IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Criminal Appeal No. 8 of 1959

Between:

RASHIK BHAI — Appellant

and

REGINA — Respondent

Immigration Ordinance (Cap. 67) s. 7—*mens rea*—landing in Colony without valid permit issued under s. 8—whether absolute prohibition even when person landing believes permit to be valid.

The appellant while in India received a forged entry permit which he said he thought to be genuine and valid. He arrived in the Colony with that permit, was prosecuted under s. 7 of the Ordinance, was convicted and recommended for deportation.

Held.—(1) S. 7 of the Ordinance imposes an absolute prohibition against a person landing in the Colony without him having a valid entry permit ;

(2) The lack of *mens rea* in such a person is irrelevant ;

(3) In such cases, upon satisfactory proof, a court cannot act under section 38 of the Penal Code and dismiss the charge but must convict the accused.

Appeal dismissed.

Cases cited:—

Harding v. Price (1948) 1 All E.R. 283 ; *R. v. Oliver* (1943) 2 All E.R. 800 ; *Sherras v. De Rutzen* (1895) Q.B.D. 918.

Cases referred to:—

Davies v. Harvey L.R. 9 Q.B. 433 ; *Attorney-General v. Lockwood* 9 M. & W. 378 ; *R. v. Woodrow* 15 M. & W. 404 ; *Fitzpatrick v. Kelly* L.R. 8 Q.B. 337 ; *Roberts v. Egerton* L.R. 9 Q.B. 494 ; *R. v. Marsh* 2 B. & C. 717 ; *R. v. Bishop* 5 Q.B.D. 259.

R. D. Patel for appellant.

J. F. W. Judge, Crown Counsel, for respondent.

LOWE, C.J. [13th February, 1959]—

The appellant was charged before the learned Senior Magistrate at Suva with being a prohibited immigrant in that he landed in the Colony when he was not the holder of a valid permit issued under the provisions of section 8 of the Immigration Ordinance (Cap. 67). He was convicted and fined £10, in default two months imprisonment, and a recommendation for the deportation of the appellant was made by the trial Magistrate.

The whole question at issue was whether or not the appellant had landed in the Colony without a valid permit. The evidence shows very clearly there had been, within the Immigration Office itself, the forging of permits for reward and there can be no doubt that the permit used by the appellant in order to obtain entry was forged. The witness who admitted forging the permit gave unsatisfactory and contradictory evidence regarding permits he had forged for reward but said quite definitely that the permit in issue had been forged by him. Even had he not been called as a witness, and he was not vital to the prosecution case, there was ample evidence from the Principal Immigration Officer to establish the forgery. The permit, it is undenied, was not a valid permit and the question arises as to whether or not the relevant section of the Ordinance imposes an absolute prohibition or whether it must be shown by the prosecution that there was *mens rea* in the appellant himself.

The relevant portion of section 7 of the Ordinance is as follows:—

" The following persons are prohibited immigrants and it shall be an offence for any such person to land in the Colony—

(*a*) any person who is not the holder of a valid permit issued under the provisions of section 8 unless such person is exempted under the provisions of that section ; "

The appellant could not and in fact did not claim any exemption under section 8 of the Ordinance.

It was argued by Counsel for the appellant that, in the absence of any word such as " knowingly " or " wilfully " in section 7, the appellant could not be guilty of an offence as he left India in good faith with a permit which he had every reason to believe was valid.

The evidence discloses that a person resident in the Colony had induced an employee of the Immigration Department to supply him with forged permits and the only reasonable inference is that one of those forged permits, presumably in duplicate, had been sent to India to the appellant after a definite refusal by the Principal Immigration Officer to a request for a permit to be issued to the appellant. The appellant required a passport to be issued in India and, apparently, upon his making application therefor, the Indian authorities wrote to the Principal Immigration Officer in Suva enclosing a duplicate of the forged permit, no doubt handed to them by the appellant, asking that the permit be authenticated before a passport could be issued. The Principal Immigration Officer, on viewing the duplicate permit, was in no doubt that the signature thereon, which purported to be his own, was in fact a forgery and he did not reply to the Indian authorities as he could reasonably anticipate that if he did not do so, no passport would be issued. In any event, the appellant himself by some means which are not disclosed, induced the Indian authorities to issue him with a passport without any authentication of the permit. This gives rise to suspicion that the appellant's story, that he did not know that the permit was not genuine, might well be false. However, the prosecution was not in a position to show that the appellant had any such knowledge and whether he did or not does not affect this appeal in any way.

