Privy Council Appeal No. 72 of 1946

Patna Appeal No. 27 of 1945

Srinivas Mall Bairoliya and another - - - - *Appellants*

v.

The King-Emperor - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH APRIL, 1947

Present at the Hearing:

LORD THANKERTON
LORD UTHWATT
LORD DU PARCQ
SIR JOHN BEAUMONT

[*Delivered by* LORD DU PARCQ]

The appellants were convicted on the 4th November, 1943, by the Deputy Magistrate of Darbhanga, under the Defence of India Rules relating to the control of prices and were sentenced to terms of imprisonment. The Sessions Judge confirmed the convictions and the sentences. Applications to the High Court of Patna for the revision of the judgment of the Sessions Judge were dismissed. The appellants obtained special leave to appeal from the judgment of the High Court to His Majesty in Council.

Srinivas Mall Bairoliya (hereafter called the 1st appellant) was at the material time acting as Salt Agent for part of the district of Darbhanga. He had been appointed to this office in October, 1942, by the District Magistrate. It was his duty to sell to licensed retail dealers the supplies of salt which were allocated by the central Government to his part of the Darbhanga district. Sitaram Prasad, who will be referred to hereafter as the 2nd appellant, was employed by the 1st appellant, who had entrusted him with the duty of allotting the appropriate quantity of salt to each retail dealer, and noting on the buyer's licence the quantity which he had bought and received.

The proper performance of these duties was essential to the due enforcement of orders made under the Defence of India Rules. By Rule 81 (2) of these Rules, the validity of which is not in question, Provincial Governments were empowered to make orders to provide for controlling the prices at which articles or things of any description whatsoever might be sold. The Defence of India Act, 1939, under which the Rules were made, empowered the Provincial Governments to delegate the exercise of their powers to certain officers, and the power to provide by order for controlling the prices at which various articles (among them salt) might be sold otherwise than in a primary wholesale market had been in fact delegated to District Magistrates. Rule 81 (4) of the Rules provided for the punishment of persons guilty of contravening any such order.

Both the appellants were jointly charged with having sold salt on three days in July, 1943, to three named traders, in each case at a price exceeding the maximum price which had been fixed by order of the District Magistrate. The salt mentioned in the charges was of two kinds, Sambhar and rock salt, the controlled price of the former being Rs.3-2-0 per maund, and of the latter Rs. 3-5-6. The 1st appellant was also separately charged, in respect of the same sales, with having abetted the 2nd appellant's contravention of the order. The Deputy Magistrate acquitted the 1st appellant of the substantive offences, but convicted him on the three charges of abetting. He convicted the 2nd appellant on each of the three charges made against him. Both appellants were sentenced to undergo rigorous imprisonment, the 1st appellant for a term of 18 months, the 2nd for 12 months: they were also fined Rs.1,000 and Rs.500 respectively.

In addition to the Price Control Officer (Mr. A. Karim) and his clerk, twelve persons were called as witnesses at the trial, three of whom were the dealers named in the charges. The other nine were also dealers who had bought salt from the 1st appellant, and had had to deal with the 2nd appellant. The evidence of the twelve dealer witnesses is summarized in the Appellants' Case as follows:—

> " That upon their application on various dates in the month of July, 1943, to appellant No. 2 for the supply of a stated number of bags of salt, he refused to supply the required quantity unless the dealer paid to him a sum of Re.1 in respect of each bag of Sambhar salt and Rs.2 in respect of each bag of rock salt; that they paid the sums so demanded; that appellant No. 2 thereupon entered on their licences the number of bags of salt which they required and remitted Re.1 or Rs.2 of the amount so paid; that the demand of such payments was made with the knowledge and approval of appellant No. 1; and that, upon such payments being made, they presented their licences so endorsed, to Satyanarain " (another employee of the 1st appellant) " who, upon payment of the price of the quantity required by them, namely, Rs.3-2-0 per maund of Sambhar salt and Rs.3-5-6 of rock salt, authorised delivery of the amount of salt so purchased, which they duly obtained "

It appears that the 2nd appellant allowed each purchaser to take one bag without levying an additional charge for it. This accounts for the " remission " of Re.1 or Rs.2 of the total amount paid in respect of the full number of bags bought.

