

COMMISSIONER OF INLAND REVENUE

- v -

A

RANCHODHBHAI D. PATEL

[HIGH COURT, 1994 (Pain J), 11 October]

Appellate Jurisdiction

B

Income Tax-failure to supply information-whether continuous or continuing offence-whether conditional discharge an appropriate sentence- Income Tax Act (Cap. 201)Sections 50(1)& 96(1)-Penal Code (Cap 17) Section 44.

C

On appeal by the Commissioner of Inland Revenue against sentence imposed in the Magistrates Court the High Court discussed the nature and gravity of the offences of failing to file information as demanded. Conditional discharges were set aside and fines imposed in lieu.

Cases cited:

D

Attorney General v Hari Chand 14 FLR 245
Commissioner of Inland Revenue v Wendt (Cr. App. No. 76 of 1990)
Commissioner of Inland Revenue v Macaskill (Cr. App. No. 74 of 1991)
Hodgetts and Anor. v Chiltern District Council [1983] 2 AC 120
Malungahu v Department of Labour [1981] 1 NZLR 668
Mohammed Hakim Dean v R 19 FLR 158
Parry v Forest of Dean District Council (1976) 34 P & CR 209 DC
Patel v State (Cr. App. No. 97 of 1991)
R v Industrial Appeals Court (1985) V.R. 615
State v Krishna Kewal (Cr. App. No. 54 of 1992)

E

Appeal against sentence imposed in the Magistrates Court.

F

A.V. Bale for the Appellant
M.B. Patel for the Respondent

Pain J:

G

This is an appeal by the Commissioner of Inland Revenue against the sentence imposed on the Respondent in the Magistrates Court on 3 charges of failing to comply with a notice issued under Section 50(1) of the Income Tax Act. As there are a number of such appeals pending in this Court, I have taken time to consider the issues involved and prepare a reasoned judgment.

The Respondent failed to file income tax returns for the six tax years 1986 to 1991 (inclusive). By notice given on the 31st July 1992 the Commissioner demanded delivery by the 31st August 1992 of tax returns, statements of assets and liabilities and analyses of drawings for each of those years. The Respondent

failed to comply with this notice and on 23rd March 1993 the Commissioner laid three charges in the Magistrates Court. A separate charge was laid in respect of the three categories of documents demanded, namely, tax returns, statements of assets and liabilities and analyses of drawings. Each alleged an offence of failing to deliver those items for the years in question "on the 31st August 1992and on other days between that date and the 3rd March 1993which failure still continues". The summonses were served on the Respondent on the 13th April 1993 and on the 19th April 1993 he finally made full compliance with the notice. When the case was called in the Magistrates Court on the 10th May 1993 he pleaded guilty to each of the three charges. Submissions were made and the learned Chief Magistrate adjourned the case to the 17th May 1993. There is then an hiatus in the Record of Proceedings until the 4th June 1993 when the Chief Magistrate delivered a written decision. The concluding words state that "the court considers that this is an appropriate case to order a conditional discharge for a period of 12 months. Accused to pay court costs of \$30 in default 35 days imprisonment".

A

B

C

Although there were three charges, the proceedings in the Magistrates Court and submissions in this Court were only directed to the charge of failing to file tax returns. I will consider that charge on its own. Later in this decision I will have something to say about the other two charges.

D

The prosecution is under Sections 50(1) and 96(1) of the Income Tax Act. Section 50 empowers the Commissioner to demand any person by notice in writing to supply information or file a tax return if a return has not been filed. Section 96 contains the penal sanction. It provides that "for every default in complying with the provisions of Section 50.....the persons in default shall each be liable to a fine not exceeding \$40 for each day during which the default continues".

E

This brings the offence within the category of what has been described in many decisions as "continuous" or "continuing" offences. This topic was considered by Grant A.C.J. in Mohammed Hakim Dean v R 19 FLR 158 and his decision (delivered on the 7th December 1973) has been regularly cited in subsequent decisions of this Court.

