

J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL No. 143/1976

BEFORE: The Hon. Mr. Justice Luckhoo, J.A.(Presiding)
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Swaby, J.A.

FRANK GORDON ET AL v. R.

F.M.G. Phipps, Q.C. and E. deLisser for the appellants.

G. Andrade, Deputy Director of Public Prosecutions and

Mrs. S. Lewis for the Crown.

September 23, 29; October 8;
November 9; December 1, 1976

LUCKHOO, J.A.:

Each of the appellants was charged on a separate information which in each case alleged that during the period between the 23rd day of October and the 25th day of October 1975 being a worker employed to Jamaica Omnibus Services Limited, in an undertaking which provides an essential service namely - Public Passenger Transport Services for the Corporate Area, during the said period of an unlawful industrial Action in the said undertaking unlawfully did cease to continue the work which it was his duty under the contract of employment to do namely - the work of a driver, contrary to Section 13(2) of the Labour Relations and Industrial Dispute Act, 1975.

When the informations came on for trial before a resident magistrate for the parish of Kingston the prosecution successfully applied for a joint trial of the appellants (and three other persons who were similarly charged and subsequently acquitted) invoking the provisions of s. 22(1) of the Criminal Justice Administration Act which provides for a joint trial of informations where the

offences charged therein are alleged to arise out of one transaction. The prosecution alleged that all of the defendants acted together in a joint enterprise.

The appellants were convicted on the informations as laid and were each fined the sum of \$200.

The appellants have all appealed against their convictions and sentences.

The case for the prosecution was to the effect that the defendants were at all material times employed under contracts of service to the Jamaica Omnibus Service Ltd. (hereinafter referred to as "J.O.S.") as drivers of their motor buses. J.O.S. is an undertaking within the contemplation of the Labour Relations and Industrial Disputes Act, 1975 (No.14) which provides a public passenger transport service with exclusive franchise for the Corporate Area and is under the Act an essential service. On October 22, 1975 there came into existence a dispute between the J.O.S. management and its drivers when one of the drivers (Parkinson) was suspended for a period of two weeks retroactive to October 12, 1975. This dispute though still in existence was not referred to the Minister of Labour as was required by the provisions of s. 9 of the Labour Relations and Industrial Disputes Act, 1975 before there was a concerted stoppage of work by drivers of J.O.S. motor buses on October 23, 1975, as industrial action in furtherance of the dispute. The resulting strike was by virtue of s. 9(5) an unlawful industrial action.

The period of unlawful industrial actions lasted from October 23 to October 25 and on October 26 the drivers returned to work in compliance with a back to work formula reached at a meeting attended by representatives of management of the J.O.S. and officials of those unions representing drivers of J.O.S. That meeting held on October 25 was arranged by the Director of Industrial Relations in the Ministry of Labour and Employment who had on October 23 received information relating to the strike. During the period of unlawful industrial action the defendants were scheduled

to work, that is to drive, their employers' buses (save that the defendants Alvin Blake, Horace Cargill and Aston Walters had a rest day on October 24). They did not turn up for work on October 24 nor on October 25. On October 23 they had stopped working on a phased basis acting in a concerted manner in furtherance of the dispute which existed over the suspension of driver Parkinson.

The case for the defendants was that they stopped work on October 23 because the conductors had stopped working, it being provided by J.O.S. regulations that no motor bus should be operated without a conductor being present.

The learned resident magistrate rejected the defendants' statements in this regard and inter alia came to the following conclusions -

- (i) that the stoppage of work by the defendants was in the circumstances an unlawful industrial action;
- (ii) that the period of unlawful industrial action lasted from October 23 - 25;
- (iii) "that during this unlawful industrial action they (defendants) abstained from or refused to continue the work of transporting the public until October 26, 1975 after the 'back to work formula' was agreed on;"
- (iv) that "all the defendants were scheduled to work on 23rd - 25th inclusive with exception of Alvin Blake, Horace Cargill and Aston Walters who had "off" day or "rest" day on Friday 24th only;"
- (v) that no defendant reported for duty on October 24 or October 25;
- (vi) that the defendants either did not complete a shift on October 23, 1975 or as in the case of the defendant Noel Willis was signed off by an inspector at a time

earlier than scheduled for the completion of his shift for that day;

- (vii) that "in the final analysis on October 23, 1975 the drivers ceased working on a phased basis in a concerted manner and did not resume work until October 26, 1975."

A number of grounds of appeal were urged in support of the appellants' appeal.

Firstly, it was submitted by Mr. Phipps that the respective informations laid against the appellants disclosed no offence under the provisions of s. 13(2) of the Labour Relations and Industrial Disputes Act, 1975. That subsection so far as it is relevant provides as follows -

"(2) Any worker who, during the period of an unlawful industrial action which is taken in the undertaking in which he is employed -

(a) ceases or abstains from, or refuses to continue, any work which it is his duty, under his contract of employment to do; or

(b)

shall, unless he proves that he did so in any of the circumstances specified in subsection (3); be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding two hundred dollars."