It was contended on behalf of both appellants that, even assuming that all these facts were proved and that there was no other valid reason for reversing the decision of the High Court, their appeals should succeed because the evidence did not establish that a larger price had been demanded or paid than that which was alleged to have been fixed by the District Magistrate's order. Most of the dealers who gave evidence agreed in cross-examination that they had regarded the payment levied by the 2nd appellant as an " illegal gratification ", and the argument was that it was merely a bribe, which went into the 2nd appellant's own pocket and formed no part of the purchase price. This argument was rejected by all the courts in India, and in their Lordships' opinion it deserved no better fate. Whatever name may be given to the sum which the 2nd appellant exacted in addition to the lawful price, it was only by paying it that the retail dealers could obtain delivery of the salt. It can make no difference that it was paid separately, and not to the same employee who received that part of the sum demanded from the buyer which, if no more had been paid, would have been a lawful charge. Nor is it material that the excess charge may, for all that appears, have remained in the 2nd appellant's pocket. The fact that he exacted the excessive charge would make him guilty, and, if the 1st appellant knew, and connived at, what his servant was doing, he cannot avoid all responsibility for the offence by the plea that he allowed the servant to retain part of the amount paid in exchange for delivery of the salt, or, in other words, part of the purchase price.

Their Lordships now proceed to deal with the other submissions which were made on the appellants' behalf. One question raised touches the jurisdiction of the Court. Rule 130 (1) of the Defence of India Rules provides that " no court or tribunal shall take cognizance of any alleged contravention of these Rules, except on a report in writing of the facts constituting such contravention, made by a public servant." It is not in dispute that Mr. A. Karim, the Price Control Officer who has been mentioned already, was a " public servant ", and it was proved that on the 16th August, 1943, he made a report in writing to the District Magistrate which was produced at the trial and was before their Lordships. This report stated in a summary way, and without naming the complainants or proposed witnesses, that the 1st and the 2nd appellant, as well as two other employees of the 1st appellant who, in the result, were acquitted, had made excessive charges for bags of salt on four named dates in July " and on other dates ". These charges were said to have been exacted from retail salt dealers of the rural area which it was the 1st appellant's business to supply. The report stated that the Price Control Officer had examined a number of these dealers and found that there was sufficient ground for presuming that the allegation was correct. It appeared at the trial that at the date of the report he had examined two of the three buyers named in the charges, but not the third, a man named Jangal Mian. The question is whether, in the circumstances, the court was justified in taking cognizance of the contraventions alleged in this report.

Their Lordships are of opinion that the main object of Rule 130 (1) is, on the face of it, obvious. It was to protect persons against charges made by private individuals, who might be irresponsible or malicious. It would not be right to interpret it as demanding a detailed formulation of charges with the names of witnesses. In many cases more specific allegations would be desirable, but in the particular circumstances of this case the Price Control Officer, with information of a series of offences before him, sufficiently complied with the rule by reporting the result of his information, tested as it had been by the examination of a number of witnesses. Although he had not examined Jangal Mian, he may well have had information with regard to the offence to which that dealer subsequently testified. It is to be observed that one of the dates specified in the Report is the 21st July, and that the transaction with Jangal Mian was the only one of that date which was alleged in the charges made. In the circumstances it may be presumed that the Price Control Officer had some knowledge of this transaction when he made his Report, and on this view of the matter their Lordships are of opinion that the court was entitled to " take cognizance " of all the offences charged against the appellants. It was submitted on behalf of the respondent that Rule 130 (1) was directory only, and that an omission to satisfy its provisions would not affect the jurisdiction of the Court. Their Lordships do not find it necessary to express any opinion on this point.

