JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL No. 76/84

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.

HEINZ SIMONITCH v. REGINA

Mr. & Mrs. B. Macaulay for Appellant

Mr. F.A. Smith for Crown

7th March, 1985

ROWE, P.:

Heinz Simonitch, the appellant herein, was on the 25th of August, 1983, convicted in the Resident Magistrate's Court in St. James on two informations. One charged him that he, with force at Half Moon Hotel in St. James, unlawfully refused to supply to the Minister the information within specified time required, pursuant to Regulation 3 (3) of the Labour Relations and Industrial Disputes Regulations 1975, made under section 27 of the Labour Relations and Industrial Disputes Act, which request was contained in a letter dated the 18th of March, 1982, and contrary to section 3 (6) of the said Regulations. The second information charged him with a similar offence, but the date of the letter of request was stated to be the 6th of April, 1982. On each information he was fined a sum of a Thousand Dollars and in addition to pay costs of Five Hundred Dollars.

At the end of the trial, Mr. Macaulay who then appeared for the appellant, gave verbal notice of appeal and included at that time two grounds on which the appeal was based. Firstly, that the learned trial judge erred in law in overruling his submission of no case, and, secondly, that the judgment of the Resident Magistrate was unreasonable having regard to the evidence and could not be supported. He later filed and was given permission to argue, a series of supplementary grounds. They are numbered three to nine and I will read them for the sake of completeness.

"Ground 3.- The evidence disclosed that there was no doubt or dispute under section 5 (1) of the Labour Relations and Industrial Disputes Act. The Minister therefore, had no power to act under Regulation 3 (1) of the Labour Relations Regulations since that Regulation provide that the power to act must be the power derived from section 5 of the Act.

4. Assuming that the Minister can act without the conditions precedent stated in section 5 of the Act, there was no evidence that he received Form 1. The list produced in the evidence did not disclose the list of members of the BITU, as required by Regulation 3 (1).

5. On the evidence, it was clear that the appellant was Director of Half Moon Bay Ltd., which owns and operates the Half Moon Bay Hotel. There was no evidence that the letter in question from the Ministry, (not the Minister or by his general or special direction) was addressed to him, nor was there any evidence that any contact was made with him by anyone, at any time; yet he was charged in his personal capacity.

6. Assuming that he was not charged in his personal capacity, there was no evidence that he consented to the refusal to the alleged request, or connived, or did not exercise any reasonable diligence as he ought in the circumstances to have exercised to prevent the offence. The request, however, was not even made to the Company.

"7. The submission- of the Crown clearly implied that Half Moon Bay Ltd., was the employer and not the appellant; in which case, the Magistrate should in limine have dismissed the charge against the appellant.

8. The Magistrate erred in law in impliedly holding that no response to Exhibits 6 and 7 tantamounted to a refusal. Exhibits 6 and 7 dated 18th March, 1983, and 6th March, 1983, respectively, were not addressed to the appellant or to the Company which owns the hotel. "

I think that the reference to 6th "March" here should really be, to 6th April, 1983.

"9. The Magistrate erred in law in treating both informations 7501 and 7502 as constituting two separate refusals. In doing so, he impliedly held that there was a refusal between the 18th March, 1983, and the 6th of April, 1983, which refusal ended on that latter date and the new refusal on the latter date. In any case, time was the essence of the offence, and the time stated in the information were the dates on which the letter was written, which means that the refusal occurred on the dates on which the letter was written. In any event, the Ministry, (and not the Minister, or anyone by his general or special direction), on the evidence of Mr. Tyne, only treated the refusal as being that of the alleged request contained in the letter of 6th April, 1983."

As I said, these are rather lengthy grounds and Mr. Macaulay treated grounds three to eight as really an extension of ground one.

The evidence on which the crown relied was to this wise: Grethel Wilks who had worked at Half Moon Hotel for some twenty-five years, said she had a grouse and as a result of this grouse she contacted some of her co-workers and went along and spoke to the BITU representative, Mr. Crooks, at Church Street in Montego Bay, and he gave her some instructions. As a result of the instructions she collected some one hundred names of persons who worked at Half Moon Hotel, submitted those names to the BITU and it appears that those persons became members of the BITU.

Mr. Vincent Crooks, on behalf of the BITU, sent a letter to Half Moon Hotel, and it appears it was addressed to the Managing Director and was received by somebody who represented herself as the Secretary to the Managing Director. Nothing came of it, and a report was made by the Union Officer to his head office, as a result of which Mr. Lascelles Beckford, the Vice-President of the BITU, wrote to the Permanent Secretary of the Ministry of Labour on the 9th March, 1982 submitting a certificate of membership on the specified form and requesting that the Minister of Labour cause a ballot to be taken in relation to the workers at Half Moon Hotel.

