R. v. DE JAGER.

CRIMINAL APPEAL CASE NO. 36 OF 1935.

Conviction in Subordinate Court (Class I) of the Resident Magistrate, Ndola, for contravention of Proclamation No. 9 *of* 1935 *made under power of section 53F of the Penal Code—possession and distribution of certain books importation of which had been prohibited.*

The facts and the law appear from the judgment hereunder.

The sections of the Penal Code referred to in the present judgment have been repealed, replaced and subsequently amended by Ordinances No. 48 of 1938, No. 9 of 1954, No. 2 of 1955 and No. 53 of 1957. The law as stated in relation to these sections is not now therefore in point.

Francis, J.: This is an appeal by the appellant, Peter Johannes de Jager (described in the charge as the Representative of the Watch Tower Bible and Tract Society) against his conviction before the Acting Resident Magistrate, Ndola District, of two offences joined in the same information as hereunder noted:

A. That on the 21st October, 1935, at Ndola, he was found in possession of certain books to wit four books named " Deliverance " and one book named " Jehovah ", the importation into the Territory of which had been prohibited by Proclamation No. 9 of 1935; and

B. That on the same day and at the same place he distributed to one Forbes Mackenzie copies of those two books.

To these charges the appellant pleaded " not guilty ". The case was tried, and in the result he was convicted of both offences, and fined £2 or five days I.H.L. in respect of each.

The facts, which are not in dispute, may be stated shortly as follows:

In the exercise of a power conferred by section 53F of the Penal Code the Governor in Council issued a Proclamation (No. 9/35) published in the *Gazette* of 8th October, 1935, prohibiting the importation into the Territory of certain books therein named, among which are included the books " Deliverance " and " Jehovah ".

Section 53 of the Penal Code makes it an offence for any person to have in his possession or distribute any newspaper, book, etc., the importation of which has thus been prohibited.

On the 21st October, in accordance with some arrangement, the appellant presented to Mackenzie a copy of each of those two books, which were the same day handed over to the police. On the same day also, the appellant was found in possession of a despatch case containing four copies of one book and one copy of the other.

From the circumstances it would seem that the appellant has set himself to test the validity of the action of the Governor in Council.

The appeal was lodged on or about the 12th November, 1935, and set down for hearing on the 18th December of that year. On the matter coming before the Court, the Acting Judge for reasons recorded in his note, adjourned the hearing until the return from leave of the substantive Judge. Eventually on the 20th May, 1936, the cause came on for hearing before me, sitting as the High Court in its Appellate Jurisdiction.

There are eight grounds of appeal, the first two of which were taken together, and their effect briefly is that the Magistrate held as irrelevant any evidence relating to the constitution and purposes of the society, and declined to concern himself as to whether or not the act of the Governor in Council was an interference with religious liberty.

As regards the first point, on Counsel's submission of " no case " at the conclusion of the prosecution, the Magistrate's observation was as follows:

> " As to the Watch Tower Bible and Tract Society, their only connection with this case appears to be that the accused is a representative of that society. I have at the moment no evidence before me as to their constitution (which has been referred to), nor do I consider it relevant to the charge."

The Magistrate, in his judgment, referred generally to his rulings at this stage.

The case for the defence touching this point as it rested at the conclusion of the prosecution, has not been assisted to any useful degree by anything subsequently adduced. A bald statement of the existence of the " Watch Tower Bible and Tract Society and International Students Association " of Brooklyn, N.Y., and an equally vague description of its purposes and activities is not, in my view, an adequate way to establish proof of such facts, or of the further fact that the society is a religious body. For instance, it is common to find a religious body established in connection with some one or more recognised church buildings or meeting places, and, where such a body is engaged in missionary enterprise, to find it attached to some territorial centre or area. Moreover, for the purpose of facilitating its purposes and activities, provision is made under the law of this country for the voluntary registration of any such body. It is noticeable also that many if not all of the missionary societies in this Territory are noted in the Government *Blue Book.* Had evidence on some one or more of these points been forthcoming, it would have been of assistance. In any event I regard these two grounds as contingent on a determination to be arrived at on one of those which follow.