F

Since then, in my view, the nature of so-called continuing/continuous offences has been elucidated by the pragmatic decision of the House of Lords in Hodgetts and Anor. v Chiltern District Council [1983] 2 AC 120. This case overruled the decision in Parry v Forest of Dean District Council (1976) 34 P & CR 209 DC. in which it had been held that a "continuing offence" was "one which repeats itself every day. In other words a new offence is created each day". In the major speech delivered by Lord Roskill, the Law Lords made it clear that only a single offence is committed although it may take place over a period of time. The case concerned the enforcement of the provisions of the Town and Country Planning Act which authorised the local council to require the owner

G

A of land, by notice, to do something on the land ("do notices") or to stop doing something on it ("desist notice"). The Act made it an offence punishable by a fine not exceeding £400 for a person to fail to comply with the notice within the specified period. If a person still failed to comply as soon as practicable after conviction, he was guilty of a further offence and liable to a fine not exceeding £50 for each day of default after conviction. Lord Roskill said of these offences at page 128):

B " It is not an essential characteristic of a criminal offence that any prohibited act or omission, in order to constitute a single offence, should take place once and for all on a single day. It may take place, whether continuously or intermittently, over a period of time. The initial offence created by subsection (1) in the case of non-compliance with a "do notice," is complete once and for all when the period for compliance with the notice expires; but it is plainly contemplated that the further offence of non-compliance with a "do notice" created by subsection (4), though it too is a single offence, may take place over a period of time, since the penalty for it is made dependent upon the number of days on which it takes place."

D This concept of a single offence taking place over a period of time has also been recognised in other jurisdictions. In the Australian case of R v Industrial Appeals Court (1985) V.R. 615 the judgment of O'Bryan and Gillard JJ says at page 620:

E " A continuous or continuing offence is a concept well known in the criminal law and is often used to describe two different kinds of crime. There is the crime which is constituted by conduct which goes on from day to day and which constitutes a separate and distinct offence each day the conduct continues. There is, on the other hand, the kind of conduct, generally of a passive character, which consists in the failure to perform a duty imposed by law. Such passive conduct may constitute a crime when first indulged in but if the obligation is continuous the breach though constituting one crime only continues day by day to be a crime until the obligation is performed".

G The New Zealand decision of Malungahu v Department of Labour [1981] 1 NZLR 668 is a further example. The Court held that the offence of remaining in the country after the expiration of an entry permit was a single offence continuing from day to day until the person leaves.

In my view this concept and the reasoning in the above decisions are equally applicable to the offence of failing to comply with a notice given by the Commissioner under Section 50(1) of the Income Tax Act. Only a single offence is committed although it may be committed over a period of time as

Section 96 makes the penalty dependent upon the number of days for which the default continues.

The gravamen of the offence created by Sections 50 and 96 is the failure to comply with the notice and file the tax returns within the stipulated period. That failure is a single offence taking place over a period of time, namely, from the day after the time given in the notice until the default is remedied by the filing of the tax returns.

The earlier default in failing to file the tax returns by the 31st March of the following year is not an element of the offence. Indeed it could be said that, if the Commissioner has been aware of the obligation to file returns, he has acquiesced in that delay. Nevertheless it is still a background factor to be taken into account in assessing the seriousness of the offence. Each case must depend on its own facts. Generally however, default in complying with a notice after a long delay despite reminders and threatened action by the Commissioner would be more serious than a case with little or no history of earlier delay.

The prosecution need not be commenced immediately the offence is committed by failure to file the returns within the period stipulated by the notice. The offence continues until compliance with the notice. A charge could be laid in the Magistrates Court at any time up until 6 months after that compliance is made. The decision of Mohammed Hakim Dean v R 19 FLR 158 has been followed and applied in later decisions of this Court and its authority has not been challenged on this appeal.

