IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Appellate Jurisdiction
Criminal Appeal No. 110 of 1978

BETWEEN:

A.J.C. PATEL BROS. Appellant

- and -

PRICES AND INCOMES BOARD Respondent

Mr. G.P. Shankar, Counsel for the Appellant
Mr. Rabo, Counsel for the Respondent.

JUDGMENT

The appellant, a landlord, was convicted under the Counter Inflation (Application of Section 15 Order) 1973 for increasing rent without giving the requisite 6 weeks notice to the P.I. Board of his intention to increase it.

The tenant's evidence of an increase was accepted by the learned magistrate. The defence called no witnesses but submitted that there was not sufficient evidence to prove that the P.I.B. had not been given 6 weeks' notice.

The learned magistrate ruled that there was no onus on the prosecution to show that notice had not been given. He based his decision upon S. 144(A) C.P.C. which is an additional section enacted by S. 12 of Act No. 13 of 1969 and he ruled that S. 144A placed an onus upon

the defendant to prove that he had given 6 weeks' notice to the P.I.B. He held that following the defendant's failure to adduce any evidence to show that he had given such notice the defendant must be convicted.

S.144A C.P.C. as enacted in Act 13 of 1969 Section 12 reads as follows :-

"12. The Code is amended by inserting the following heading and section immediately after section 144:-

"NEGATIVE AVERMENTS"

"144A. Any exception, exemption, proviso, excuse or qualification whether it does or does not accompany in the same section the description of the offence in the Ordinance creating such offence, and whether or not specified or negatived in the charge or complaint, may be proved by the defendant or accused, but no proof in relation thereto shall be required on the part of the complainant or prosecution."

It should be most carefully noted that S.144A refers to "any exception, exemption, proviso, qualification," appearing in an Ordinance creating an offence. As I read the section it means that where certain acts, conduct or behaviour would give rise to a statutory offence, if the statute enacts that it shall not be an offence where the accused comes within some specific exemption, qualification etc. set out in the statute, then the onus of proving that he falls within the exception, exemption etc. rests upon the accused. Thus if the Traffic Ordinance states that a doctor may drive in the wrong direction along a one

way street when answering a life or death call he would if charged for such an offence have to prove that he was a doctor and that there was such an emergency. The negative averment would not rest upon the prosecution under S.144A.

Does the Order in question under the Counter Inflation Act create any exception, exemption, proviso or qualification which places any burden upon a landlord to prove that he did give 6 weeks notice to the P.I.B.? The Order appears in L.N. 71 of 1973 and the offence is based on R.2 and R.3 of the Order. They read as follows :-

> "2. Six weeks written notice shall be given to the Prices and Incomes Board of any proposed increase in any price, charge, remuneration, dividend or rent, except any increase authorised by any Price Control Order in force at the date hereof.
>
> 3. Until the end of the period of the notice referred to in the last preceding paragraph, any implementation of the proposed increase shall constitute a contravention of this Order."

The offence is not one of simply failing to give 6 weeks' notice, it is one of implementing the increase before expiry of the six weeks' notice. It can arise in two ways -

(a) giving notice and increasing the rent before the expiry of 6 weeks of the date thereof;

(b) giving no notice and increasing the rent.

The wording of the regulations 2 & 3 does not necessarily require that the particulars of offence be drafted in the negative. If notice has been given but the rent is increased before the six weeks notice expires there will be no negative averment. It is only where no notice is alleged that the negative averment arises. In my view, the regulations do not create a general offence which may be resisted by showing under S. 144A of the C.P.C. that one comes within a particular proviso, exemption, exception or qualification.

In order that S. 144A of the C.P.C. should apply to an offence under the Order I think the regulations would have to read somewhat as follows:-

> "It shall be an offence to increase the rent without giving notice, or before the expiry of 6 weeks after the giving of such notice provided that :-
>
> _____"

and here the exceptions or exemptions or qualifications which exclude the increase from the regulations may be mentioned viz:- "the building is only used for _____; or the tenant has been

in occupation for at least 10 years without an increase of rent; or the tenancy was created at least 20 years ago for a period of at least 40 years and the terms are that _____ ."

One cannot, I think, construe regulations 2 & 3 of the Order as meaning that "it shall not be an offence to increase the rent provided 6 weeks notice has been given," because it is not an offence to increase rent. The offence only arises if the rent is increased in circumstances which contravene the statutory requirement, that is in the absence of the requisite notice.

With respect I consider that the learned magistrate erred when he purported to apply S.144A of C.P.C. Perhaps he was misled by the heading and marginal note to the section which reads "negative averments, "and the fact that the charge under Regulations 2&3 of the Order was in this case framed in the negative because it was alleged that no notice had been given.

Cross, on Evidence, 4th Edn. p. 87 observes that "if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who asserts the negative." Thus, as the learned author says the prosecution have been relieved from having to prove that an apothecary charged with practising without a certificate did not have one; that a driver did not have a

certificate of insurance or driving licence or road tax licence or to prove that a person in possession of drugs did not have a prescription. In such cases it is a simple matter for the accused to produce his insurance certificate, licence, etc. and it would be virtually impossible for the prosecution to prove the absence of those items. It should, I think be, noted that in the foregoing illustrations, the accused, was under an obligation to obtain and retain possession of some prescribed form of document, possession of which is conclusive proof that he is not committing any offence. Moreover there is a statutory body authorised and obliged to issue such authorisations to applicants entitled to them.

In the instant case the landlord cannot produce any document, licence or certificate because the regulations do not require the P.I.B . to acknowledge his application. How then would he prove that he had given such notice? He is not in the same fortunate position as statutory licence holders. He could give evidence upon oath that he posted or personally delivered a notice to the Board but this would place a heavier burden upon him than upon those who simply produce a statutory licence, certificate, etc. The Act or the regulations do not prescribe the modes in which notice must be given to the P.I.B. or how service of it can be proved. It does not oblige the Board to issue any acknowledgement of service upon them of a notice which a landlord could produce if challenged or charged with an offence. Such evidence as the landlord can adduce may well be met with an allegation supported by evidence that

no notice was ever delivered or received and we then have a situation where the onus lies heavily upon the landlord. In my view it cannot be said in such circumstances that the affirmative is peculiarly within the knowledge of the landlord in the sense that that proof by the P.I.B. that they had not received notice would be exceptionally difficult, if not impossible.

In reply to this Court's question, the prosecution advocate stated that the P.I.B. commence a prosecution because notice of the intention to increase the rent has not been given to the P.I.B. It seems to follow that on receiving the tenant's complaint the P.I.B. satisfy themselves from their own records that no notice has been received or that it is not 6 weeks old and then they institute proceedings. Apparently the Board must be in a position to adduce evidence that notice has not been received otherwise it would not institute proceedings. I am of the view that the burden in such charges is not imposed upon a landlord within that general rule relating to negative averments to which I have referred. Neither under the Counter Inflation Act, nor under the aforesaid Order nor under the common law is the burden placed upon the landlord. With respect to the learned magistrate I am of the opinion that the conviction cannot be upheld.

The appeal against conviction is allowed. The fine of $250 if paid to be refunded and the orders for repayment of rent and costs is set aside.

(Sgd) J.T. Williams
Judge

Lautoka,
7th November, 1978.