A letter was sent by the Ministry dated the 18th of March, 1982, to "The Managing Director, Half Moon Hotel and Club, P.O. Box 80, Montego Bay", the first paragraph of which said:

> "I am directed to request that in accordance with Regulation 3 sub-regulation 3 of the Labour Relations and Industrial Disputes Regualtions 1975, you submit to this Ministry within seven days of receipt of this letter the undermentioned information: "

and sub-paragraph (a) asked for:

> "The names of all chambermaids, laundry, bar waiters, bartenders, pastry staff, bar porters, maintenance, carpenters, painters, plumbers, scullions, storekeepers, electricians, waiters, bell-hops, cooks, beach attendants, general helpers, all the line staff excluding managerial and executive staff. "

There were other requests numbered (b) to (h) of which I need make no mention; and that letter was signed by Mr. M.O. Tyne for the Permanent Secretary.

No reply having been received to this letter, on the 6th of April a reminder was sent by registered post to the "Managing Director, Half Moon Hotel and Club, P.O. Box 80, Montego Bay", and that letter ended up by saying:

> "The Labour Relations and Industrial Disputes Regulations, Regulation 3 (6) make failure to supply such information an offence, and if the information is not received within five days of the date of this letter, consideration will be given to the initiation of appropriate legal action."

That letter was not returned to the Ministry unclaimed.

In the course of the hearing of the charges which we are told were preferred under the directions of the Director of Public Prosecutions, the prosecution was required to prove that the appellant, Simonitch, was an employer within the meaning of the Labour Relations and Industrial Disputes Act and the Regulations made thereunder. Evidence came from Grethel Wilks that at no time did she speak to Mr. Simonitch about her grouse. She would get paid by the Pay Clerk, and she said that Mr. Simonitch gave instructions for her to be paid, but when cross-examined as to why she said this, she said that at no time did she ever see or hear Mr. Simonitch giving such instructions.

Nobody else who gave evidence spoke of any direct relationship between Mr. Simonitch and the Half Moon Hotel, except that Grethel Wilks produced hotel stationery which she said was put into hotel rooms from time to time. One of these documents put in evidence contained the logo "Half Moon," partly in shade and partly in black, and then it related that it referred to the "Hotel and Cottage Colony, Montego Bay, Jamaica, West Indies," and "E.W. Simonitch, Managing Director." And the second one simply read, "The Half Moon Club," without any indication as to who might be in charge.

Mr. Macaulay's first point, therefore, was that the prosecution had failed to prove that the appellant was an employer. The Labour Relations and Industrial Disputes Act which became law in 1975 and under which the Minister is given a power to cause ballots to be taken in certain circumstances,

in section 2 thereof defines an employer, and 'employer' there is defined to mean a person for whom one or more workers work or have worked or normally work or seek to work. The submission of Mr. Macaulay was that if the evidence is that Mr. Simonitch is Managing Director of a particular entity, then at best he would himself be an employee and would not qualify as an employer, having regard to the definition in section 2 of the Act.

In support of his arguments that Mr. Simonitch in his capacity as Managing Director was an employee, Mr. Macaulay referred us to the case of Lee v. Lee's Air Farming Ltd., [1961] A.C. 12 a case from New Zealand, and that case sufficiently exemplifies the principle that a company is entirely different from its officers, even if the sole shareholder or the majority shareholder, is the only officer of the company.

Mr. Macaulay submitted that the Minister had a power under section 5 of the Act to require ballots to be taken but only if there is any doubt or dispute as to whether the workers or a particular category of workers in the employment of an employer wish any, and if so, which trade union to have bargaining rights in relation to them. So, he said, on the evidence of Wilks and of the other persons who were called, there was nothing to show that there was any dispute or doubt. It appears that Mr. Macaulay might have been giving the words 'dispute or doubt' a much too narrow meaning. If an application is made to the Minister under section 5 and if the Minister is unsure as to whether the workers in a particular employment wish to have bargaining rights through the trade union making the application then he is in doubt and it therefore appears that the word 'doubt' is wide enough to cover the situation which arose in this particular case. The relevant Regulation, made under section 5 is Regulation 3 and sub-regulation 3 (1) says:

> "The Minister may cause a ballot to be taken under section 5 of the Act if -
>
> (a) a request in writing to do so is made to him by a trade union (hereafter in the Regulations referred to as the applicant) and a certificate in the form set out as Form 1 in the Schedule is supplied to him. "

The Union initiated the proceedings with a letter on the prescribed form to which I earlier referred from Mr. Beckford to the Ministry.