I come now to the third ground which reads as follows:

> " (3) The Acting Resident Magistrate was wrong in holding that Ordinance 10 of 1935 applied to publications other than seditious publications. "

This paragraph is ambiguously worded, but from Counsel's address it is obvious that it is section 53F of the Ordinance that is referred to.

In this connection, it was submitted by Counsel that the section, which reads—

> "*Power to prohibit importation of newspaper, etc.*
>
> 53F. The Governor in Council may by proclamation prohibit the importation into the Territory of any newspaper, book or document."

must be held to apply to newspapers, books or documents of a seditious nature *only*, and cannot be construed to convey such a wide and drastic power as to prohibit the importation of any literature whatsoever. Mr. Lloyd seriously criticised the manner in which this section had been imported into the Penal Code, and invited particular attention to its inclusion in the verbal amendment to section 54, defining "seditious intention". He maintained that unless it is held to apply to seditious literature *only* then its inclusion in the place in which it is found, is an infringement of Art. XV (3) of the Royal Instructions.

Ordinance No. 10 of 1935, entitled briefly "An Ordinance to amend the Penal Code", after effecting certain minor improvements and one major amendment, proceeds to substitute for the existing operative section, a new body of law relating to sedition. This has been effected by the addition of eight substantive sections and one or two consequential verbal amendments. In some respects the law as now represented follows the criminal law of England. For instance, it defines "seditious intention", and up to a point leaves to the courts a determination in this respect. But the Legislature, as if unreliant on the courts, has gone further, and conferred power (section 53E) on the Executive to declare what is a seditious publication. This, of course, goes beyond anything found in the criminal law of England. In the course of the proceedings an expression was used describing the enactment of this section as a process of "short circuiting"—the description, if a little crude, is nevertheless apt.

At this point the Legislature might have been satisfied; but in the next succeeding section, 53F, an even wider and more exceptional power is confided namely that of prohibiting the importation into the Territory of *any* newspaper, book or document. Clearly a contingency was foreseen, when it might become desirable for the Governor to act arbitrarily and without assigning reason.

Penalties resulting from the contravention of any order issued by virtue of the exercise of these powers are provided for in sections 53 and 53A.

An examination of sections 53, 53A to 53E, 53G and 54, shows that they deal particularly with seditious libel or seditious publications, and unless section 53F is intended also to relate to seditious matter, its insertion among these sections is inapposite, and the consequential reference to it in section 54 is misleading. Nevertheless the wording of section 53F is precise and unambiguous. It is not inconsistent with any

other section, and indeed is especially implemented in two preceding sections, namely 53, paras. (*c*) and (*d*), and 53A (1). Moreover, were it to be transferred to some other part of the Code, its meaning would still be clear and simple, and its efficient operation unaffected.

The very nakedness of the language used in this section, almost emphasises the singular nature of the authority delegated, and one may be excused questioning the necessity for such policy, but this affords no ground for a court to hold that it is not good law. In this connection I should like to cite a passage in the judgment of POLLOCK, C.B. in *Miller* v. *Salomons* 21 L.J. Ex. at p. 197:

> "I think, where the meaning of a statute is plain and clear, we have nothing to do with its policy or impolicy, its justice or injustice, its being framed according to our views of right, or the contrary. If the meaning of the language used by the legislature be plain and clear, we have nothing to do but to obey it; and I think to take a different course is to abandon the office of Judge, and to assume the province of legislation."

I am of opinion, therefore, that section 53F is not restricted in its operation to seditious literature.

Now it is quite evident that the section is misplaced; but does this amount to an "intermixing of things as have no proper relation to each other" in the words of Art. XV (3) of the Royal Instructions ?

That article reads as follows:

> "(3) Each different matter shall be provided for by a different Ordinance, without intermixing in one and the same Ordinance such things as have no proper relation to each other; and no clause is to be inserted in or annexed to an Ordinance which shall be foreign to what the title of such Ordinance imports. . . ."

