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UJAGAR SINGH & OTHERS

v.

DIRECTOR OF PUBLIC PROSECUTIONS

B [COURT OF APPEAL, 1976 (Gould, V. P., Marsack J. A., Spring J. A.), 9th, 23rd November]

Criminal Jurisdiction

Trade disputes—influencing others to take part in an unlawful strike—whether publication of Union Secretary's comments to press and radio sufficient to prove that strikers C *influenced by such utterances in absence of direct evidence that they heard or read the publications—Trade Disputes Act* 1973 *ss.* 2, 8, 12(1) (4), 33(7), 37.

Criminal law—charge—insufficient evidence to support charge on date alleged—whether proper for court to convict on basis of other evidence establishing a like offence on a different date—whether Criminal Procedure Code (Cap. 14) s. 204(1) correctly applied.

D The first appellant, the General Secretary of the Municipal Workers Union, several days after the Minister had declared a strike unlawful, made certain comments to the media to the effect that he considered the strike lawful and that he would defy the Minister. These utterances were subsequently published and broadcast and he was charged under Trade Disputes Act s. 12(1) with influencing others to take part in a strike. After an acquittal in the Magistrate's Court, the judge convicted E him of the offence. On appeal by the respondent.

Held: 1. There was no direct evidence to show that the strikers ever heard the broadcasts or read the press, and it was mere speculation to say that they were influenced by what the Secretary had said to the media.

2. Where the facts proved in respect of the date of the offence fell short of F amounting to the offence alleged, Criminal Procedure Code s. 204(1) did not enable the prosecution to ask for a conviction because other overt acts established a like offence on a different date.

Appeal from convictions passed by a judge of the Supreme Court, sitting in appellate jurisdiction, upon the appellants, who had all been acquitted in the G Magistrate's Court.

S: M. Koya and M. Tapoo for the appellants.
E. J. Gleave for the respondent.

Judgment of the Court (read by Gould V. P.) [23rd November 1976]—

H This is an appeal from convictions passed by a judge of the Supreme Court, sitting in appellate jurisdiction, upon the appellants, who had all been acquitted in the Magistrate's Court. The convictions in the Supreme Court were the result of an appeal brought by the Director of Public Prosecutions.

Though the notices of appeal to this court were in terms brought against conviction only, the grounds of appeal stated that the sentences (which were fines) were harsh and excessive, but in any event counsel for the appellants abandoned any appeal against sentence and we are concerned only with the convictions. By virtue of section 22(1) of the Court of Appeal Ordinance (Cap. 8) the appeal is limited to questions of law.

The charges arose out of a strike of municipal workers at Ba which, as stated in the judgment of the Supreme Court, commenced on the 14th November 1975, and despite a declaration of the Minister of Labour having effect from the 24th November 1975, that the strike was unlawful, continued until the 15th January 1976. In the first count, only the first appellant, Ujagar Singh, described as the General Secretary to the Municipal Workers Union, was involved. It reads—

FIRST COUNT

Statement of Offence

INFLUENCING OTHERS TO TAKE PART IN AN UNLAWFUL STRIKE:

Contrary to section 12(1) and 37 of the Trade Disputes Act No. 7 of 1973.

Particulars of Offence

UJAGAR SINGH (s/o Bachint Singh), being the General Secretary to the Municipal Workers' Union, did on the 1st day of December 1975 at Ba in the Western Division, in connection with a strike by the employees of the Ba Town Council engaged in essential services, and declared under Section 8 of the said Act by Jonati Mavoa, Minister of Labour to be unlawful influenced others to take part in the strike.

The second count involved appellants 2—7 and was as follows—

SECOND COUNT

Statement of Offence

CESSATION OF WORK IN FURTHERANCE OF AN UNLAWFUL STRIKE: Contrary to Section 12(4) and 37 of the Trade Disputes Act No. 7 of 1973.