It was further contended on behalf of both appellants that no satisfactory evidence had been adduced to prove that any orders had been made, and alternatively, that it had not been proved that proper notice of the order or orders alleged had been given, so as to comply with the provisions of Rule 119 (1) of the Defence of India Rules. The material words of this Rule are as follows:—

> " Save as otherwise expressly provided in these Rules, every authority, officer or person who makes any order in writing in pursuance of any of these Rules shall, in the case of an order of a general nature or affecting a class of persons, publish notice of such order in such manner as may in the opinion of such authority, officer or person, be best adapted for informing persons whom the order concerns . . . .
>
> and thereupon, the persons . . . concerned shall be deemed to have been duly informed of the order."

It is unnecessary to quote the rest of the Rule, which refers to orders " affecting an individual person ".

The facts bearing on these contentions which were proved at the trial are as follows. Two documents were produced which bore the signature of Mr. G. P. Varma (who was Mr. Karim's predecessor as Price Control Officer) and were in the form of reports by him to the District Magistrate. They contained the Price Control Officer's recommendations as to the prices to be fixed for salt in the Darbhanga district. These reports had been submitted to the District Magistrate, with the words " For orders " immediately above the signature of Mr. Varma. The District Magistrate had written at the foot of one of these documents the words " I agree throughout ", at the foot of the other the word " Approved ", and in each case had appended his own signature. After the word " Approved " on the latter document there appear the words " Take action immediately ", signed by Mr. Varma. As these words were clearly addressed to Mr. Varma's subordinates they are important as an indication that the approval signified by the District Magistrate was intended to be acted upon without any further direction from him. The dates on which the District Magistrate (Mr. C. L. Bryson) affixed his signature to these documents were the 28th January and the 1st February, 1943. There was no other documentary evidence of any order, but Mr. Karim produced three printed price lists, dated the 19th June, the 20th July, and the 9th August, 1943, with the name of the District Magistrate, Mr. Bryson, itself also in print, at the foot of each of them. No price lists were produced bearing Mr. Bryson's written signature, and there was no evidence that he had in fact signed any such lists, or that the printed lists produced were copies of signed originals. The latest in date of the documents could have no direct relevance to any of the charges, which, it will be observed, all relate to earlier dates. The others have no evidential value in themselves. Mr. Karim, however, said in his evidence when he produced them " The price lists are distributed among the merchants through the peons ", and a clerk in his office deposed that the rates fixed were printed and were distributed among the members of the Price Control Committee, of which (he said) the 1st appellant was a member, and the shopkeepers. The lists produced may therefore be regarded as specimens of the printed papers which were so distributed.

The High Court agreed with the appellants' contention that no orders had been proved, but held that in all the circumstances the making of an order could be presumed, since the appellants had been " careful to make it appear as though no more than the controlled prices had been charged " and their conduct thus showed them to have been aware of the orders made. With all respect to the High Court, their Lordships cannot regard this reasoning as satisfactory. When once the making of an order has been proved, there may well be a presumption that it has been duly promulgated, and there may of course be evidence from which such promulgation may be inferred, but the fact that a person has acted as he might have acted if an order had been in existence, and if he had been minded to disobey it, cannot be conclusive to show either that an order has been duly made or that he has had notice of it. Their Lordships are clearly of opinion, however, that the District Magistrate intended to make, and in fact made, " orders " when he signed the documents which were submitted to him " for orders " by the Price Control Officer. The Rules do not require that orders should be in any particular form, and indeed Rule 119 (1) seems to contemplate that they may be made orally.

It remains to consider whether notice of the orders was duly published. At this stage it is legitimate to have recourse to Section 114 of the Indian Evidence Act, and to presume that the District Magistrate did what he is likely to have done, " regard being had to the common course of . . . public business ". See illustration (*e*) which gives as an instance a presumption that " official acts have been regularly performed." Apart from the presumption, there was, as has been said,

some evidence of a practice by which price lists founded on orders previously made were circulated among interested persons, including the 1st appellant. It seems highly probable that the District Magistrate thought the method of giving notice which would thus appear to have been employed " best adapted for informing persons " affected by his orders, which in their Lordships' opinion were plainly orders " affecting a class of persons ". No doubt such a presumption as existed here might easily have been rebutted, and the slight evidence given might readily have been displaced, if in fact the orders had not been brought to the notice of the appellants or at least duly promulgated. Far from its being rebutted, however, the presumption is much strengthened when it is seen that the written statements of the appellants do not suggest that they were ignorant of the controlled rate, and that the objection that it had not been proved that due notice of the order had been given appeared for the first time in the appellants' notice of application to the High Court. Their Lordships are satisfied that the point is without substance, and even if it had any technical justification it would be impossible to say in these circumstances that a miscarriage of justice had resulted.

