IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Appellate Jurisdiction

Criminal Appeal No. 66 of 1982

BETWEEN: 1. VELLAIDAN s/o Permal — Appellants
2. KRISHNA PILLAY s/o Munsami Pillay

A N D : R E G I N A — Respondent

Messrs. V. Chand & Co. — Solicitors for the Appellants
Mr. S. C. Maharaj — Counsel for the Respondent

J U D G M E N T

This is the joint appeal of two FSC locomotive drivers against their convictions for two offences each, under Section 15(1) Sugar Industry Act, Cap. 206. They also appeal against a sentence of $500.00 imposed for each offence, totalling $1000.00 against each appellant with nine months' imprisonment in lieu on each offence.

I will use the expressions used in the magistrate's court for identifying the appellants. Vallaidan (appellant No. 1) I will refer to as accused No. 1 and Krishna Pillay the other appellant I refer to as accused No. 2.

It was not disputed during the appeal that the offences which occurred on 2nd September, 1981 in the case of accused No. 1 and on 3rd September, 1981 in the case of accused No. 2 arose out of a wild cat strike in Lautoka when locomotive drivers and their assistants employed by the FSC suddenly decided not to work thereby causing a hold-up at the sugar crushing mill.

It may be useful to set out Section 15(1) which reads as follows:

> "15(1). Notwithstanding any other law in force in Fiji, any person who, other than during the existence of a dispute notified by the independent chairman under the provisions of sections 4 or 14, does any act or makes any omission the doing or omission of which hinders or is calculated to hinder orderly planting or growing or harvesting of cane, transport of cane to a mill, crushing the cane, making sugar at a mill, or transport or storing of sugar, shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding two years."

There are obviously numerous acts or omissions which can interfere with sugar production and many ways in which production can be affected as illustrated in the subsection.

The offences of which the accuseds were convicted allege that sugar production was affected by (i) hindering the transport of cane and (ii) hindering the crushing of cane. Thus the one act of failing to drive locomotive gave rise to the two offences against each accused. Mr. Jai Ram Reddy for the accuseds conceded that if they refused to drive their locomotives it would give rise to the consequences complained of.

The ground of appeal against conviction is simply that there was insufficient proof of the accuseds' guilt.

The evidence reveals that the Fiji Sugar and General Workers' Union has four branches; one attached to each crushing mill. There are sections within the branches representing various departments or groups of employees. The locomotive drivers and their assistants come within the traffic branch and it is common ground that in September 1981 the two accuseds were the local delegates of the traffic department.

A new locomotive was brought into operation in July, 1981, and the accuseds raised the question as to the method of selecting drivers for it. At a meeting with the general manager the accuseds who apparently did not approve of the drivers appointed to the new locomotive said that the drivers of locomotive No. 5 should have been allocated the new locomotive. There were a few other grievances raised.

On 2nd September, 1981 there was a further meeting about 10.00 a.m. attended by the accuseds, the General Manager and one or two other officers of the area. The meeting ceased about 12.30 p.m. without the manning of the new locomotive being settled. Up to that time and up to 3.00 p.m. the traffic department was functioning and the locomotive drivers were working, i.e. the 7.00 a.m. to 3.00 p.m. shift.

However, at 3.00 p.m. the locomotive drivers and their assistants who were due to commence the afternoon shift from 3.00 p.m. to 11.00 p.m. did not commence work. The locomotive drivers were on strike and the night shift 11.00 p.m. to 7.00 a.m. did not work.

Accused 1 was on 3.00 p.m. to 11.00 p.m. shift and he did not work on 2nd September, 1981.

On 3rd September, 1981 accused 2 was on 7.00 a.m. to 3.00 p.m. shift. He did not work on that date and the strike continued until just after 3.00 p.m. on 3rd September, 1981.