Particulars of Offence

KISHORE SINGH (s/o Matchal Singh), RAM AUTAR (s/o Makhan), TULSI RAM (s/o Shiu Murat), RAM RUP (s/o Bhagauti Prasad), HARI RAM (s/o Shiu Din) and GANESH (s/o Shin Sami), did on the 25th day of November 1975 at Ba in the Western Division, ceased work, namely: sanitary services, being RAM AUTAR, TULSI RAM, RAM RUP, HARI RAM and GANESH's employment, they the said KISHORE SINGH, RAM AUTAR, TULSI RAM, RAM RUP, HARI RAM and GANESH are bound to do in such circumstances which give rise to reasonable suspicion that they the said KISHORE SINGH, RAM AUTAR, TULSI RAM, RAM RUP, HARI RAM and GANESH are taking part in or acting in furtherance of an unlawful strike; being the strike by the employees engaged in the essential services

of the Ba Town Council and which strike was declared unlawful on the 22nd day of November 1975 under section 8 of the Trade Disputes Act No. 7 of 1973 by Jonati Mavoa, the Minister of Labour.

The 8th and last appellant was charged alone in count 3, with an offence exactly the same as that charged against appellants 2—7 in count 2, save only that the date specified is the 2nd December 1975 instead of the 25th November 1975, as in count 2.

Subsections (1) and (4) of section 12 of the Trade Disputes Act, 1973, are in the following terms—

> "12(1) Any person who in connection with any strike, lock out or boycott declared under the provisions of this Act to be unlawful, causes or procures or counsels or in any way encourages, persuades or influences others to take part in any such strike, lock out or boycott shall be guilty of an offence."

> "12(4) Any person who ceases work or refuses to continue work being work which in terms of his employment he is bound to do, in circumstances which gives rise to reasonable suspicion that he is taking part in or acting in furtherance of an unlawful strike shall be guilty of an offence:

> Provided that it shall be a sufficient defence if he satisfies the court that he ceased work, or refused to continue work, as the case may be, for causes wholly unconnected with that strike."

Section 37 prescribes penalties of fine, imprisonment, or both for offences under the Act. In declaring the strike to be unlawful the Minister acted pursuant to section 8 of the Act, which (excluding the proviso, which is not relevant) reads—

> "8. Where it appears to the Minister that there is an actual or a declared strike or lock out arising out of a trade dispute in any industry or section of industry, and the Minister is satisfied that all practicable means of reaching a settlement of that dispute through the procedure laid down in the registered agreement or, where or such procedure is provided in the agreement, under the provisions of this Act have not been exhausted he may by order declare such strike or lock out to be unlawful."

We will deal first with the appeal by the first appellant, who was convicted by the learned judge of influencing others to take part in an unlawful strike and fined $500. It will be seen that the "Particulars of Offence" in this count are (except that a date is specified) almost completely uninformative. It is not stated who the "others" are alleged to be, and there are no particulars of how the influencing was said to be done. No objection to any inadequacy in the charge was taken, however, in the Magistrate's Court where the appellants were represented by counsel and all pleaded not guilty. In his judgment, the learned magistrate said, concerning the case against this appellant—

> "The court is left with the evidence as adduced. The date of the offence is 1st day of December 1975. The only evidence relevant to this court is that of P.W. 7, P.C. Janki Prasad. The constable said he heard 1st accused Ujagar Singh, saying to the arbitrator, Wing Kengwai (P.W. 1)—"That the Council go to hell and my members will be on strike until demand is met." The strange feature is that Wing Kengwai was called as the first witness by the prosecution. He did not say in his evidence Ujagar Singh saying these words. P.C. Janki Prasad was a bystander

who said he heard 1st accused saying this to Wing Kengwai. I regard this piece of evidence as unsatisfactory. Even if this piece of evidence is accepted by court it does not amount, in court's view, as influencing others to take part in the strike. As to who were influenced is not disclosed in the charge. The charge merely refers to "others" and this is insufficient. The date on which the Minister declared the strike unlawful is not given although it is shown in counts 2 and 3. Even if it is taken to mean "others" as those accused mentioned in count 2 the dates are different. The date in count 2 is given as 25.11.75 whereas on count 1, 1st accused is charged with committing the offence on 1.12.75. Having heard the evidence I am not satisfied the prosecution has proved its case beyond reasonable doubt."

It will be noticed that in the passage of his judgment the learned magistrate finds that there is only one episode upon which the prosecution might rely for proof, that being certain words spoken on the 1st December 1975, by the first appellant to Wing Kengwai, the labour officer, who had been appointed arbitrator in the dispute. He gave evidence, but was not even asked about the episode, and there was no evidence at all that the words spoken by the first appellant on that occasion did influence anybody or were communicated to anybody, who would have been likely to be influenced or even possibly influenced. We are satisfied that the learned magistrate's view of this particular evidence was the correct one, and indeed no one has challenged this.