Counsel also cited the mandatory provisions contained in Art. XVIII of the Northern Rhodesia (Legislative Council) Order in Council, 1924, which is set out hereunder:

> "*Conformity with Royal Instructions.*
>
> XVIII. Subject to the provisions of this Order the Governor and the Council shall, in the transaction of the business of the Council and the passing of, and assenting to, Bills or Ordinances conform as nearly as may be to the directions contained in any Instructions under His Majesty's Sign Manual and Signet which may be addressed to the Governor in that behalf; but no Ordinance enacted by the Governor, with the advice and consent of the Council, shall be invalid by reason that in the enactment thereof any such Instructions were not duly observed."

Art. XV (3), when read carefully, means no more than this, that you cannot at the same time deal in one Ordinance with a law relating (say) to Agriculture and a law concerned (say) with Prisons, for there is no proper relation between one and the other; but you can, in the same Ordinance, deal with differing aspects of the same subject. In this

amending Ordinance there are four or five different matters relating to the Criminal law, and section 53F, although in the wrong place as I think, is as germane as any of the other sections. Clearly it does not contravene the latter part of the Article.

In his address Crown Counsel did not discuss this aspect, but was satisfied to rest his case on the proviso to Art. XVIII of the Legislative Council Order. The meaning of this proviso is clear, and it is obviously intended to save local inconvenience which might ensue immediately from any unintentional error or doubtful conflict, which may of course be adjusted in the exercise of the power of disallowance. The conclusiveness of the proviso must be accepted as saving the infringement charged by Mr. Lloyd.

In the result I hold that section 53F is valid law.

The next ground of appeal is as follows:

> " (4) The Acting Magistrate was wrong in holding that Ordinance 10 of 1935 is valid, especially as to section 53 (*c*) thereof."

The wording is wide, but what is meant here I think, is the exception taken to the validity of that part of section 53 para. (*c*) in its relation to both sections 53E and 53F.

I do not concern myself with section 53E; it is not in question. With respect, however, to the submission as it affects 53F, Counsel based his argument on the proposition that if that section applied only to seditious literature then that part of para. (*c*) above referred to, must be invalid. I have given my decision concerning section 53F, and as a result this ground must fail.

The next ground reads:

> " (5) The Acting Resident Magistrate was wrong in holding that the Proclamation contained in Government Notice No. 87 of 1935 was not *ultra vires* the said Ordinance."

Construing this strictly, the complaint is that Proclamation 9 of 1935 went beyond the power conferred upon the Governor in Council by section 53F.

In speaking to this point Counsel founded his argument on the pre-supposition that section 53F applied to seditious literature only and not to *any* literature, and submitted that the exercise of any power purporting to arise therefrom is invalid in so far as the books prohibited were not declared seditious. It may be that in the framework of his address he intended to let the argument end there. It is obvious, however, that directly any decision is arrived at, which maintains the integrity of section 53F, such a submission is disposed of.

This results in setting a closer limitation on the ground of appeal as drafted, than its presence demands, and from the sense of Counsel's address at an earlier stage of the proceedings, I feel sure that this is the ground upon which he founds his inquiry generally as to the legality and

propriety of the action of the Governor in Council. If a wider meaning, therefore, is read into the wording—and I propose doing so—my assumption is correct.

To put it briefly Mr. Lloyd charges the Executive with having interfered in religious liberty. In dealing with this point due regard will be paid to grounds (1) and (2) as yet undetermined. The following are his arguments:

1. The Watch Tower Bible and Tract Society is a religious body and, as such, enjoys equal status with other churches and religious bodies.
2. The books in question are of a religious nature.
3. The appellant is a member of a religious body, and he is unable to carry on his work without the use of those books.
4. The Proclamation is repugnant to a basic principle embodied in the Law of England, which in its recognition of freedom of conscience applies in Northern Rhodesia.
5. Any act in deprivation of the use of these books by the natives of this Territory is an infringement of, or at least a non-compliance with, the terms of Art. XXIII of the Royal Instructions.

   NOTE.—This article incidentally imposes on the Governor a duty (*inter alia*) to promote religion among the native inhabitants, and safeguard them in the free enjoyment of their possessions.