Subsection (3) is as follows -

"(3) The circumstances referred to in subsection (2) are that the action in respect of which the worker is charged was done -

(a) under duress and in circumstances in which he could not reasonably be expected to take any other action;

(b) for a reason wholly unconnected with the unlawful industrial action referred to in subsection (2)".

Mr. Phipps contended that there is no such offence under s.13(2) of the Act as "ceasing to continue" work as distinct from "ceasing" work. Mr. Andrade for the Crown on the other hand contended that the words "to continue" were mere surplusage and may be disregarded. We announced that we would overrule the submission and continue hearing the appeal on the other grounds filed but would give our reasons for so doing later on. This we now will proceed to do. We take the view that before a worker can "cease" to do work he must necessarily have been doing work and so his ceasing work would necessarily involve his ceasing to continue the work he was employed to do. We are therefore in agreement with Mr. Andrade's contention that the words "to continue" in the context of the paragraph of the subsection are mere surplusage. We do not agree with Mr. Phipps' further contention that the presence of the words "refuses to continue" in the paragraph would avoid such a construction.

The next question is whether the evidence adduced on the part of the prosecution and accepted by the learned resident magistrate supports a finding that the defendant "ceased work which it is his duty, under his contract of employment, to do." In considering this question we will proceed upon the assumption that the prosecution proved by admissible evidence those other matters which it had set out to prove. Upon such assumption the prosecution proved that the defendants stopped work on a phased basis on October 23 in a concerted manner in furtherance of the dispute which existed over the suspension of driver Parkinson; that they did not report for work on October 24 and 25; that they resumed work on October 26. That would support an information charging "abstaining" from work on October 24 and 25, which, however, was not the charge laid in these cases and perhaps would support an information charging "refusing to continue" work on October 23, which also was not the charge laid in these cases, as after the strike

had been initiated they refrained from continuing to perform the work which they had to do that day. But did they "cease" work which it was their duty under their contracts of employment to do?

Paragraph (a) of s. 13(2) of the Act contemplates that in furtherance of a strike which is in existence a worker might take one or more of the three courses of action specified in that paragraph namely, ceasing or abstaining from or refusing to continue work which it is his duty under his contract of employment to do. Abstaining from work means not to undertake the performance of work at all. When he refuses to continue work he stops work he had already begun but has not yet completed and there need not of necessity be a demand to continue the work followed by a refusal on his part to do so. The refusal may be by conduct and it constitutes a refusal to continue work when the work is without some lawful reason left uncompleted. When a worker ceases work there is, in the context of the paragraph a termination by him of his employment and if he does so in breach of his contract of employment and otherwise than in one of the circumstances set out in subsection (3) of s. 18 the offence of ceasing any work will have been committed.

We are unable to agree with Mr. Andrade's contention that in the context of the enactment the work "ceases" bears not only the meaning of a permanent cessation of employment but also a temporary cessation of work by the worker and that this is so despite the inclusion in the paragraph of the words "refuses to continue" which contemplates cessation of work by the worker.

In the cases under appeal none of the appellants terminated his employment. They all returned to work on October 26.

Mr. Andrade contended that paragraph (a) of s. 19(2) of the Act contemplates one offence - that of a worker withholding his labour during the period of a strike - and that the paragraph designates three different modes by which such an offence might be committed, namely, by ceasing work, by abstaining from work and by refusing to continue work and that it is immaterial which of the three

modes is specified in an information so long as the evidence adduced supports one or other of those modes. In that connection reliance was placed on the judgment of the Divisional Court in England in Thomson v. Knights (1947) K.B. 336 where an information for driving under the influence of drink or drug - a charge in the disjunctive - was held not to be bad for duplicity as it charged only one offence, namely, driving while in a disabled condition. The information in the instant cases do not charge an offence in the disjunctive. Further, the paragraph contemplates not one but three separate and distinct offences which a worker might commit in furtherance of a strike during the period of that strike. In Thomson v. Knights the offence charged was driving while in a disabled condition - a condition resulting from the ingestion of drink or drug. The appellants were charged with ceasing to work and the evidence does not support such a charge. They were not charged with "abstaining from" work nor were they charged with "refusing to continue" work. They were not required to answer to any such charges and cannot therefore be convicted of any such charges. See Budhu v. Allen (1962) W.I.R. 420. F.S.C.

By paragraph (a) of s. 13(2) of the Act the offences contemplated are that during the period of a strike a worker

- (i) terminates his contract of employment;
- (ii) does not do the work he is assigned to do;
- (iii) stops doing the work he was engaged in doing before it is completed,

all without one or other of the lawful excuses provided by s. 13(3) of the Act.

In Thomson v. Knights one act was forbidden by law, that of driving while in a disabled condition. In the cases contemplated by s. 13(2) of the Act, three different and distinct acts listed above are forbidden by law during the period of a strike. It is true that the resulting effect is in each case a furtherance of the unlawful industrial action. It is the act itself which constitutes the offence and not its resultant effect. To construe

the paragraph in the way suggested by Mr. Andrade would be to read words into the paragraph which are not there and for this to be done there is no warrant.

Our view on this aspect of the appeal does not require us to consider the other grounds of appeal urged on behalf of the appellants.

In the result the appeals are allowed, the convictions are quashed and the sentences are set aside.