When this count came to be considered by the learned judge in the Supreme Court he was able to deduce by logical reasoning from the particulars, that the "others" who, it was claimed, were influenced, could only be Ba municipal employees engaged in essential services. We do not dissent from this though an accused person should not have to arrive at the meaning of a charge by inference; it should be stated with clarity.

A more important matter is that, in deciding to convict the first appellant the learned judge made no mention of the overt act discussed by the learned magistrate in the passage from his judgment we have quoted. Instead he relied upon two other incidents on different dates. These are descried in the following passage from his judgment—

"With regard to accused 1 the charge in count 1 is that he influenced others to take part in the strike.

P.W. 3, George Williams, News Editor of the F.B.C., knows the accused and says that he spoke to him about the Minister's declaration that the strike was unlawful, saying that he wanted to get the accused's reaction. This was on 24.11.75. The accused 1 told him that as far as he (accused 1) was concerned the strike was lawful and he would defy the Minister. It is noteworthy that he did not say that the members of the Union regard it as lawful and that they have decided to defy the Minister. The accused's comments were broadcast at 7 p.m., 7.15 p.m. and 8.00 p.m., in Fijian, English and Hindi.

P.W. 4 a reporter with the Fiji Times Newspaper also spoke to the accused about the Minister's declaration. This was at Lautoka on 25.11.75. He says the accused said he would continue the strike, despite the Minister's declaration and that he would pull out other members. It was published in the newspaper. Again the accused 1 did not suggest this was the decision of the strikers; he did not say that other workers had decided to come out in sympathy but that he (accused 1) would pull them out.

A His comments to the news media contrast sharply with his unsworn statement to the magistrate that he was only a paid employee on the union, implying that he simply follows instructions."

The chronology is that the order of the Minister was made on the 22nd November, but was to take effect from the 24th November: it was published first by broadcast at 7 p.m. on the 24th and at the same time Ujagar Singh's comment to Mr Williams was broadcast. The Fiji Times of the 25th November contained only the B news of the Minister's order. If Ujagar Singh's comments to the Fiji Times reporter, which were made on the 25th November, were published, the relevant copy of the paper was not made an exhibit; nor is there any statement in the record of the evidence of the reporter, that what Ujagar Singh said to him was published.

Having made reference to the two incidents in the passage quoted above, the learned judge made the following findings, the words in brackets under heads 1 and C 4 being our own brief comments:—

1. That in presenting his views to the news media for publication Ujagar Singh intended to influence others. (This goes only to the question of mens rea).
2. The date the 1st December 1975, mentioned in the charge was inaccurate but the influence was spread over more than one day and section 204(1) of the Criminal Procedure Code rendered the variance between the charge and the D evidence not material.
3. That the word "others" in the charge was not vague.
4. That the word "influenced" should receive its ordinary meaning. (Unfortunately he did not state in terms what he considered this to be).
5. That it was possible for persons already on strike to be influenced to take part in a strike because the character of the strike changed from the 24th November. Thereafter it was an illegal strike. Appellants 2—8 were among the E "others" and not yet taking part in an unlawful strike. They ignored the declaration an flouted the law. This was exactly the conduct that Ujagar Singh had exhorted them to follow through the news media.
6. There was ample evidence that appellants 2—8 were influenced to take part in the illegal stike by the announcements of the first appellant.

F We have consulted the Shorter Oxford English Dictionary as to the meaning of the word "influenced" used as a transitive verb as in "did influence others". The appropriate meaning for "influence" is "to exert influence upon, to affect by influence". The most appropriate meaning for the noun "influence" seems to be— "The exertion of action of which the operation is unseen, except in its effects, by one person or thing upon another; the action thus exercised".

G These meanings leave it an open question whether it is enough to "exert" an influence or whether it is essential to "affect" by influence: in terms of this case whether an exhortation by Ujagar Singh by way of general broadcast was enough in itself or whether it was necessary to show that the exhortation did have some effect upon the minds of the "others" in inclining them to take part in an illegal strike. We believe that the latter is the appropriate interpretation in the context of section 12(1) of the Trade Disputes Act. It seems likely from the tenor of his judgment that this is H the conclusion that the learned judge in the Supreme Court arrived at, though he did not say so in as many words.