Counsel cited Hals. Vol. XI, paras. 704 and 711. The first authority refers to " Churches " and " religious denominations ", and describes generally the history and method of their formation. There are several cases dealing with the question of what is or is not a religious denomination, c.f. *Hawkes* v. *Moxey*, 1917, 86 L.J. (K.B.) 1530; *Flint* v. *Courthrope*, 1918, 87 L.J. (K.B.) 504; and others to be found in note (*k*) Hals. Vol. XI p. 407. In admitting that these cases bear on the question here but obliquely, I must observe that the judgments are both weighty and helpful. No doubt the matter is one of degree in each case, but following these judgments, with the material before me it is impossible to accept the analogy between this Tract Society and a " Church " or " religious denomination " in the sense in which it is used in his citation.

Counsel referred also to the passage dealing with the liberty of conscience in para. 711 Hals. Vol. XI. It reads:

> " Save in so far as positive law may otherwise provide, the civil law (note: this means as opposed to ecclesiastical law) recognises and has always recognised the right to all to follow the dictates of their consciences in the religious opinions which they hold."

He volunteered the concession that a Legislature may in fact interfere with that liberty of conscience in certain circumstances, but only under the authority of a positive law. He stressed the fact that the

section with which he was dealing, section 53F, was not positive law. The impression I received here was that he sought to place on the expression " positive law " an interpretation different from what it should bear. " Positive Law " according to Byrne means " rules of conduct laid down and enforced by public authority. In other words a public enactment." So whether the section be hidden away among unrelated matter or not, it contains an important element of the Penal Code, and according to this definition, must be regarded as a part of the positive law.

I come now to consider the proclamation.

The Order in Council, as part of the Foreign Jurisdiction Act, 1890, has created the Legislative Council and invested it with powers to legislate for the peace, order and good government of the Territory. The Council has, and was intended to have within prescribed limits, plenary powers as large and of the same nature as those of the Imperial Parliament, and it is obvious that the words used authorise the utmost discretion of enactment for the attainment of the objects in view. It has often been said that what may be suitable in the law of England may not always be expedient abroad, and this is particularly the case when consideration is given to the circumstances of the tropical African dependencies. It is not uncommon, therefore, to find among the laws of the British Dominions and possessions generally, instances where principles of English law, important or otherwise, have been abrogated or modified to meet local conditions. So there can be no suggestion that any provision differing from those made in England for peace, order and good government may not be made for the same purpose in this Territory, and I would express surprise if no example of such deviation is not already to be found in the Statute Book of Northern Rhodesia.

But the question raised by Mr. Lloyd is the repugnancy of a proclamation (being part of a local Ordinance) to an English law establishing freedom of conscience in religious matters. The description is vague and it would have been helpful if he had particularised whether it was the common law or the statute law to which he was referring. At all events Counsel argued that this law applies to this country by virtue of Art. XXI of the Northern Rhodesia Order in Council. Incidentally a reference might also have been made to section 11 of the High Court Ordinance, 1933, where the application of English law is more specifically dealt with.

Art. XXI provides that all laws of whatsoever nature in force at the date of the Order continue in force until repealed, revoked or varied, while section 11 provides that the common law, the doctrines of equity and the statutes which were in force in England on the 17th August, 1911 (being the date of the commencement of the Northern Rhodesia Order in Council, 1911), shall be in force within the Territory. The generality of the wording of these two authorities must however be subject to some qualification before they can be of any practical use. What is intended undoubtedly, is that the law of this country shall be exercised in conformity with the substance of the common law, the doctrines of equity and the Statutes of general application.

Now if this body of English law may be abrogated and modified in the way I have described, there must at the same time be some limitation to the principle which avoids a local Ordinance by reason of its repugnancy with that law.

And here I come to the case of *Rex* v. *Crewe ex parte Sekgome*, 1910, L.R. 2 K.B.D. where this question is fully discussed. The case is one in which the political action of the High Commissioner for South Africa, taken in respect of the Bechuanaland Protectorate, was in question before the Privy Council.

In dealing with the matter there at issue (the abrogation of the Habeas Corpus Act) FARWELL, L.J. laid down certain principles which may suitably be applied to this case.

(NOTE.—The Judge here read that part of the judgment of FARWELL, L.J., which commences at the bottom of p. 612 to the eighth line on p. 616.)