There is no procedure laid down by the Sugar Industry Act, Section 14 dealing with industrial disputes in the sugar industry and it is only when the Independent Chairman so certifies under Section 14 that there is a dispute that its existence is recognised at law. No attempt was made to suggest that a certificate had been issued and in fact none had been issued. Consequently there was no lawfully recognised dispute on 2nd and 3rd September, 1981. In spite of the absence of any certificate the locomotive drivers and their assistants went on strike.

P.W. 2, Ahmed Raza, Personnel Officer says that following a meeting on 4th August, 1981, Accused 2 had asked that the question of drivers for the new locomotive be put before the Union President.

P.W. 1 Chirag Ali Shah, P.W. 3 David Joseph, and D.W. 2 the National President of the Union, all officials of the union, say that the proper procedure was not followed. Moreover, the complaint had been referred to the national union body along with other matters of concern to the locomotive drivers. The strike, as P.W. 1 said, was a wild cat strike.

There are about 130 locomotive drivers and assistants. How many took part in the strike is not revealed but it appears that the bulk of them did not work and traffic was held up for just under 24 hours.

It appears that although all those who were on strike may have been proceeded against the prosecution have selected the two accuseds no doubt because they were the local locomotive workers' union representatives. It was the accuseds who raised the issue on behalf of their fellow drivers. Something like 130 drivers do not come out on strike without some consensus ad idem and without in some way consulting or conferring with their delegates.

In front of the magistrate it was urged that the accuseds could not go to work when all the other drivers had struck. P.W. 1, the Secretary to the Union, asked the accuseds to tell the locomotive drivers to go to work. He says that they said the men would not listen.

P.W. 5, Subha Khan, driver of the new locomotive says that on 2nd September, 1981 he was on 9.00p.m. to 5.00 a.m. shift. When he arrived at work, at 8.45 p.m. he saw the accuseds sitting with the locomotive drivers. Accused 2 told him they were on strike and said "I want help." P.W. 5 said in cross-examination that some drivers were not in favour of a strike and he said that accused 2 assured him they were not striking about the new locomotive but about shifts and rations. The learned magistrate believed P.W. 5 as he was entitled to

do but he made an error in saying both accuseds had asked P.W. 5 not to work. It was only accused 2 who mentioned the issue of a "strike" to P.W. 5. However, the magistrate's error is scarcely material. The evidence throughout indicates that both accuseds were in responsible positions vis à vis the strike in their positions as union delegates, and that is obviously why the prosecution have selected them to be charged. It is not an unusual approach to prosecute trade union leaders or stewards and one which has been adopted from time to time in England in the case of unlawful stoppages. Figure heads in the striking body are often proceeded against as representatives of the unruly law breaking factions.

Mr. Jai Ram Reddy for the two accuseds has concentrated on the wording of the particulars of offence that the accuseds had "refused to work". He submits that there is no evidence that they refused to work. However, there was ample evidence that they took part in the unlawful or wildcat strike.

In Strouds Judicial Dictionary 4th Edition the word "strike" is allocated a whole page. It refers repeatedly to the industrial aspect in using the word "strike" and quotes numerous judicial authorities which describe a strike as a refusal of a body of workmen to work for their employers in furtherance of some claim by the workmen. The supplement thereto gives examples showing that a strike is a concerted refusal by workmen to work so as to get improvements in terms and conditions of work.

The Trade Dispute Act, Cap. 97 Section 2 defines strike as follows:-

> ". . . '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 or employees, or to aid other employees in compelling their employer or any employee or body of employees to accept or not to accept terms or conditions of or affecting employment."

In my view those explanations and definitions of the word "strike" clearly indicate that the accuseds by going on strike were refusing to work.

It is most regrettable that counsel who have insisted that the accuseds had not refused to work did not draw attention to the long standing legal interpretations, and our own statutory definition of strike.

There was ample evidence which the learned magistrate obviously accepted which support the convictions of the accuseds of the offences with which they were charged. The appeals against convictions are dismissed.