Then Regulation 3, sub-regulation (3) says:

> "The Minister may, pursuant to paragraph 2, require the employer to supply him within such period as the Minister may specify, with such information as the Minister thinks necessary in respect of the workers in relation to whom the request for the ballot has been made, and in particular may require the employer to state ..... "

and thereafter is set out, a series of things for which the Minister may ask. The letters of the 18th of March and the 6th of April from the Ministry to the Managing Director of Half Moon Hotel and Club contained a full list of the particulars which the Minister has power to request.

The sanction which is provided for refusal to obey the requirement of the Minister in sub-regulation (3) is provided in sub-regulation (6) of Regulation 3, and it there says:

> "Any person who refuses to supply to the Minister any information which the Minister, pursuant to this Regulation requires him in writing to supply, or who wilfully gives false information in a certificate referred to in sub-paragraph (a) of paragraph (1), shall be guilty of an offence and be liable, on summary conviction before a Resident Magistrate, to a fine not exceeding one thousand dollars."

It is observed that this sub-regulation uses the words "any person" but it is clear to us, and in this we agree with Mr. Macaulay, (and we do not understand the Crown to have been saying any thing different), that the words "any person" when used here must refer to the persons from whom the Minister is empowered to require information under sub-rule (3) and that that "person" must be an employer. So, "any person" here

really refers to "any employer".

Now, as the evidence developed there was a suggestion from the defence during cross-examination that whatever was happening at Half Moon Hotel was being run by a company known as Half Moon Bay Limited. When this was introduced by the defence, the prosecution objected on the basis that that was an irrelevant matter in the particular case. The notes of evidence disclose that Mr. Macaulay attempted to put in a Certificate of Incorporation relating to the Half Moon Bay Limited and the Deputy Director of Public Prosecutions objected to this being made an exhibit on the ground that it was irrelevant, that Half Moon Bay Limited was not before the court; and he went on to say that there was no evidence before the court that Half Moon Bay Limited operated the Half Moon Club.

Later on in the course of the case, Mr. Macaulay again returned to this particular question, when Mr. Beckford was being cross-examined, and Mr. Beckford was asked whether he had ever discussed the dispute about which he was speaking with Half Moon Bay Limited, and whether if up to 1982 the BITU had written to the Half Moon Bay Limited. To this Mr. Smith again objected saying it was irrelevant to the proceedings as Half Moon Bay Limited was not before the court and he repeated his contention that there was no evidence that Half Moon Bay Limited "is trading as Half Moon Hotel or Half Moon Club and Half Moon Hotel or Half Moon Club and Cottages". In our view what had to be first resolved was whether the activity being carried on at Half Moon Hotel was being carried on by Half Moon Hotel as an incorporated body, or whether it was being done by an un-incorporated body, or was it being done by a person as his own endeavour.

Mr. Smith submitted that there was evidence on which the court could find that Half Moon Hotel and Club by whatever name called was operated and controlled and managed by the appellant and was but the trade name of the appellant's endeavour. So, the prosecution, was therefore, primarily based on the allegation that the appellant was himself carrying on a business as Half Moon Hotel and was consequently the employer.

It does not seem to us that the meagre evidence given by Grethel Wilks supports that contention. At best the appellant was being treated as Managing Director. When indeed the Certificate of Incorporation from Half Moon Bay Limited was put in evidence, it disclosed that Simonitch was a director and shareholder of that particular entity. In our view all the evidence pointed in one direction and that was to show that the appellant was not himself an employer within the meaning of the Act.

Mr. Smith at the end of the day sought to place the crown's case on a second limb, a limb on which the crown submitted that Simonitch could be convicted in his capacity as a Director of the Half Moon Bay Limited. Mr. Smith was able to make the submission by virtue of certain provisions contained in the Interpretation Act. Now, since 1968 provision has been made for directors of limited liability companies to be personally responsible for some of the criminal activities committed by their companies. Section 49 (2) is the relevant section. Section 49 (2) reads:

> "Where an offence under any Act passed after the 1st of April, 1968, has been committed by a body corporate, the liability of whose members is limited, then notwithstanding and without prejudice to the liability of that body, any person who at the time of such commission was a director, general manager, secretary or other similar officer of that body, or was purporting to act in any such capacity, shall

> "subject to section 3, be liable to be prosecuted as if he had personally committed that offence, and shall, if on such prosecution it is proved to the satisfaction of the court that he consented to or connived at, or did not exercise all such reasonable diligence as he ought in the circumstances to have exercised to prevent the offence, having regard to the nature of his functions in that capacity and to all the circumstances, be liable to the like conviction and punishment as if he had personally been guilty of that offence. "

The crown submitted that the informations which charged the appellant in his own name without any reference to his position as a director of a particular limited liability company were sufficient to charge offences punishable under this section because the appellant was in fact the Managing Director of a body corporate which had committed the offence of refusing to supply the information which the Minister required.