This judgment establishes the principle that in a local enactment there *may* be repugnancy to the law of England, except in so far as such repugnancy, (*a*) is not to some principle of natural justice, the violation of which would induce a Court not to give effect to it; or (*b*) is not to some Imperial Statute applied in some special way by express words or necessary intendment. This then is the limitation which, in my view, should be placed on the words of Art. XXI of the Order in Council, and section 11 of the High Court Ordinance.

Now although the result flowing from this Proclamation is general, I gather that the case for the appellant is concerned not so much with its effect on the European element of the population, as with its consequences on the native inhabitants, and here I pause in uncertainty as to the number of British subjects among them.

Be that as it may, the question arises, what is the statute law of England relating to freedom of religion which may be said to apply by express words or necessary intendment to His Majesty's subjects resident in, or resorting to, this Territory ? No statute has been cited which applies by express words, and, I am unaware of any. Nor has any statute been quoted which applies by necessary intendment.

There is, of course, a mass of law bearing generally on the subject of religion, much of which has been enacted in relief of non-conformity. Commencing possibly with the Toleration Act, 1688, these statutes deal generally with freedom of worship, the registration of worship, removal of disqualification, and matters of a like nature establishing equality of privilege; and in such matters it may be taken that, subject to such qualifications as local circumstances may render necessary, the general effect of these statutes applies by necessary intendment to individuals being His Majesty's subjects in this country. But the subject of inquiry here—the banning of the books of this Tract Society—does not appear to me to bear any relation to these matters, and seemingly falls for consideration in the question whether the act of prohibition is or is not a contravention of one of the principles of natural justice referred to by WILLES, J. in his judgment in *Phillips* v. *Eyre*.

It is axiomatic—indeed the point is conceded by Mr. Lloyd—that religious matters *are* subject to the control of the Legislature, but I imagine that even in the most backward of dependencies administered by virtue of the Foreign Jurisdiction Act, a legislative authority would hesitate long before indulging in legislation antagonistic to public feeling on any fundamental matter. For instance, I would not expect a prohibition to be placed on the Holy Scriptures, the Koran, or on books of a liturgical or devotional nature to whatsoever religion or creed they may belong. When, however, the case involves books containing politico-religious teachings of a kind noticeable in those under review, the matter assumes a different complexion. Politico-religious discussion among the educated invariably excites controversy, and its propaganda among primitive people may lead quite feasibly to misconception. Consequently, I am not prepared to say that the deprivation of literature of this order is an interference with any principle of natural justice.

I am afraid I have entered into a long discussion on the subject of religious freedom as affected by the operation of the Foreign Jurisdiction Act, and I have done so because, apart from the courtesy due to the appellant's counsel, the matter in its varying phases seemed to demand careful examination; and although I am satisfied with the conclusions at which I have arrived, there is yet another aspect from which the validity of the Proclamation may be viewed.

The Legislature has entrusted a wide discretionary power to the Governor in Council, and such a trust lays upon the trustee the duty not to shrink, if need arises, from availing himself of such power. It becomes obvious therefore that if, within the limits prescribed—and those limits are very wide—that power is used in aid of peace, order and good government, it has been lawfully exercised. From the letter of the Chief Secretary to the appellant, dated 13th August, 1935 (marked Ex. G.), it would seem that the Government considered certain of the society's publications appearing in this Territory, to have a subversive influence on the natives, and the appellant was warned of the Governor's intention to place a ban on them.

Now directly such a contingency arose, it would appear to me that there is a duty imposed upon the Governor to act, as and when he thought fit; and, quoting partly from the language of KENNEDY, L.J. in *Rex* v. *Crewe ex parte Sekgome* at p. 628, " if his view of the facts was a reasonable view for him to take—and as to this an observation made earlier in this judgment is relevant—it appears to me to be impossible to deny that, so far as it relates to the two books in question, this proclamation was a valid proclamation, not *ultra vires,* but within the scope of the power and duties entrusted to the Governor ". The proclamation therefore must be regarded as an Act of State which, on the authority of the case just quoted, I am bound to respect.

The sixth, seventh and eighth grounds are of no substantial importance, and were not especially argued.

In the result this appeal must be dismissed.