The appellants' remaining submissions may be disposed of shortly. A number of dealers were called who spoke of transactions, not the subject of any charge, which they had had with the appellants during, or shortly before or after, the period covered by the dates of the offences charged. This evidence, if accepted, proved beyond doubt that the 1st appellant knew of the 2nd appellant's illegal exactions and connived at them. The High Court thought that this evidence was admissible only on the principal charge, and was not relevant to the charge of abetting, on which alone the 1st appellant was convicted. In their Lordships' opinion the evidence was admissible and was relevant to both charges. " A person abets the doing of a thing who . . . . intentionally aids, by any act or illegal omission, the doing of that thing " (Indian Penal Code, Section 107). It may well be that the learned Deputy Magistrate, having found as he did that the 1st appellant knew what was being done, ought to have convicted him as a principal. The 1st appellant can derive no benefit from this error, if error there were. The evidence was relevant to the charge of abetting, because it showed an intention to aid the commission of the offence and an intentional omission to put a stop to an illegal practice, which, it need hardly be added, was an " illegal omission." The evidence was thus admissible to prove intention, under Section 14 of the Indian Evidence Act.

The High Court took the view that even if the 1st appellant had not been proved to have known of the unlawful acts of the 2nd appellant, he would still be liable, on the ground that " where there is an absolute prohibition and no question of *mens rea* arises, the master is criminally liable for the acts of his servant." With due respect to the High Court, their Lordships think it necessary to express their dissent from this view. They see no ground for saying that offences against those of the Defence of India Rules here in question are within the limited and exceptional class of offences which can be held to be committed without a guilty mind. See the judgment of Wright J. in *Sherras* v. *De Rutzen* [1895] 1 Q.B. 918, at p. 921. Offences which are within that class are usually of a comparatively minor character, and it would be a surprising result of this delegated legislation if a person who was morally innocent of blame could be held vicariously liable for a servant's crime and so punishable " with imprisonment for a term which may extend to three years." Their Lordships agree with the view which was recently expressed by the Lord Chief Justice of England, when he said: " It is in my opinion of the utmost importance for the protection of the liberty of the subject that the court should always bear in mind that, unless the statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind." (*Brend* v. *Wood* 110 J.P. 317, at p. 318.)

Some complaint was made that the Deputy Magistrate had paid attention to recorded statements of persons who were not called to give evidence before him. It will suffice to say as to this that if those statements are wholly left out of account there was still ample evidence to justify the Deputy Magistrate's decision. (See Section 167 of the Indian Evidence Act.)

Finally, it was urged that reliance had been placed on the uncorroborated evidence of accomplices. Section 133 of the Indian Evidence Act expressly provides that " an accomplice shall be a competent witness against an accused person " and that " a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." No doubt the evidence of accomplices ought as a rule to be regarded with suspicion. The degree of suspicion which will attach to it must however vary according to the extent and nature of the complicity: sometimes, as was said by Sir John Beaumont, C.J. in *Papa Kamalkhan* v. *Emperor* (1935) I.L.R. 59 Bombay 486, the accomplice is " not a willing participant in the offence but a victim of it." There is ground for saying that the accomplices in this case acted under a form of pressure which it would have required some firmness to resist.

In the result their Lordships find no sufficient reason for reversing the decision of the Courts in India, and they will humbly advise His Majesty that the appeal should be dismissed.

(56861) Wt. 8013—20 5/47 D.L. G. 338

In the Privy Council

SRINIVAS MALL BAIROLIYA
AND ANOTHER

v.

THE KING-EMPEROR

DELIVERED BY LORD DU PARCQ

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1947