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CENTRAL BOARD OF HEALTH

v.

BA TOWN COUNCIL

B [SUPREME COURT, 1976 (Williams J.), 30th, December]

Appellate Jurisdiction

Public health—nuisance—overflow of waste from public toilets—liability of Town Council—whether offence of strict liability—effect of strike of Council's employees—Public Health Ordinance (Cap. 91) *ss.* 15, 55*(a) (b),* 133.

C

Local Government—public health—nuisance—overflow of waste from public toilets—liability of Town Council—whether offence of strict liability—effect of strike of Council's employees—Public Health Ordinance (Cap. 91) *ss.* 15, 55 *(a) (b),* 133.

Criminal law—mens rea—permitting a nuisance under Public Health Ordinance (Cap. 91*) ss.* 15, 55 *(a), (b),* 133.

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During the strike by Council employees, the public toilets in Ba market overflowed. Proceedings were brought by the appellant against the respondent in the Magistrate's Court which was acquitted on the grounds that the appellant had no power to institute proceedings under Public Health Ordinance s. 133, that the respondent was not subject to the Ordinance, and owing to the strike the respondent

E could not be said to have created or permitted the nuisance.

Held: 1. The magistrate had misinterpreted s. 133 supra, and the respondent was subject to the Ordinance.

2. The appellant was entitled to prosecute the respondent in the same way as any other occupier.

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3. The fact that the respondent's workmen were on strike did not excuse the respondent from carrying out its legal obligations.

4. Although the offence was not one of strict liability, the degree of mens rea required to be proved was slight, and there was ample evidence that the respondent

G knew of and permitted the nuisance by its actions.

Cases referred to:

Grays Haulage Co. v. Arnold [1966] 1 W.L.R. 534; [1966] 1 All E.R. 896.
Harding v. Price [1948] 1 K.B. 695; [1948] 1 All E.R. 283.
Sherras v. De Rutzen [1895] 1 Q.B. 918.

H *Hobbs v. Winchester Corporation* [1910] 2 K.B. 471.
Lim Chin Aik v. R. [1963] 1 All E.R. 223; [1963] A.C. 160.
R. v. Turner [1816] N & S 206.
R. v. Burdett (1820) 106 E.R. 873.

Appeal against the acquittal of the respondent in the magistrate's Court of the charge of creating a nuisance.

M. J. Scott for the appellant.
G. P. Shankar & S. R. Shankar for the respondent.

WILLIAMS J.: [30th December 1976]—

This appeal is brought by the Central Board of Health against the acquittal of Ba Town Council of a charge of creating a nuisance under s. 55*(b)* of The Public Health Ordinance, (Cap. 91).

The alleged offence occured on 28/11/75 when the toilets at Ba market overflowed so badly that they deposited human waste on the steps.

Health Inspector Elija Vuivuda, P.W. 1, observed the overflow on 28/11/75 and on 30/11/75 he served a notice on the Council requiring them to clean up the mess. The service of a notice appears to have been superfluous for the purposes of establishing an offence under s. 55*(b)*. Some form of notification is required by s. 55*(a)* in order to give rise to an offence thereunder but under s. 55*(b)* the service of a notice is not necessary and the occupier is liable for creating the nuisance where, to quote the sub-section,

> "the contents of a privy or drain belonging to a dwelling house or building are permitted to overflow or escape."

It was not disputed that there was a nuisance, but the Council denied liability on the ground that due to a strike of municipal workers it was not possible to clean out the toilets. As far as could be gleaned from the evidence the strike occured early in November and continued beyond the middle of December 1975.

It was submitted to the magistrate by defence counsel that because all fines are paid into the Council revenue under s. 133 the Council is not subject to the Ordinance and could not be penalised for such an offence.

That submission, which was somewhat misleading was accepted by the magistrate.

His attention was not sufficiently drawn to the exact wording of s. 133 which does not say that all fines recovered under the Ordinance will go into Council revenue. It is only those fines which are recovered by or on behalf of the Council which go into Council revenue. A fine imposed on the Council would not be the result of an action instituted by or on behalf of the Council against itself but on the contrary it would be the result of a prosecution instituted against the Council by some other person or authority. Consequently the fine imposed upon the Council would not go into the Council revenue. In my view the magistrate erred in interpreting s. 133 as indicating that the Council was not subject to the Ordinance.

His judgment states that the Central Board of Health had no power to institute proceedings against the Council. No reasons were advanced for that finding apart from the above reference to s. 133. The magistrate was satisfied that the Council is the occupier of the public market and of the public lavatory installed there. Under s. 55 the occupier is liable for any nuisance created on his premises and the Ordinance does not state that where the occupier is a local authority no offence is

committed or no authority to prosecute exists. All persons and bodies are amenable to the laws of the country unless the enacting statute or some other legislation specifically creates some exception. Neither the Council nor the magistrate referred to the existence of any such exemption from liability or prosecution. S. 54 requires local authorities to enforce the provisions relating to nuisances but this does not mean that they are thereby above the law which they are repaired to enforce. Of course it is unlikely that the Council would institute proceedings against itself but s. 15 enables the Board of Health to exercise the powers vested in local authorities. Thus where the Council fails to prosecute a third party the Board may do so and where the Council commits a nuisance the Board can prosecute the Council as it would any other occupier.

