1964

April 7

STATE OF GUJARAT

v.

KANSARA MANILAL BHIKHALAL

[M. HIDAYATULLAH AND N. RAJAGOPALA AYYANGAR, JJ.]

Factories Act, 1948 (*Act 63 of 1948, ss. 61, 63, 101 and 117—System of work—Hours changed—Failure to notify—Applicability of s. 61(10)—Protective clause—Scope Responsibility of offence*—Mens Rea, *if necessary to establish.*

On inspection three of the workmen were found working in a factory before their shift commenced. It was stated that the Inspector of Factories was informed by a letter written a day prior to this inspection about the change of the timing though the letter did not reach the Inspector till the day after the inspection. This change in the hours of work was not notified and displayed as required by s. 61(1) of the Factories Act. The respondent as the occupied/manager of the factory was convicted under s. 63 of the Act. On appeal, the Sessions Judge acquitted the respondent holding that the second part of s. 61(10) of the Act applied to a case of second or subsequent change in the system of work in a factory and this being the first change there was no need to wait for a week or to obtain the previous sanction of the Inspector as required by the later part of s. 61(10), and further s. 117 of the Act protected the action because it was bonafide. The State appealed to the High Court which agreed with the Sessions Judge in his interpretation of s. 61(10) but expressed no opinion on s. 117 of the Act and it dismissed the appeal. On appeal by special leave:

Held: (i) The respondent was not saved from the operation of s. 63 which is peremptory, by reason of anything contained in s. 61(10) and the sending of the letter to the Inspector of Factories was therefore misconceived. The words "change in the system of work in any factory which will necessitate a change in the notice" in s. 61(10) refer not to departure from the notice but to *a change in the system*, a change which would require the notice to be recast. The notice shows "the period during which adult workers may be required to work" and these words are descriptive of the scheme of employment of labour in the factory but are not apt to contemplate the time of employment for each individual worker. That can only be found by referring to the register which goes with the notice. Sub-section (1) makes no mention of the change in the register but of the change in the notice and thereby indicates that the change which is contemplated is an over all change affective to a whole group and not an individual worker. The latter part of the sub-section also points in the same direction because it implies that such changes should not be frequent and if the change is for the second time it should not be made until one week has elapsed since the last change.

(ii) The language of s. 117 of the Act is not limited to officers but is made wide to include "any person". The protection conferred can only be claimed by a person who can plead that he was required to do or omit to do something under the Act or that he intended to comply with any of its provisions. It cannot confer immunity in respect of actions which are not done under the Act but are done contrary to it.

(iii) The occupier and manager, are exempted from liability in certain cases mentioned in s. 101. Where an occupier or a manager is charged with an offence he is entitled to make a complaint in his own turn against any person who was the actual offender and on such proof the occupier or the manager is absolved from liability. This shows that compliance with the peremptory provisions of the Act is essential and unless the occupier or the manager brings the real offender to book he must bear the responsibility. It is not necessary that *mens rea* must always be established. The responsibility exists without a guilty mind.

Ranjit Singh v. *Emperor*, A.I.R. (1943) Oudh 308, *Ranjit Singh* v. *Emperor*, A.I.R. (1943) *Oudh* 311, *Public Prosecutor* v. *Mangaldas Thakkar*, *A.I.R.* [1958] Andh. Pra. 79, *In re P. Lakshmaiah Naidu*, I.L.R. [1958] Andh. Pra. 925, *Public Prosecutor* v. *Vattem Venkatramayya*, A.I.R. 1963. Andh. Pra. 106, *Provincial Government C.P. and Berar* v. *Seth Chapsi Dhanji Oswal Bhate and Anr.* I.L.R. [1940] Nag. 257 and *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *H. E. Watson*, A.I.R. 1934 *Cal.* 730, referred to.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 5 of 1963. Appeal by special leave from the judgment and order dated June 21, 1962 of the Gujarat High Court in Criminal Appeal No. 383 of 1961.

D. R. Prem and *B. R. G. K. Achar*, for the appellant.

M. V. Goswami, for the respondent.

April 7, 1962. The Judgment of the Court was delivered by

Hidayatullah, J.