This brings us however to a point at which we differ, with respect, from the learned judge, and that is where he finds that there was ample evidence that appellants 2 to 8 were in fact influenced by the utterances in question. We go further and say that there was in fact no evidence to that effect. There was no evidence that they heard the broadcast on the evening of the 24th November, so when they continued on strike on the 25th it is impossible to say what their motives were, and it is pure speculation to say that they might have heard the broadcast and might have been influenced. The prosecution must prove all these things beyond reasonable doubt. The words of Ujagar Singh to the Fiji Times reporter had not even been spoken when appellants 2 to 7 failed to report for work on the 25th November and if they were subsequently published (which appears not to have been proved) there is no proof at all that the minds of others were affected by them, and in our view of the meaning of "influenced" in the context, that element has to be established by the prosecution like all others, beyond reasonable doubt. We are of opinion that in the absence of any direct evidence that either of the utterances of the first appellant, as published, was seen by the other appellants, and in the absence of evidence of any unequivocal act providing a necessary inference that they must have seen and acted upon such utterances the conviction cannot be permitted to stand.

A B C

There is another unsatisfactory feature concerning this conviction. The charge was laid for an offence committed on the 1st December 1975, when, as has been seen, no act of the appellant upon which it could properly be based, was proved. Yet the conviction would have been entered for an offence committed on that date. The learned judge mentioned that the influence could spread over more than one day, though earlier in his judgment he had pointed out that the charges were not drawn as continuing offences. If, as the Supreme Court found, the conviction could be based upon the earlier overt acts, the conviction should have been related to those dates, even though section 204(1) of the Criminal Procedure Code rendered amendment of the charge unnecessary. But in fact we consider that the learned judge put far too great a strain on section 204(1). So far as dates are concerned it is intended to get over difficulties which arise when the facts upon which the prosecution relies are shown to have occurred but not on the exact date which has been alleged. But when the facts proved in respect of that date fall short of amounting to the offence alleged, we do not think that section 204(1) entitles the prosecution to ask for a conviction because other overt acts establish a like offence on a different date. It would need to be very clear that the charge made was one of a continuing offence for that to be justified, and that is not the case here. We do not need to consider this point further, in view of our finding that the conviction cannot be sustained, but in our opinion it provides an additional ground of considerable weight, in support of our decision to that effect.

D E F

We come now to counts 2 and 3, against appellants 2—7, and 8 respectively. These appellants were acquitted by the learned magistrate because of what he regarded as confused evidence as to whether they were due to work on sanitary services on the days charged. It was common ground that a roster system was in force and squads of labourers worked alternate weeks—this system in fact occasioned the strike. There was evidence that garbage (an essential service) was collected daily from the market but only twice weekly from Ba township, on Mondays and Thursdays, whereas the days charged were Tuesdays. The following passage from the judgment of the learned judge gives the details:—

G H

> "It was the defence who extracted from P.W. 5 that garbage in the township was normally collected on Mondays and Thursdays. The defence did not follow up

this information and ask P.W. 5 why he had said the accused would have been detailed for garbage collection on Tuesday 25/11/75 and Tuesday 2/12/75. I have little doubt that P.W. 5 would have given the answer had he been asked to explain. The prosecution in re-examintion did not seek any elucidation as to why they would be detailed for garbage collection on Tuesday 25/11/75 and Tuesday 2/12/75. P.W. 6, the Ba Market Master, stated that no one had been collecting garbage as from 14/11/75. By 25/11/75 there must have been considerable and alarming amounts of garbage and refuse accumulated in the market and the township. By 2/12/75 the situation would be much worse. In such circumstances it is unlikely that P.W. 5 would limit garbage collecting to a mere 2 days per week. He would be anxiously waiting for any man to report in order to put him on to that duty. Had any days other than 25/11/75 and 2/12/75 been selected for the counts II and III against accused 2 to 7 and accused 8 respectively he would surely have said he would have put them on to garbage collection.

The magistrate approached the evidence in relation to garbage as if this were a normal situation and thought that it was the routine garbage collecting days that P.W. 5 had in mind. It was not a normal situation; had it been normal these charges could not have arisen. It was because of the unusual circumstances, namely the strike, that these charges have arisen.