With regard to the effect of the strike as a factor contributing to the nuisances the magistrate observed in his judgment,

> "This unusual situation was brought about by the strike of the Council's employees. In these circumstances it could not be said the Council 'created' the nuisance or 'permitted' the nuisance."

In determining to what extent, if any, the strike of the Council's employees afforded a defence to the Council one has to consider whether or not this is an offence of strict liability and if not where the onus lies in proving the issue of guilt.

Crown counsel appeared to take the view that although this is not an offence of strict liability nevertheless the element of "mens rea" is very slight in public health offences. In *Gray's Haulage Co. v. Arnold* [1966] 1 W.L.R. 534, it was stated that where a statute uses the word 'permitting' then there had to be knowledge by the accused of the existence of facts pointing to the offence; the court observed that one cannot permit something of which one is not aware. Humphreys J. in his judgment in *Harding v. Price* [1948] 1 K.B. 695 at 702 said,

> "In the absence of any such words as 'permit' or 'suffer' or 'knowingly' from the statement of the offence, in a statute, knowledge is prima facie not a necessary ingredient of the offence. . . "

It follows therefore that where the statute uses the word 'permits' knowledge on the part of the accused, is a necessary ingredient of the offence.

How slight is the element of mens rea in cases of this kind? Had the section 55*(b)* not used the word permit then following the judgment in *Sherras v. De Rutzen* [1895] 1 Q.B. 918, which states that offences of causing a public nuisance are usually of strict liability, this may have been regarded as an offence of strict liability. It follows that the element of mens rea introduced by the word "permits" is probably very slight. In deciding the extent of mens rea in offences related to public health and public nuisance I consider by way of analogy with offences of strict liability that one must have regard to the nature of the offence, the convenience and welfare of the public and the smallness of the penalty imposed by the statute. For example vendors of meat must see that it is fit for human consumption and it is no defence that they were not aware that it was polluted, otherwise the distribution of bad meat would not be effectively prevented—*Hobbs v. Winchester Corporation* [1910] 2 K.B. 471, at 482-485. That case was concerned with offences of strict liability and was considered in *Lim Chin Aik v. R.* [1963] 1 All E.R. 223, at 228, where the Privy Council referred to the mode of interpreting and construing statutes in determining whether an offence was one of strict liability. They said at 228 R,

"But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those when he may be expected to influence or control, which will promote the observance of the regulations."

In my view the Council in relation to its control of the public lavatories fall squarely within the above quoted requirements and might have been regarded as strictly liable except for the use of the word "permits".

Accordingly I am inclined to concur in the submission of Crown counsel that in an offence of this nature the degree of mens rea required to be proved is very slight.

Was the Ba Council aware that the toilets were overflowing on 28/11/75? P.W. 1, a Health Inspector observed that the block was overflowing on that date and he informed the Council of this although under s. 55*(b)* he was not required to do so. The condition of the toilets was so appalling that one could reasonably conclude that the Council must have been aware of it. P.W. 1's evidence is that the overflow was so extensive that human excrement was lying on the steps.

The fact that the Council was aware on 28/11/75 that the toilets had overflowed badly does not in itself signify that it permitted the overflow. There must be something that invests the Council on the face of it with knowledge that an overflow commenced prior to 28/11/75 and was still continuing or circumstances were such that an overflow was likely to occur if they did nothing to prevent it. If such a situation was apparent from the prosecution evidence then, in my opinion, there was something for the Council to answer. In cases of strict liability the actus reus is all that the prosecution need prove but it is possible even in certain types of case of strict liability for the defendant to show that he had no knowledge that there had been an "actus reus". In *Harding v. Price* [1948] 1 K.B. 695 Singleton J. at 704 stated that in certain cases the effect of "strict liability" is merely to shift the onus of proof to the defendant.

I consider that the onus, although very slight is on the prosecution to establish in the light of any evidence given by the Council that the latter permitted the overflow. In that respect the evidence of the Health Inspector, P.W. 1, is pertinent. He said that the Council had to clean the toilet daily and the nuisance in this case could have been remedied in an hour. D.W. 1, the Town Clerk, gave evidence for the Council stating that the strike of Council employees commenced on 6/11/75 and it included those who were responsible for cleaning the toilets.

The evidence of D.W. 1 alleges that from 6/11/75 there was no labour available to clean the toilets daily or at all. Once labour of that kind was withdrawn the Council should have anticipated that trouble could probably arise in connection with the toilets due to lack of maintenance. In order to prevent an overflow the Council should have employed other labour to maintain and clean the toilets and if other labour was not available should have withdrawn them from public use. For three weeks prior to the overflow on 28/11/75 the Council was aware of a state of affairs which would probably give rise to a nuisance of this kind. The Council did nothing effective until 17/12/75 when it was cleaned.

