*", it must be strictly proved that those powers were so exercised. The matter is obviously one of technicality but as it appears to me, no other conclusion would be a proper one — in the circumstances, as I emphasise — of this case.

For the foregoing reasons the appeal is allowed.

Reference was made in the course of the appeal to the omission from either section 60(1) or section 100(1) of the usual words "shall be an offence"; the appeal being allowed for other reasons I need do no more than note this without expressing an opinion as to the consequences of the omission.

Appeal allowed.