HIDAYATULLAH, J.—On June 21, 1960 at 5-50 A.M. the Inspector of Factories, Bhavnagar, visited Saurashtra Metal and Mechanical Works, Wadhwan City, which is a factory within the meaning of s. 2(m)(i) of the Factories Act, 1948. He found seven workmen working on a machine and on examining the notice of period of work for adult workers and the register of workers he found that three of the workmen belonged to a group which was expected to begin work from 7 A.M. He commenced proceedings under s. 63 of the Factories Act, 1948 against the respondent Mr. Kansara Manilal Bhikhalal as the occupier/manager of the factory, after issuing notice to him to show cause. He asked for enhanced penalty under s. 94 of the Factories Act because the said Mr. Manilal Bhikhalal was convicted on a previous occasion in three cases. As three workmen were concerned three separate complaints were filed in the Court of the Judicial Magistrate, First Class, Wadhwan City.

The defence of the respondent was that he was not the occupier and manager of the factory. It may be pointed out that one Mr. Dangi and the respondent are partners. They have another factory at Dharangadhra and the defence was that Mr. Bhikhalal was manager at the Dharangadhra factory

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and Mr. Dangi was manager at Wadhwan. Another defence was that a machine had gone out of order the previous day and after it was repaired work was started a little earlier the next day, because production had suffered and goods were required. The Inspector, it was stated, was informed by a letter (Ext. 11) written on the 20th about the change of timing though the letter, unfortunately, did not reach the Inspector till the 22nd. It was admitted that this change in the hours of work was not notified and displayed as required by s. 61(1). It was urged that s. 61(10) permitted a change to be made in the system of work in a factory and as this provision was fully complied with, there was no offence. The Judicial Magistrate did not accept these defences. According to him, Mr. Dangi's letter (Ext. 15) showed that the respondent was the occupier and the manager of the factory at Wadhwan. On the second defence the Magistrate was of the opinion that the hours of work could not be changed without the permission of the Inspector of Factories under sub-s. (10) of s. 61. The contention on behalf of the respondent that this being the first change it was not necessary to wait for one week before making another change, was not accepted because it was held that the factory manager must always wait for one week before introducing a change. The respondent was, therefore, convicted under s. 63 of the Factories Act in respect of three offences and under s. 94, enhanced punishment was imposed upon him by ordering him to pay a fine of Rs. 100 in respect of each offence.

On appeal the Sessions Judge of Surendranagar ordered the acquittal of the respondent. The learned Sessions Judge held that the second part of s. 61(10) applied to a case of second or subsequent change and this being the first change it did not fall within the second part. According to the Sessions Judge, it fell in the first part of the sub-section and the change could not be said to have been effected in breach of that part since the Inspector of Factories was informed about the change. The learned Sessions Judge was also of the opinion that s. 117 of the Factories Act protected the action because it was *bonafide*. The conviction and sentence were accordingly set aside. The State of Gujarat appealed against the acquittal but was unsuccessful. A Division Bench of the High Court which heard the appeal agreed with the Sessions Judge in his interpretation of s. 61(10) and did not express any opinion on s. 117 of the Act. In this appeal filed by special leave of this Court these two points have again arisen for our consideration.

The scheme of the Factories Act bearing upon the present matter may now be examined. It is convenient to do so

in the reverse order. Section 92 is a section providing generally for penalties and s. 94 provides for enhanced penalty after previous conviction. These sections prescribe penalties for contravention of any of the provisions of the Act or of any rule made or of any order in writing given thereunder. The breach here is stated to be of s. 63 of the Act which lays down that the hours of work must correspond with notice required to be displayed under s. 61 and the register directed to be maintained under s. 62. It provides:

> "S. 63. Hours of work to correspond with notice under section 61 and register under section 62.—
>
> No adult worker shall be required or allowed to work in any factory otherwise than in accordance with the notice of periods of work for adults displayed in the factory and the entries made beforehand against his name in the register of adult workers of the factory."

