A

APENISA SEDUADUA AND SIX OTHERS

v.

REGINAM

B [SUPREME COURT—Cullinan, J.,—19 July 1984]

Apellate Jurisdiction

Trade Disputes—Trade Disputes Act s.14—onus of proof—not shown that appellants knew or had reasonable cause to know that probable consequences of action would deprive public C *of electricity.*

S. R. Shankar for the 1st, 2nd, 3rd, 4th, 5th & 6th Appellants
V. Ka!yan for the 7th Appellant
M. Raza for the Respondent

D Appeal against a conviction in the Magistrate's court at Lautoka that appellants wilfully broke their contract of service contrary to s.14(1) of Trade Disputes Act (Cap. 97) (the Act). The offence and particulars were as follows:

"Statement of Offence

Wilfully breaking contract of service: Contrary to Section 14(1) *(a)* and Section 38 of the Trade Disputes Act, (Cap. 97).

E

Particulars of Offence

Apenisa Seduadua, Kepieni Pesamino, Josefa Anise, Maleli Raileqe, Josevata Valacakau, Luke Vosa and Merea Pathak in combination with other members of the Fiji Electricity Authority Staff Association and of the National Union of Electricity Workers between the 22nd day of October. 1982 and the 26th day of F October 1982 (both days inclusive) at Lautoka in the Western Division being in the employment of the Fiji Electricity Authority did wilfully break their contracts of service knowing or having reason to believe that the probable consequence of their so doing would deprive the public to a great extent of an essential service, namely, Electricity Services."

On 22 October, 1982 the appellants and some 100 members of the Fiji G Electricity Authority Staff Association withdrew outside headquarters building of the Authority in Lautoka before mid-day. The same day an undetermined number of employees in the Authority, all members of the National Union of Electricity Workers also withdrew their services, as did substantial numbers of employees in

Suva. The appellants and others remained away from work on Monday and Tuesday 22 and 23 and 26 October, 1982. On the last day, an agreement was successfully negotiated with management and all employees returned to work.

Section 14(1) of the Trade Disputes Act (Cap. 97) reads as follows:

"14.—(1) Any person who wilfully breaks his contract of service, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others will be—

(a) to deprive the public, or any section of the public wholly or to a great extent of an essential service, or substantially to diminish the enjoyment of that service by the public or by any section of the public; or

(b) to endanger human life or cause serious bodily injury or to expose valuable property whether real or personal, to destruction, deterioration or serious damage,

shall be guilty of an offence."

Grounds of appeal to the Supreme Court included that the prosecution had failed to prove beyond reasonable doubt that the appellants know or had reasonable cause to believe the probable consequences of their actions would be to "deprive the public to a great extent of an essential service namely, electricity services".

Kermode, J. in *Gyanendra Singh* Cr. App. No. 53/1977 after referring to the mens rea (knowing or having belief etc.) stated:

"It is not necessary for the prosecution to prove that harmful consequences were intended as a result of the breach of contract provided the conduct constituting the breach was intended."

In Citrine's Trade Union Law 3rd Edition at page 526 the author wrote:

"It is sufficient to show that such consequences were probable and that, at the time of the breach the accused knew or had reasonable cause to believe that they would result from his conduct. The onus of proof on the prosecution will be discharged by showing that circumstances of which the accused knew, or must have known were such as would have led any reasonable man to believe that such consequences would probably ensue."

The learned author goes on to discuss the term "that the probable consequences" and says,

"It should be noted that the actual consequences are not material, except in so far as they are evidence of what was probable. It is therefore not sufficient to prove that the actual consequences were to deprive the public of their supply (in the instant case an essential service) if such consequences were improbable in the circumstances."

In the instant case it appeared that the evidence established that there was no deprivation of services to the public.