Counsel for the appellant relied on the case of *Harding v. Price* (1948) 1 All E. R. 283, in which it was shown that the owner of a vehicle was involved in an accident whilst driving that vehicle but, owing to the noise caused by the vehicle in motion, he was undoubtedly unaware that the accident had happened and did not report it to the Police Station or to a police constable as required by section 22 (2) of the Road Traffic Act, 1930. *Prima facie* that subsection imposes an absolute duty on a driver of a vehicle which is involved in an accident, to report that accident, but it was held that the driver was not guilty of an offence under that subsection which, by its nature and the nature of the offence, implies that there must be *mens rea* in the driver, as otherwise, not knowing anything about the vehicle being involved in an accident, he could not possibly be expected to report. A distinction must be drawn between that case and the instant case, firstly, because the onus was upon the appellant to show that he had a valid entry permit when he landed in the Colony (*R. v. Oliver* (1943) 2 All E.R., 800), and secondly, because the provisions of section 7 can leave no doubt of the intention of the legislature. By the terms of the section there is an absolute prohibition on the entry of any person, not otherwise exempted, who is not in possession of a valid permit authorizing his entry. The words " prohibited immigrant " can leave no doubt as to that.

In *Sherras v. De Rutzen* (1895) Q.B.D., 918, the appellant appealed against a conviction for supplying liquor to a police constable whilst the constable was on duty. The evidence showed that section 16 (2) of the Licensing Act 1872 prohibited any person from so supplying liquor. The appellant who was the licensee of a public house knew the police constable who was a customer of his hotel. In those days, police constables on duty in England wore arm bands and it was generally accepted that a police constable not wearing an arm band was off duty. The constable entered the licensed premises whilst not wearing his arm band and was served with liquor. On appeal against the resultant conviction it was held that the subsection was not intended to apply where the licensed victualler *bona fide* believed that the police constable was off duty, despite the fact that it did not contain the word " wilfully " or " knowingly ", and even although the word " knowingly " appeared in subsection (1) of section 16 in connexion with another offence, which suggested that it had been omitted deliberately in framing subsection 2.

In the course of his judgment *Wright, J.* said—

> " Apart from isolated and extreme cases of this kind, the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of *Lush, J.* in *Davies v. Harvey* (L.R. 9 Q.B. 433), are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. Several such instances are to be found in the decisions on the Revenue Statutes, e.g., *Attorney-General v. Lockwood* (9 M. & W., 378), where the innocent possession of liquorice by a beer retailer was held an offence. So under the Adulteration Act, *R. v. Woodrow* (15 M. & W. 404), as to innocent possession of adulterated tobacco ; *Fitzpatrick v. Kelly* (L.R. 8 Q.B. 337), and *Roberts v. Egerton* (L.R. 9 Q.B. 494), as to the innocent possession of game by a carrier ; *Rex v. Marsh* (2 B. & C. 717). So as to the liability of a guardian of the poor, whose partner, unknown to him, supplied goods for the poor: *Davies v. Harvey*. To the same head may be referred *R. v. Bishop* (5 Q.B.D. 259), where a person was held rightly convicted of receiving lunatics in an unlicensed house, although the jury found that he honestly and on reasonable grounds believed that they were not lunatics. Another class comprehends some, and perhaps all public nuisances: . . ."

The judgment goes on to say that, except in such cases as those referred to, there must in general be guilty knowledge on the part of the defendant, or someone who he has put in his place to act for him generally, or in the particular matter, in order to constitute an offence.

The instant case is one of a nature similar to those cases of absolute prohibition which *Wright, J.* referred to.

As I have said, the legislature by section 7 of the Immigration Ordinance has, in the public interest, imposed an absolute prohibition on any person landing in the Colony without a valid permit and *mens rea* does not enter into the question. If that were not so, the " immigration door " would be opened very wide and the result could be that numerous persons could enter the Colony on forged or otherwise invalid permits and, professing their innocence, claim a right to remain in Fiji despite the provisions of the Ordinance. Such a possibility is not implicit in any section of the Ordinance and is, of course, absurd.

Learned Counsel for the appellant argued that the Magistrate was wrong in making a recommendation for the deportation of the appellant, and that in the circumstances he should have accepted the appellant's explanation and, without entering a conviction, should have discharged him under section 38 of the Penal Code. Such an argument is, of course, completely illogical as it would entail the learned Senior Magistrate condoning the offence of the appellant entering, and remaining in, the Colony without a valid permit authorizing him to do so.

In the instant case there could be no reasonable result, following conviction, other than a sentence and a recommendation for deportation. An offence of this nature is a serious one and exemplifies the necessity (of which the Principal Immigration Officer showed in evidence that he is aware) for the utmost caution by the Immigration Authorities in order to prevent unscrupulous persons from defeating the provisions of the Ordinance. The circumstances surrounding the obtaining of forged permits have implications of considerable gravity and, if action has not already been taken, the matter should be thoroughly investigated with a view to the prosecution of the other person or persons implicated.

The appeal is dismissed. The recommendation for deportation was properly made.