Section 61 deals with the notice of periods of work for adults. It is divided into 10 sub-sections of which sub-ss. (1), (2) and (10) alone are relevant here. They are as follows:—

> "61. Notice of periods of work for adults.—
>
> (1) There shall be displayed and correctly maintained in every factory in accordance with the provisions of sub-section (2) of section 108, a notice of periods of work for adults showing clearly for every day the periods during which adult workers may be required to work.
>
> (2) The periods shown in the notice required by sub-section (1) shall be fixed beforehand in accordance with the following provisions of this section, and shall be such that workers working for those periods would not be working in contravention of any of the provisions of sections 51, 52, 54, 55, 56 and 58.
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> * * * * *
>
> (10) Any proposed change in the system of work in any factory which will necessitate a change in the notice referred to in sub-section (1) shall be notified to the Inspector in duplicate before the change is made, and except with the previous sanction of the Inspector, no such change shall be made until one week has elapsed since the last change."

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Section 62 next provides that a register of adult workers shall be maintained in which will be shown (a) name of each adult workers in the factory; (b) the nature of his work; (c) the group, if any, in which he is included; (d) where his group works on shifts, the relay to which he is allotted and (e) such other particulars as may be prescribed. Section 51 to which reference is made in the second sub-section of s. 61, already quoted, prescribes a 48 hours week; s. 52 refers to weekly holidays; s. 54 generally fixes a maximum of 9 hours a day for work; s. 55 fixes the interval for rest and prescribes that working hours shall not exceed 5 hours at one stretch; s. 56 fixes generally that the period of work and rest should be spread over 10½ hours and s. 58 prohibits the overlapping of shifts.

The Sessions Judge and the High Court concurred in holding that the provisions of sub-s. (10) were complied with and there was thus no offence under s. 63. They treated this as a change in the system of work in the factory necessitating a change in the notice referred to in sub-s. (1) and held that as the change was notified to the Inspector before it was made there was nothing illegal in employing the three workers before their shift commenced. They also held that as this was the first change there was no need to wait for a week or to obtain the previous sanction of the Inspector as required by the latter part of the tenth sub-section. With due respect to the High Court, we do not agree that this sort of case is contemplated by the tenth sub-section. That sub-section speaks of "change in the system of work in any factory which will necessitate a change in the notice" and these words refer not to a departure from the notice but to *a change in the system,* a change which would require the notice to be recast. The notice shows "the periods during which adult workers may be required to work" and these words are descriptive of the scheme of the employment of labour in the factory but are not apt to contemplate the time of employment for each individual worker. That can only be found by referring to the register which goes with the notice. Sub-s. (1) makes no mention of the change in the register but of the change in the notice and thereby indicates that the change which is contemplated is an overall change affecting a whole group and not an individual worker. The latter part of the sub-section also points in the same direction because it implies that such changes should not be frequent and if the change is for the second time it should not be made until one week has elapsed since the last change. This cannot possibly refer to a casual change in the hours of work of an individual worker.

The learned counsel sought to justify the action by referring to s. 59 which provides that extra wages for overtime shall be paid. No such claim was made earlier in this case and justification was sought only from the provisions of sub-s. (10) of s. 61 and s. 117 of the Act. Section 59 cannot be considered in isolation: It has to be read with s. 64, where the State Government has been given the power to make 'exempting rules'. Under those rules a departure from the provisions of ss. 51, 52, 55 and 56 can be made but only in accordance with the rules so framed; as for example, overtime work may be taken from workers engaged on urgent repairs in spite of the provisions of ss. 51, 54, 55 and 56, but must be in accordance with rule 91 and the urgency which is referred to in this section and the rule is 'an urgency relating to the factory and not an urgency felt by the constituents of the factory'. A departure from the hours of work as laid down in s. 61(2) can only be made in those cases in which the exempting provisions of the rules cover the case and not otherwise.

It would, therefore, appear that the offence which was committed in the case was the employment of workers contrary to the notice displayed under s. 61(1) without any justification by reason of any exempting provision. The respondent was not saved from the operation of s. 63, which is peremptory, by reason of anything contained in sub-s. (10) and the sending of the letter to the Inspector of Factories was therefore mis-conceived.