A His Lordship said:

> "It must be emphasised that the mischief which section 14 seeks to prevent is the deprivation to a great extent of an essential service. The test to be applied is not that of the nature of an employee's work but the extent of his knowledge or belief as to the probable consequence of breaking his contract. The question whether or not an employee is an essential worker within any such service may
B well be relevant however in determining his knowledge or belief as to such consequences."

Held: . . . . . The totality of the evidence indicated that for the three days involved there was little or no disruption in the administration of the Authority, and no deprivation whatever of service to the public.

C There was no doubt that whilst no deprivation of service to the public occurred, sooner or later, considering the very numbers involved, and whether or not such numbers included "essential workers" deprivation would have resulted.

On all the evidence there was no evidence of deprivation of an essential service, as there was in other cases cited in the appeal.

D It was not proved beyond reasonable doubt that appellants knew or had reasonable cause to belief that the probable consequences of their actions, even in combination with other members of the Staff Association and of members of the National Union of Electricity Workers, would be to deprive the public of to a great extent of electricity.

E Appeals allowed.

Convictions and sentences set aside.

Cases referred to:

D.P.P. v. Gyanendra Singh & Others **23 FLR 134**
F ***Taniela Veitata v. R.*** **23 FLR 294**
Dhansukhlal & Ors. v. R. **24 FLR 126**

CULLINAN, Mr Justice.

Judgment

G The appellants and approximately 100 other members of the Fiji Electricity Authority Staff Association withdrew outside the headquarters building of the Authority in Lautoka before mid-day on Friday, 22nd October 1982. That same day an undertermined number of employees in the Authority, all members of the National Union of Electricity Workers also withdrew their services. Apparently a substantial number of employees in Suva did likewise. The appellants and others
H remained away from work on Monday and Tuesday 23rd and 26th October. On the latter date an agreement was successfully negotiated with management through the ages of the Ministry and all employees returned to work on Wednesday 27th October, 1982.

Section 14(1) of the Trade Disputes Act. 97 reads as follows: A

"14.—(1) Any person who wilfully breaks his contract of service, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others will be—

(a) to deprive the public, or any section of the public wholly or to a great extent of an essential service, or substantially to diminish the enjoyment of that service by the public or by any section of the public; or B

(b) to endanger human life or cause serious bodily injury or to expose valuable property whether real or personal, to destruction, deterioration or serious damage,

shall be guilty of an offence."

There are a number of grounds of appeal filed by the appellants. One ground which is common to all appellants, is that the prosecution failed to prove beyond reasonable doubt that the appellants knew or had reasonable cause to believe that the probable consequences of their actions would be "to deprive the public to a great extent of an essential service, namely, electricity services." C

The provisions of section 14, were considered by Kermode J. in *DPP v. Gyanendra Singh & Others* and *The Fiji Waterside Workers & Seamen's Union* and also Grant C.J. in *Taniela Veitata v. R.* In the latter case Grant C.J. observed at pp.10/11. D

"Some discussion took place on the hearing of the appeal as to the precise meaning to be attached to subsection 1, which is based on sections 4 and 5 of the English Conspiracy and Protection of Property Act 1875, the history of which may be found in Citrine's Trade Union Law 3rd Edition Chapter 1. The subsection is aimed primarily at preventing damage to the public weal arising from disruption of an essential service. This could arise in certain circumstances from a wilful breach of contract of service by only one person in a key position, such as an air traffic controller; or in other circumstances only by a combination of persons wilfully breaking their contracts of service. An apposite example of the latter in a dock labourer. In the ordinary way his breach of contract of service would not result in a disruption of an essential service rendering him liable to prosecution under this subsection. But if he combined with other dock labourers, all of whom wilfully broke their contracts of service in a sufficient number to disrupt the essential service of the port and docks, each of them would become liable to prosecution." E F

With those observations I respectfully agree. When it comes to the phrase "probable consequences" I respectfully adopt the dicta of Kermode J. *Gyanendra Singh* at pp. 14/15: G

"Section 14(1) of the Act states the mens rea of the offence. There must be a wilful breach of the contract of service knowing or having reasonable cause to believe that the probable consequences of such breach are those stated in subparagraphs *(a)* and *(b)*. The breach must be deliberate and intentional. The necessary mens rea will be presumed from the actual or imputed knowledge of the person breaking his contract as to the probable consequences of his conduct." H

A It is not necessary for the prosecution to prove that harmful consequences were intended as a result of the breach of contract provided the conduct constituting the breach was itself intended.