That decision held that effect must be given to the 6 month limitation period prescribed in Section 219 of the Criminal Procedure Code for laying a charge in the Magistrates Court. Applied to this type of offence which continues over a period it restricts the punishable period of offending to 6 months before the laying of the charge. On this basis the period of default that is punishable is the period from the date of default in complying with the notice (but limited to a maximum period of 6 months prior to the laying of the charge) until the date of compliance (or the date of conviction if no compliance has been made). The maximum penalty prescribed by Section 96(1) is a daily rate of \$40. However the jurisdiction of the Magistrates Court is limited by Section 7 of the Criminal Procedure Code to a fine not exceeding \$1,000.

Having regard to the foregoing matters, the offence committed by the Respondent in this case must be regarded as serious. The charge relates to a failure to file tax returns for six separate years from 1986 to 1991 (inclusive). Notice was given to the Respondent on 31st July 1992. At that time his obligation to file those returns was already long outstanding. He failed to comply with the notice by due date of 31st August 1992. The default continued and the charge was laid on 23rd March 1993. The Respondent finally complied with the notice on 19th April 1993 which was 6 days after the summons was served upon him. The period of default is limited for the purposes of this charge by

A

B

C

D

E

F

G

A Section 219 of the Criminal Procedure Code to 208 days from 23rd September 1992 to 19th April 1993. That makes the total potential penalty prescribed by Section 96 (1) of the Income Tax Act to be a fine of \$8,320, although the Magistrates jurisdiction is limited to \$1,000.

B The Respondent pleaded guilty to the charge. Section 206 (2) of the Criminal Procedure Code provides that "the Court shall convict him and pass sentence upon or make an order against him, unless there shall appear to it sufficient cause to the contrary". Instead of convicting the respondent and passing sentence upon him, the Magistrate granted a conditional discharge pursuant to Section 44 of the penal code.

The Commissioner appeals against this conditional discharge. It is argued that a conviction should have been entered and an appropriate fine imposed.

C The power to grant an absolute or conditional discharge should be exercised sparingly. In most cases a conviction and appropriate sentence should be imposed upon a finding or plea of guilty. However a wide discretion is given to the Court by Section 44 of the Penal Code. On appeal, this Court will only interfere if that discretion has been exercised by the Magistrate on a wrong principle and a discharge is unduly lenient for the particular offence. That is outside the range of sentences which, applying all the relevant factors, could reasonably be considered appropriate.

In his remarks on sentencing, the learned Chief Magistrate referred to the submissions made in mitigation and then said:

E "The Court having carefully considered the facts of the case, the nature of the offence and the need to deter other persons from committing the offence. The Court having further considered the mitigating circumstances, the accused is a first offender who pleaded guilty to the offence. The Court considers that this is an appropriate case to order a conditional discharge for a period of 12 months".

F These matters covered a number of circumstances that could properly be taken into account for sentencing purposes. In particular, the respondent was a partner in a firm that ceased business in 1986, he was a first offender, he pleaded guilty to the offence and he had been involved in community work.

G However, in my view insufficient consideration was given to the nature of the offence which is a specific factor to be considered in terms of Section 44 of the Penal Code. For the reasons earlier given, this was a serious offence under the Income Tax Act. It was not a minimal breach involving, for instance, a tax return for one year only and a very short delay. Nor was it a trivial or purely technical breach for which no moral blame could be attributed to the Respondent. This offence involved long delays in filing tax returns for 6 separate tax years

culminating in the failure of the Respondent for a further substantial period to deliver those returns as required by the formal notice from the Commissioner. Moreover the Respondent has given no explanation for his failure. The Court was told that the Respondent's business ceased to operate. If that means that he earned no income, then 'NIL' returns could have been filed as soon as demand was made upon him. Instead he failed to comply with the formal notice and only did so after the summons had been served upon him. Ultimate compliance is a factor to be considered in his favour but it does not absolve the default that has occurred. It brings the commission of the offence to an end and prevents the accrual of any further penalty.