Mr. Macaulay answered this contention in two ways. Firstly, he said, it must be shown that a corporate body had committed the offence, but for this to be shown it must be proved by the prosecution that the corporate body had been served with the document from the Ministry of Labour. Service upon a company may be made by virtue of section 370 of the Companies Act by leaving the document or other legal proceeding at the company's registered office or by sending it by post to that registered office, and in those circumstances the document etc. would have to be addressed to the Secretary of the company who would have legal authority to receive those documents.

With regard to the Labour Relations and Industrial Disputes Act, the following special provisions for service are contained in section 26:

> "Any award or other document which may be, or is required by or under this Act to be, served on or given to any person or trade union, shall be deemed to be served or given if it is delivered to that person, or is sent to him by registered post at his last known place of business or abode, or in the case of a trade union or any other body or association of persons if it is delivered or sent by registered post to the secretary or clerk of that trade union or association, at its registered or principal office. "

So, Mr. Macaulay says that what ought to have been done in the instant case if the prosecution was relying on service upon the body corporate, was for the letters from the Ministry to have been sent to the registered office of Half Moon Bay Limited addressed to the secretary of that body. On the evidence no such attempt had been made by the Ministry of Labour and the only attempt at service was upon the Managing Director of Half Moon Hotel Limited and Half Moon Hotel, an entity certainly quite different as a legal personality from Half Moon Bay Limited.

The second challenge to the application of section 49 (2) of the Interpretation Act which was mounted by Mr. Macaulay was that the information was bad because it should have indicated in its body, to the person charged, that he was being charged in his capacity as a director, and then evidence would or could be led by him to show that he had neither consented nor connived at, as the case may be to the acts alleged, nor had he acted without reasonable diligence. But, it was submitted, in its present form the information was not sufficient to bring to the appellant's mind that he was being charged as an officer of the company who had neglected to carry out his duties as such.

Whatever may be said about the form of the information, we are satisfied that the crown has failed to prove that the body corporate had been served with the letters from the Minister of Labour and had failed to respond and so had committed an offence under the Labour Relations and Industrial Disputes Act. And if the company had not committed the offence, then it would not be possible for one of its directors to be personally charged and be liable to conviction by virtue of the provisions of section 49 (2) of the Interpretation Act. In our view the prosecution failed on this ground.

The third element which Mr. Macaulay did refer to, and which the court, in the course of the arguments, referred to, was that it was not open to the prosecution to bring a case against Simonitch personally and to say at all times that he was being charged with running this business as his own endeavour, and at the last minute to switch around and say, very well, we have been unable to prove that, so, convict him please for being a director who did not exercise due care or who connived at, or who did some other act which as a director he ought not to have done. We do not think that the crown could ride two such horses on the same information and we would never allow a conviction on that second limb to stand.

Mr. Smith in his submissions to us admitted that the prosecution was in some difficulty to determine who in fact was the employer. It is a difficulty which cannot be resolved by the court but rather one which should have been cleared up at the investigative level.

We are of the view that the principal submissions made by Mr. Macaulay in support of his grounds were very well founded and that the appeal in relation to both informations must succeed. Insofar as he said that the appellant could not properly be convicted on both informations, that too seems sustainable,

because the second of the letters was but a reminder that the first had not been complied with and was not itself, a second demand which could lead to a second conviction and penalty.

There is only one aspect of the matter which is left to be decided and that is the question of costs. Under section 271 of the Resident Magistrate's Act it is open to a magistrate who hears a case in his special statutory summary jurisdiction where the case is brought before him on information, to order costs to be paid either by the informant or the defendant as he may deem just and reasonable; and then the section goes on to provide for sanctions in cases where it is not paid. An application was made by the crown in this particular case for an award of costs and it was granted. The crown did not in the course of the case, so far as the notes go, give any basis on which it was asking the court to make the award, nor did the court in making the award give any basis whatsoever on which it was grounded.

We have taken the view that in the normal case which comes before the Resident Magistrate exercising his special statutory summary jurisdiction, orders for costs are not made. If, therefore, there is going to be an order for costs, special circumstances should exist. There are some jurisdictions where statutory provisions are made for costs in criminal cases which relate not only to informations but indictments. We do not have such legislation in Jamaica and it does not seem that it would be right for costs to be ordered without any guide or without any measure as to the figure selected. Mr. Macaulay has asked for costs. We do not think that, although the matter is determined in favour of the appellant, we should make any order for costs in favour to the appellant. But we do make an order, that the fines and costs which have already been paid by the appellant be refunded to him.

The appeals are allowed, the convictions and sentences are set aside and verdicts of acquittal are entered. There will be no order as to costs. It is ordered that the fines and costs paid by the appellant be refunded.