The learned author of Citrine's Trade Union Law 3rd Edition at page 526 states:

B "It is sufficient to show that such consequences were probable and that, at the time of the breach the accused knew or had reasonable cause to believe that they would result from his conduct. The onus of proof on the prosecution will be discharged by showing that circumstances of which the accused knew, or must have known were such as would have led any reasonable man to believe that such consequences would probably ensue."

C The learned author goes on to discuss the term "that the probable consequences" and says,

"It should be noted that the actual consequences are not material, except in so far as they are evidence of what was probable. It is therefore not sufficient to prove that the actual consequences were to deprive the public of their supply (in the instant case an essential service) if such consequences were improbable in the circumstances." "

D

The latter passages from Citrine (which work I regret is not available to me) were again quoted by Kermode J. in his judgment in the case of *The Fiji Waterside Workers & Seamen's Union* (at p. 52), where he applied them, to the particular facts of that case as follows:

"In the instant case there was considerable evidence that the public were deprived of an E essential service and of the disastrous effect of the strike. This evidence was material, although it went a lot further than was necessary, to establish that the consequences were probable.

While I agree there was no direct evidence that any of the appellants actually knew that such consequences would follow their breaches of contract, the circumstances namely that the dockworkers would not load or unload F vessels would lead any reasonable man to believe that the consequences as alleged in the charge would probably ensue notwithstanding the alleged availability of a pool of labour, and that the appellants knew and should have known the consequences would probably arise.

Despite the alleged availability of a pool of labour the clear evidence is that the probable consequences did in fact arise which as I have indicated is G evidence that the probable consequences could arise as a result of the appellants' actions in going on strike and there by breaking their contracts of service."

I find the above passages of particular assistance. A glance at the Schedule to the Act listing essential services will serve to illustrate that there are surely some such services where even a relatively brief breach of contract of service by certain H employees in sufficient numbers must inevitably lead to the deprivation of some section of the public of such service to a great extent: many examples spring to mind, which I do not consider necessary or desirable to enumerate. Suffice it to say that there must be many cases where it is obvious to the reasonable man that such deprivation is inevitable, much less a probable consequence. At the other end of the scale however there may be cases of breaches of contract by employees in essential

services where such deprivation is not necessarily a probable consequence. It must be remembered that section 14 does not necessarily render unlawful a breach of contract by an employee in an essential service: the section only has that effect where the employee knows or reasonably believes that public deprivation of such service will probably result from his actions. The question of whether such deprivation is or is not a probable consequence. is of course relevant to the particular employee's knowledge or belief in the matter. In this respect, as the learned author of Citrine observed. "the actual consequences are not material, except in so far as they are evidence of what was probable." It will be seen therefore that evidence of the actual consequences may well be relevant to the employee's knowledge thereof or belief therein.

In the present case the totality of the evidence established and the learned trial magistrate accepted, at least at one point in his judgment, that there was no deprivation of service to the public. It was not contested that all generation and distribution staff remained at their posts. The Engineer in charge of Systems Control testified indeed that his department operated normally, that all his staff had reported for work and there never had been a time when they did not do so, that there was a contingency plan to cover any emergency in his department but it had never been put into operation. He observed that faults can arise "on a day like today." He testified however that in several places distribution lines were damaged and that he "had to call people to fix them." He did not elaborate on who such 'people' were. In any event he added "we get complaints every day". The learned trial magistrate observed that the witness further on testified that

> "..... There were numerous consumers affected—distribution lines broken...
> .....
> Power lines were repaired by senior staff or people who did not go on strike. Generators broke down during that period—senior staff and those on strike attended to it."