A

B

This Court has previously referred to the gravity of this offence as indicated by the penalty provided and the need for deterrent sentences to ensure proper fulfilment of the purposes of the Income Tax Act. (See, for instance, the observations of Hammett CJ in Attorney General v Hari Chand 14 FLR 245 which have been cited with approval or expressed in similar terms in later decisions of Commissioner of Inland Revenue v Wendt (Cr.App. No. 76 of 1990), Commissioner of Inland Revenue v Macaskill (Cr.App. No.74 of 1991) and Patel v State (Cr.App. No.97 of 1991).

C

This Court requires solid grounds before it will interfere with the discretion of a Magistrate to grant a discharge under Section 44 of the Penal Code. In this case however, the exercise of that discretion is wrong in principle, as the Magistrate failed to properly take into account the circumstances of and gravity of the offending. As a result the Respondent has been discharged which is unduly lenient for such an offence. This is not an offence for which it is inexpedient to inflict punishment. Similar observations have been made in this Court (albeit on different facts but applying the same principles) by Jesuratnam J. in Commissioner of Inland Revenue v Wendt (Criminal Appeal No.76 of 1990) and by Saunders J. in State v Krishna Kewal (Cr.App. No.54 of 1992). Failure to comply with a notice under Section 50(l) of the Income Tax Act is not a trifling matter. Special extenuating circumstances would be required before an absolute or conditional discharge under Section 44 of the Penal Code could be contemplated for a serious default.

D

E

F

Accordingly, in this case, a conviction and fine should be imposed on the charge of failing to comply with the notice to file tax returns.

The further two charges cause me considerable concern. They allege that the Respondent:

G

"1. Failed to deliver to the Commissioner complete and detailed statements of all assets and liabilities, both business and personal, in and outside Fiji, of himself, his wife and children as at 31st December 1986, 1987, 1988, 1989, 1990 and 1991.

- A 2. Failed to deliver to the Commissioner analysis of his drawings account for the years ended 31st December 1986, 1987, 1988, 1989, 1990 and 1991.”

These were required by the same notice dated 31st July 1992 which required the filing of tax returns for the same years. However only one notice was given requiring production of all these items.

- B I have already held that the offence created by Sections 50(l) and 96(l) of The Income Tax Act is a single offence committed over the period of time during which default in complying with the notice continues. Section 50(l) empowers the Commissioner to demand any information or tax returns by a notice in writing and I see no reason why several items cannot be included in the one notice. However it would seem implicit in the statute and legal decisions that
- C the failure to comply with the notice creates only one offence. That is a single offence of failing to comply with the notice and default continues until all the items demanded have been provided. I do not see how the items demanded can be divisible into separate charges each carrying the same penalty. Taken to its limit, this would mean that a separate charge could be laid for every item in the notice if there has been no compliance at all. In this case that would mean
- D 12 charges for failure by the Respondent to deliver tax returns and failure to deliver analyses of drawings for the 6 years in question. He was also required to provide for those same years statements of assets and liabilities:

- business and personal
- in Fiji and outside Fiji
- of himself
- E - of his wife
- and of his children

- F Assuming that the Respondent has 3 children this demand required him to give 4 statements each (business, personal, in Fiji and outside Fiji) for 5 people for each of the 6 years. That is a further 120 separate items of information making a grand total of 132 items demanded by the notice. It seems incredible that a separate charge could be laid for each of these items, even though Section 96(l) provides a fine for “every default” in complying with the provisions of Section 50. The more plausible view would seem to be that the failure to comply with a notice creates only one offence. That offence continues to be committed until all the demanded items have been supplied. If a comprehensive list of items has

- G been demanded, then that is a factor to be taken into account by the Court in assessing culpability for the period of default and can be reflected in the penalty imposed.

In this case I am conscious of the fact that this issue was not argued at the hearing and counsel have not had the opportunity to make submissions on it.