For the foregoing reasons I consider that the magistrate wrongly concluded that P.W. 5 was confused. He never suggested that P.W. 5 was in any other way unreliable or untruthful. Had the magistrate recollected that this was an abnormal situation he should never have thought P.W. 5 was confused. In the circumstances, I am in the same position in regard to assessing P.W. 5's evidence as the magistrate was and I find that there was no reason to regard him as confused simply because he had said accused 2—7 would have been put on garbage duty on 25/11/75. It was an abnormal situation as is indicated by the Minister's declaration on 24.11.75 that the strike was unlawful. The next day, 25.11.75, was the day when P.W. 5 would have reason to expect the accused 2 to 7 to obey the laws of the country and return to work after that declaration. Possibly for that reason, 25.11.75 was selected as the date for count I, although such speculation is not material.

Similar reasoning applies of course to count III and accused 8, except that the situation would be even worse by the 2nd December 1975. I find that accused 2—7 were required for garbage disposal on 25.11.75 and failed to report for that duty. Likewise accused 8 was required for similar duties on 2.12.75 and failed to report for that duty."

This embodies a finding of fact by the learned judge, and one to which he was entitled to come on the evidence recorded to the effect that appellants 2—7 and 8 were required for garbage duty on the relevant dates and failed to report. This appeal lies only on questions of law and where, as happened in the case of the first count, there is in our opinion no evidence to support an essential element in the proof of the prosecution case, that is a question of law and we may interfere. In the case of counts 2 and 3 however, the question is the weight and effect to be given to the evidence of Ram Rattan the supervisor of works. This is a question of fact only and not subject to appeal. (We would add that in the third last paragraph of the passage which we have just quoted from the Supreme Court judgment, the reference to count 1 is obviously intended to be to count 2).

Mr Koya for the appellants has argued a number of other grounds of appeal which now need to be considered only as far as the appellants in counts 2 and 3 are concerned. One is that work performed by workmen after their strike has been declared illegal by Ministerial order under the appropriate statute, is forced labour, forbidden by section 6 of the Fiji Constitution. We do not accept this. No work at full rates of remuneration from which the worker is a liberty to retire can be described as forced labour.

Another ground is that the Order by the Minister that the strike was illegal was law-making, and as the Minister was an executive officer, there was a breach of the doctrine of the separation of powers. The answer is that the Order was made pursuant to authority given by an Act of Parliament enacted constitutionally by the Parliament of Fiji and such powers as the Minister exercised were delegated to him by the Act.

Another ground of greater merit, is that it was not proved that the strike in question was a strike within the definition of "strike" in section 2 of the Trade Disputes Act, 1973: this reads—

> " "strike" means the cessation of work by a body of employees acting in combination, or a concerted refusal or a refusal under a common understanding of any number of employees to continue to work for an employer, done as a means of compelling their employer or any employee or body of employees, or to aid other employees in compelling their employer or any employee or body of employees, to accept or not accept terms or conditions of or affecting employment;"

It was in evidence that there was an agreement in force between the particular union and the local government authority, governing conditions of service, and under section 33(7) of the Trade Disputes Act, 1973, its provisions were implied conditions of contract between employer and employees. It was not a provision of the agreement that there should be a roster system. Therefore, the submission is that there was no refusal to work—"done as a means of compelling the employer. . . . to accept or not to accept terms or conditions of or affecting employment." The workers were not seeking to enforce any variation of or any new conditions on their employers: only asking that agreed conditions be adhered to. We think that the construction of the definition is not limited by any agreement as to conditions of service, but is wide enough to embrace terms and conditions actually operating or which are sought to be imposed. Where or not the Ba Township Council had power under the agreement to impose or vary conditions may be one question (which it is not for us to answer) but it is in evidence that it had brought into effect and operated the roster system. It had become a condition de facto at least, and was a condition affecting employment. The removal or termination of that term or condition would be a variation of the terms and conditions or employment being observed prior to the commencement of the strike, and the strike was a means of compelling the employer to agree to that variation. In our opinion the definition applied to the proved circumstances.

Finally we agree with the court below that it was not necessary for the prosecution to call evidence to establish the validity of the Order of the Minister made under section 8 of the Trade Disputes Act, 1973.

In the result the appeal of the first appellant is allowed, his conviction is quashed and the fine, if paid, is to be refunded. The appeals of appellants 2—8 (inclusive) are dismissed.

Appeal of first appellant allowed. Appeals of other appellants dismissed.