Would the evidence at this stage, if it went no further, have justified a finding by the magistrate that the Council permitted the toilets to overflow? It could be argued that since the onus is on the prosecution, they would have to show that the Council took no action to prevent the nuisance, e.g. by proving that nothing prevented the Council from closing the toilets to the public, or by proving that nothing prevented it from employing other labour. To place such a burden upon the prosecution would amount to requiring them to prove that a number of alternatives were open to the Council and that the Council did not adopt or attempt any of them. What steps the Council took to try and prevent the occurrence of the nuisance is peculiarly within their own knowlege and the prosecution cannot be expected to adduce evidence to prove that the Council took no steps. *Phipson on Evidence,* p. 108, quotes from the judgment of Bayley J. in *R. v. Turner* [1816] N & S 206, 211 with regard to negative averments of this nature, pointing out that a negative averment of a fact peculiary within the knowledge of the opposite party does not have to be proved. In *R. v. Burdett* (1820), 106 E.R. 873, Best J. said at 863 with regard to establishing a negative averment,

> "Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough if its existence is highly probably particularly if the opposite party has it in his power to rebut it by evidence yet offers none."

That being the law of evidence in such circumtances I am of the opinion that the evidence adduced by the prosecution coupled with the Town Clerk's evidence that the strike commenced on 6/11/75 would, if no further evidence were adduced, have justified the magistrate in finding that the Council had permitted the overflow.

I am not suggesting that it became the responsibility of the Council to prove that it had not permitted the overflow.

Only the Council is aware of what steps it took and it gave evidence through the Town Clerk of what it did. He said,

> "We tried our best to clean. The strikers prevented it . . . We asked the Board (of Health) to clean the toilets. The Board did not clean it."

He stated that the strikers would not let volunteers clean the toilets.

Those are bare statements of fact unsupported by any details from the witness as to how the Council attempted to clean the toilets between 6/11/75 and 28/11/75 when they overflowed; there are no details of when or how often the attempts were made; there were no details of the mode in which the strikers prevented the attempt, how far the attempt was present and whether police protection was sought prior to 28/11/75. The prosecution could not be expected to lead evidence showing that there were no volunteers or that they were not obstructed forcefully by the strikers in attempting to clean the toilets. An attempt to prove a case of that kind cold entail calling every able bodied person in Ba.

In any event the Town Clerk's evidence as to cleaning of the toilets appears to refer to clearing up the mess which occured on 28/11/75 after notice had been served on him. But at that stage the nuisance had already occurred. The charge was not failing to clear up the mess caused by the overflow but one of permitting the overflow. There is no evidence from the Council as to what was done between 6/11/75 and 28/11/75 to prevent the nuisance from occuring. One method would have been to

close the toilets and prevent the public from using them. It is apparent that this was not done before 28/11/75 because on that day the human excrement had overflowed on to the steps leading to the toilets and this could only be the result of people using them.

I am not stating that the onus was on the Council to prove that it did not permit the nuisance. It was on the prosecution to satisfy the magistrate beyond doubt that the Council permitted it. As I have stated the amount of mens rea required to establish such an offence once the actus reus is proved is slight, and in the light of the evidence given by the defence it is my opinion that the prosecution had proved that the Council permitted the overflow to occur on 28/11/75.

One hesitates to reverse another court on a finding of fact. However, in this trial the veracity of the witnesses on both sides was not in issue. The magistrate found there was a case to answer for permitting the nuisance. Having heard the Town Clerk he concluded that the offence was inevitable having regard to the strike. In my opinion, having regard to the law as I have endeavoured to outline it that was an erroneous finding. The Council knew the toilets required cleaning every day; it knew from 6/11/75 to 28/11/75 that they were not being cleaned; the purpose of cleaning them is (inter alia) to prevent such an overflow and the Council must have been aware that to keep the toilets open for such a long period without maintenance would almost inevitably lead to an overflow. It was not so much a question as to whether an overflow would occur as a question of when it would overflow. Once the overflow occured in these circumstances and there being no satisfactory evidence that the Council, having allowed the toilets to remain open, took any steps to prevent an overflow from occurring it should have led the magistrate to the conclusion that the prosecution had proved that the Council had permitted the overflow.

This has not been an easy case and it has not been made easier by he Health Inspector who clearly confused sections 55*(a)* and *(b)* . He served a notice under s. 55*(a)* which is concerned not with permitting a toilet to overflow, but with the offence of allowing the filth to remain near a building for 12 hours after the occupier is required to remove the same. His evidence was more concerned with the time taken to clear away the filth after 28/11/75 than it was with the actual overflow and the circumstances leading up to its occurence.

I set aside the order of acquittal and substitute a finding of guilty.

Order of acquittal set aside and finding of guilt substituted.