Nor have any facts been given about the demand to provide the statements of assets and liabilities and analyses of drawings. The only information before the Court is that they were demanded in the notice and "full compliance was made on the 19th April 1993". No specific submissions have been made in respect of those two matters. The hearing in the Magistrates Court and on appeal in this Court has been limited to the failure to file the tax returns. This has been the dominant, if not exclusive, concern of the Commissioner.

A

In all the circumstances I propose to deal only with the charge of default under the notice by failing to furnish tax returns. The justice of the situation will be met if (for the reasons earlier given) I allow the appeal on that charge and substitute an appropriate monetary penalty. The appeals in respect of the other two charges will be dismissed. If he wishes to do so, the Commissioner can address the issues I have raised on some further occasion.

B

The penalty prescribed in Section 96(l) of the Income Tax Act is "a fine not exceeding \$40 for each day during which the default continues". In all the cases cited to me the fine has been expressed as a daily sum for the punishable period of default. That sum has varied from 50c to \$1.50 and, in all but one of the cases, it has been imposed on 3 charges. This has resulted in total fines ranging from \$53 (imposed in 1968 for default for 53 days in filing a tax return for one year only) to \$805.50. A common penalty has been \$1 per day on each of 3 charges making a total of \$3 per day. In my view such a penalty is quite moderate when compared to the maximum provided of \$40 per day.

C

D

No scale of fines can be set. Each case must be considered on its own facts. A level of fine must be assessed that is appropriate for the particular default and regard must be given to the ability of the offender to pay the total fine. The decision of Hammett CJ in Attorney v Hari Chand 14 FLR 245 remains a very sound authority for the principles to be applied in assessing the appropriate fine in these cases. Regard must be given to such matters as the gravity of this offence (as indicated by the maximum fine prescribed by the Legislature), the means of the accused, the previous record of the accused and the prevalence of the offending. The learned Chief Justice also stressed the need for appropriate facts to be provided by the prosecutor to enable the Court to make "a balanced assessment of what would be an appropriate penalty in the particular circumstances of each case". He was emphatic that a nominal fine is "manifestly inadequate".

E

F

I have already noted that this case involves a serious default by the Respondent and no explanation has been given for that default.

G

However there are some mitigating circumstances to be taken into account. The Respondent is a retired businessman who has not previously offended. The firm in which he was a partner ceased business in 1986 and this appears to have precipitated the failure to file returns. Compliance with the notice was finally made. The Respondent has otherwise shown himself to be a responsible

member of the community.

- A A further factor is that this is an appeal by the State in the person of the Commissioner. The Respondent has already been sentenced in the Magistrates Court for the offence and has had to bear the uncertainty of this appeal and the imposition of a more substantial sentence. Some allowance should be made for that. The increased sentence on appeal is not necessarily the proper sentence that ought to be imposed at first instance. On appeal a sentence at the lower end of or even less than the acceptable range may be appropriate. There should also be some consistency with the total fines imposed by this Court in other similar cases on appeal. In those cases fines have been imposed on several charges. For the reasons earlier given, the fine in this case will be imposed on one charge only but the culpability of the Respondent for failing to comply with the notice is the same.
- B
- C

Taking all these factors into account, I consider an appropriate fine to be fixed on appeal in this particular case is at the rate of \$2.00 per day for the 208 days of default. That is a total fine of \$416.00.

- D No submissions were made on the question of costs. The order of the Magistrate should remain.

Accordingly I make the following orders:

1. The appeal in respect of the charge of failing to deliver returns of income for the years 1986 to 1991 as demanded by the Commissioner is allowed and
 - E (a) The sentence of a conditional discharge for 12 months imposed in the Magistrates Court is quashed.
 - F (b) In substitution therefore a fine of \$416 is imposed.
2. The appeals in respect of the charges of failing to deliver statements of assets and liabilities as required by the Commissioner and failing to deliver analyses of drawings as required by the Commissioner are dismissed.
- G 3. The order in the Magistrates Court for the Respondent to pay court costs of \$30 is confirmed.

(Appeal allowed in part; sentence varied.)