The learned trial magistrate observed,

> "P.W.5 (the Chief Accountant) stated that during the 3 days when the staff of the accounts section were away, some of the senior staff, including one of his accountants had to fill in for them and do their job. It is unnecessary to traverse the totality of the evidence on this issue in any further detail. Suffice it to say that in my view it establishes that senior staff had to do the work which under normal circumstances would have been done by those who were not present. But this could only go on for a limited time. I find as a fact that there was more than a minor disruption which sooner or later would have led to a substantial disruption and eventually to complete chaos."

The Chief Accountant has testified that during the three days involved some of his senior staff prepared computer input documents, but there was no immediate payment required however, nor was there any financial crisis, much less any deprivation of service to the public. The System Control Engineer's evidence, reproduced above adduced mainly in re-examination, does not establish that it was unusual for senior staff to repair power lines and generators with or without the assistance of "people who did not go on strike." His evidence adduced in examination-in-chief as well as cross-examination, namely that all of his staff reported for duty was unaffected. It was not disputed that the "people who did not go

A on strike", for example Generation Supervisors and System Controllers, were in fact all members of the Staff Association. The General Manager referred to such persons as "responsible people".

In this respect the learned trial magistrate observed,

> "A1 would have the Court believe that they had stayed on the job because he
B had something to do with them and further that since they were "essential workers" they could not have walked off. I prefer and accept the evidence of P.W.1 (the General Manager). In so far as it was maintained otherwise, I am satisfied it is an afterthought."

That approach in my view completely overlooks the coincidence that apparently not one single member of the Staff Association who was engaged in the work of
C generation and distribution left his post; it also ignores the prosecution evidence on the point, namely that of the Systems Control Engineer, that the "Staff Association, of which the first appellant was General Secretary, "could have withdrawn labourers under me" and that he assumed that the members of the Association at the Vuda National Control Centre "would take direction from (the) Secretary" in the matter. There was also the evidence of the first appellant in the matter which was corroborated by that of the seventh appellant when she said that only "not essential
D workers" would join a picket line.

The appellants contended that only non-essential workers had failed to work on the three days in question. It was the prosecution case that all employees of the Fiji Electricity Authority were "essential workers". It might be argued that if all the employees of the Authority were in concert to commit an offence under section 14, without the protection of section 17 of the Act, each and every such employee might
E then be regarded as an essential worker employed in an essential service. I am not however entirely persuaded as to the merit of such proposition. Within any such essential service there must inevitably be degrees of what is "essential", according to the work performed by an employee. The learned counsel for the appellants Mr Shankar and Mr Kalyan submit that to suggest, as did two prosecution witnesses, that the ladies who serve tea in the Authority are "essential workers", and
F that the breach by them of their contracts of service would, though ultimately, through a chain reaction of either sympathetic or disgruntled subsequent breaches by other employees, lead to a deprivation of an essential service to the public, is to deal in possibliities rather than probabilities. I am inclined to agree.

It must be emphasised that the mischief which section 14 seeks to prevent is the deprivation, to a great extent, of an essential service. The test to be applied is not that of the nature of an employee's work, but the extent of his knowledge or belief as to
G the probable consequence of breaking his contract. The question of whether or not an employee is an "essential worker" within any such service may well be relevant however in determining his knowledge or belief as to such consequences. In this respect the learned trial magistrate did not accept the evidence of the first appellant in the matter. He did not apparently accept that of the seventh appellant which, as I have said, corroborated the former evidence. He made no reference to that of a
H defence witness who had served for 15 years with the Authority up to 1981, having then attained the position of Financial Controller; he testified that up to 1973 at least, when he changed appointments within the Authority, certain staff such as shift operators, fitters and certain electrical staff were designated as essential workers. Again, the present Personnel Manager at least admitted to the contents of a

letter, apparently addressed by the Authority's Workshop Manager at Walu Bay, Suva, on 20th October, 1982, to the Union Representative, informing the latter that there was a "new list of essential workers". A