It was contended before us that the respondent was not the occupier/manager of the factory and, in any event, s. 117 of the Act protected him because he was not present there and his action was *bonafide*. As to the first part of this argument it is sufficient to say that the Magistrate found that he was the occupier and manager. The letter of Mr. Dangi (Ext. 15) quite clearly establishes this. The argument under s. 117 of the Act requires a more detailed consideration. That section reads as follows:—

> "17. Protection to persons acting under this Act.—
>
> No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act."

It is argued by Mr. M. V. Goswami on the authority of cases about to be mentioned that this section gives protection against prosecution in respect of anything which is done in good faith under the Act. He referred us to two decisions of

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Thomas, C. J. in *Ranjit Singh* v. *Emperor*(1) and *Ranjit Singh* v. *Emperor*,(2) in which the learned Chief Justice observes that the language of s. 117 is not limited to the inspecting staff but is wide enough to include occupiers, managers, foremen, workers etc. Mr. Goswami also refers to two decisions of the Andhra Pradesh High Court in *Public Prosecutor* v. *Mangaldas Thakker*(3) and *In re. P. Lakshmaiah Naidu*(4) in which the same view has been expressed. Mr. D. R. Prem on behalf of the State of Gujarat relies on *The Public Prosecutor* v. *Vattem Venkatramayya*(5) and *Provincial Government, C.P. and Berar* v. *Seth Chapsi Dhanji Oswal Bhate and Anr*(6). Reference was also made to *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *H. E. Watson*(7).

It is not necessary to refer to the lines of reasoning adopted in these cases. The language of this protecting clause is not limited to officers but is made wide to include "any person". It thus gives protection not only to an officer doing or intending to do something in pursuance or execution of this Act but also to "any person". But the critical words are "any thing * * * done or intended to be done" *under the Act*. The protection conferred can only be claimed by a person who can plead that he was required to do or omit to do something under the Act or that he intended to comply with any of its provisions. It cannot confer immunity in respect of actions which are not done under the Act but are done contrary to it. Even assuming that an act includes an omission as stated in the General Clauses Act, the omission also must be one which is enjoined by the Act. It is not sufficient to say that the act was honest. That would bring it only within the words "good faith". It is necessary further to establish that what is complained of is something which the Act requires should be done or should be omitted to be done. There must be a compliance or an intended compliance with a provision of the Act, before the protection can be claimed. The section cannot cover a case of a breach or an intended breach of the Act however honest the conduct otherwise.

In this connection it is necesary to point out, as was done in the Nagpur case above referred to, that the occupier and manager are exempted from liability in certain cases mentioned in s. 101. Where an occupier or a manager is charged

(1) A.I.R. (1943) Oudh 308.
(2) A.I.R. (1943) Oudh 311.
(3) A.I.R. (1958) Andh. Pra. 79.
(4) I.L.R. (1958) Andh. Pra. 925.
(5) A.I.R. (1963) Andh. Pra. 106).
(6) I.L.R. (1940) Nag. 257=A.I.R. (1938) Nag. 408.
(7) A.I.R. (1934) Cal. 730.

with an offence he is entitled to make a complaint in his own turn against any person who was the actual offender and on proof of the commission of the offence by such person the occupier or the manager is absolved from liability. This shows that compliance with the peremptory provisions of the Act is essential and unless the occupier or the manager brings the real offender to book he must bear the responsibility. Such a provision largely excludes the operation of s. 117 in respect of persons guilty of a breach of the provisions of the Act. It is not necessary that *mens rea* must always be established as has been said in some of the cases above referred to. The responsibility exists without a guilty mind. An adequate safeguard, however, exists in s. 101 analysed above and the occupier and manager can save themselves if they prove that they are not the real offenders but who, in fact, is. No such defence was offered here.

For these reasons we are of the opinion that the respondent is not saved by s. 117. We, accordingly, set aside his acquittal and convict him under s. 63 read with s. 94 of the Factories Act. He is sentenced to pay a fine of Rs. 50/- in respect of each of the offences, or in default to undergo 15 days' simple imprisonment.

Appeal allowed.