The accuseds say that the fines are excessive and that they should not have been cumulative amounting to $1,000 each. They submit that the two offences with which they have each been charged are substantially the same offence. In other words that they are charged twice for what amounts to the same wrongful conduct.

I concur in the appellants' arguments regarding the imposition of two accumulative fines. The gravamen of the wrong doing was that each accused took part in an illegal strike, that is to say each one refused to work. Their failure to drive their locomotive could, as their appeal counsel Mr. J. R. Reddy concedes, have several consequences, and under Section 15(1) of the Act each consequence would give rise to an offence. I think with respect that concurrent penalties would suffice.

Turning to the imposition of a $1,000 in fines I notice that the defence called twelve witnesses inclusive of the accuseds and the prosecution called ten witnesses. They included several trade union officials on each side and the accuseds were represented by counsel. At the end of the day the magistrate may well have mistakenly visualised the dispute as a trade union dispute in which the fine would be borne by the union. However, the union was against the strike.

Consequently the accuseds will no doubt be responsible for their own fines. There is no suggestion here of the accuseds being made "scape goats". This is not a "scape goat" situation which arises when some offence becomes prevalent and the many offenders are undetected for a long time and someone is finally caught. He may be dealt with severely to deter others but not so excessively as to make an example or "scape goat" of him.

As union delegates the accuseds had a wider insight into the background and official negotiations of the union's higher officials than the other drivers. They undoubtedly knew that the matters complained of were being attended to and knew that this was an illegal strike. The hold-up was serious and they are bound to

have been aware of it. It may seem gratuitous that two men out of the large number of strikers should bear the brunt of the illegal behaviour. But they are trade union delegates; one might in other areas describe them as "shop-stewards". The cry of punish one punish all is one which is often brought to bear on authorities and courts in the hope of making the prosecution of only one or two of a number of offenders seem unfair.

It never succeeds and for obvious reasons it cannot succeed in turning the police and the magistrates from the course of common-sense. The courts would be wrong to refrain from punishing several of a large crowd of wrongdoers simply on the ground that the almost impossible task of charging everyone had not been attempted.

Those responsible for law and order must demonstrate that penal laws such as the section in question have to be obeyed for the good of the community. If two persons out of 130 offenders are prosecuted they are unfortunate but it does not amount to injustice.

Mr. Jai Ram Reddy complains that a total fine of $1,000 is disproportionate to the accuseds' earnings of $60 per week and that a smaller fine would be more in keeping. Section 15 provides for a maximum term of two years imprisonment without reference to any specific ceiling by way of fine. The offences are serious. A group of workers who try to hold the nation to ransom merit imprisonment and the alternative of a fine introduces a measure of leniency provided it is not prohibitive. I think that $1,000 was excessive but if it were contended that a fine of $100.00 was the accuseds' absolute limit one could not impose a fine because the alternative term of imprisonment would by Section 35 of the Penal Code be limited to four months' imprisonment. The learned magistrate imposed nine months' imprisonment as an alternative to each fine amounting to eighteen months in all. In my view eighteen months would be excessive in the circumstances, but four months would be inadequate.

I would have been inclined to send the accuseds to prison without the option of a fine but since the learned magistrate provided the option I hesitate to eliminate it. Nevertheless small fines for such offences cannot be imposed.

The appeals against conviction are dismissed. The appeals against sentence are allowed to the extent that the sentences will be varied as follows:-

Accused 1 - Vellaidan

Count I .. .. Fined $500.00 or six months' imprisonment.

Count II .. .. Fined $500.00 or six months' imprisonment.

The sentences to be concurrent.

Accused 2 - Krishna Pillay

Count III .. .. Fined $500.00 or six months' imprisonment.

Count IV .. .. Fined $500.00 or six months' imprisonment.

The sentences to be concurrent, i.e. $500.00 in all or six months in all.

J. T. Williams
Judge

Lautoka,
19th November, 1982