In any event the totality of the evidence indicated that, for the three days involved, there was little or no disruption in the administration of the Authority, and no deprivation whatever of service to the public. Further, the evidence indicated that the Staff Association and indeed the National Union of Electricity Workers wished to avoid any such deprivation, and of course resultant criminal liability. As the first appellant put it, "they (essential workers) would only leave if we told them all the formalities (presumably of section 16) had been followed". The learned trial magistrate observed that the appellants held posts within the Association: the latter evidence raised the inference that, in keeping with the intentions of the Association, they also wished to avoid any such deprivation. B

The learned trial magistrate observed however that sooner or later there would have been "substantial disruption" leading "eventually to complete chaos". As I see it, everything depended on the intentions of the appellants. There is no doubt that whilst no deprivation of service to the public occurred, sooner or later, considering the very numbers involved, and whether or not such numbers included "essential workers", deprivation would have resulted. The learned counsel for the respondent Mr Raza submits that the appellants went on a wild cat strike, informing their superiors that they were staying out indefinitely. The learned trial magistrate accepted that there had been some difficulty in negotiations between management and the Staff Association, that strike action had been threatened, but that the notice of a trade dispute had not been accepted by the Permanent Secretary. The fact that the date of the contemplated strike was not stated in such notice is an indication of the prevailing indecision. There was clearly indecision on the morning of the 22nd October 1982, but whatever the catalyst may have been, the decision was ultimately, and it seems hastily, made. For my part, I agree with the learned trial magistrate that a strike, and not a lock-out as claimed by the appellants, occurred: a few members of the Association remained working in the headquarters building at Lautoka. Nonetheless it seems that even though the decision to strike may have been sudden, no doubt pre-conceived strike plans were put in operation and key personnel remained at their posts. C D E F

The statement of indefinite withdrawal of services is in no way conclusive against the appellants: a strike would lose all effectiveness if its proposed duration were revealed to management in advance. While the appellants withdrew their services they physically withdrew no further than the footpath outside the headquarters building for the remainder of the day, and again on the Monday. They attended again on the Tuesday, while the first appellant journeyed to Suva to take part in negotiations. The learned trial magistrate stated that he had no doubt that had agreement not been reached on the 26 October the appellants would not have returned to work on the 27th October, 1982. "The facts that they returned after the agreement was signed proves this," he said. There was no basis for such assumption. There is nothing to show that the appellants were reluctant to return to work, or were not eager to settle, nor indeed that they would not have returned to work in the absence of agreement, or even negotiation. To infer otherwise seems to me to have the effect of displacing the onus of proof. G H

At the end of the day, there was no evidence of deprivation of an essential service, as there was in the cases of e.g. *Gyanendra Singh* (air transport services) at p.4 & 7,

A *the Fiji Waterside Worker & Seamen's Union* (port and docks services) at p.52, *Taniela Veitata* (port and docks services) at p.17 and also in the Court of Appeal case of *Dhansuklal & Ors. v R* (air transport services) at p.3. Bearing in mind the steps taken by the Staff Association to ensure against a deprivation of service, and the extremely limited duration of the strike, pending negotiation and agreement, reflecting as they do the appellants' intentions in the matter, I do not see that it was proved beyond reasonable doubt that the appellants knew
B or had reasonable cause to believe that the probable consequences of their actions, even in combination with the other members of the Staff Association and the members of the National Union of Electricity Workers, would be to deprive the public to a great extent of electricity. Certainly I am not satisfied that had the learned trial magistrate directed his mind to the evidence which I have detailed he would inevitably have convicted the appellants.

C There are other grounds of appeal which, in the view I take of the ground of appeal dealt with, I do not find necessary to consider. It would be unsafe to allow the convictions to stand. The appeals are allowed in respect of all the appellants and the convictions and sentences are set aside.

Appeals allowed.