R. v. WALTER DUNCAN FRASER.

CRIMINAL APPEAL CASE NO. 5 OF 1941.

Emergency Powers (Defence) Regulations, 1940—*order to accused to continue work—form of order—failure to continue work—intention necessary—mere absence from work not sufficient proof of intention not to continue work.*

The appellant was convicted by a Subordinate Court of failing to obey an order of the Governor that he continue at his work. At the hearing in the lower court it was proved that he had been absent from work and that he had sent two letters to his employers which read as follows:

"Please ask Mr. Ross to let me have to-day off. I have so much to do. The boarders are paying and I can't leave the money in the house. Must put it in the bank. I have also to go to the P.O. to collect some money.

Expected my sister-in-law back this morning. Anyhow she will be back sometime this week-end and I shall be relieved of this job.

Trusting you understand.

Yours faithfully,

W. D. FRASER."

"If at all possible let me have to-day off. I am not quite myself and have a lot to do.

My sister-in-law has not come back yet but as soon as she does I will give up this job.

There is some money to collect and I cannot keep it here. Will be down to-morrow sure.

Yours faithfully,

W. D. FRASER."

The appellant based his appeal on the following grounds:

(1) The Order made by the Governor enjoining the defendant to work for the Rhodesia Broken Hill Development Company, Ltd., is void for ambiguity and want of definition.

(2) There is no finding of the fact by the Court that the accused was physically fit and capable of performing his duties as a fitter on Friday the 3rd day of January, 1941, or on the following Saturday, January 4th.

(3) The evidence of the accused that he was incapable of performing his duties must be accepted, and it is not sufficient for the prosecution to prove a mere absence from duty to secure the conviction of the accused of disobedience to the Governor's order.

(4) It is inequitable that an administrative officer who has been instrumental in procuring an order against the accused should be placed in a position of having to decide as Magistrate what constitutes a breach of the order.

On the hearing of the appeal the High Court quashed the conviction for the reasons set out in the judgment reported below.

The Emergency Powers (Defence) Regulations, 1940, have now been repealed.

Law, C.J.: The appellant was convicted of failing to obey an Order, contrary to Regulation 3 of the Emergency Powers (Defence) Regulations, 1940. These Regulations appear under Government Notice No. 103 of 1940, dated the 1st July, 1940.

2. The Order in question Ex. A is dated Lusaka the 11th September, 1940, and purports to have been issued under Regulation 2 of the Regulations referred to above. It reads as follows:

> "In exercise of the powers conferred upon the Governor by Regulation 2 of the Emergency Powers (Defence) Regulations, 1940, I hereby order W. D. Fraser to continue to perform the work of a fitter with the Rhodesia Broken Hill Development Company, Limited, at the Company's Mine situated at Broken Hill."

3. In his Memorandum of Appeal (Ground 1) the appellant complains that the above Order was void for ambiguity and want of definition. At the hearing of the appeal it was argued on behalf of the appellant that no reasons were given for the Order, that is to say, the Order did not recite whether it had been made as necessary or expedient for securing public safety, the defence of the Territory, the maintenance of public order, the efficient prosecution of the war, or for the maintenance of essential supplies or services.

4. The terms of the Order are undoubtedly general, and indefinite as to time. The Regulations, however, do not require that an Order thereunder should be made in any particular form. An Order is not a conviction, indictment or even a charge. It is not therefore invalid merely because it does not specify the reasons for making it or for not limiting its duration. A somewhat similar objection was unsuccessfully taken on behalf of an applicant for a Writ of *Habeas Corpus* in a recent case before the Divisional Court in England in respect of his detention in a prison under the Defence Regulations, 1939 (*in re* Lees, *The Times*, 23rd August, 10th September and 3rd October, 1940). It was there held that the Court had power to inquire into the validity of an Order of detention. So also, in my opinion, this Court has power to examine

whether the Order now under consideration was *intra vires* the Emergency Powers (Defence) Regulations, 1940. A decision to this effect was recently given in the High Court of Southern Rhodesia (RUSSELL, C.J. *in re* Pakai and the City Council of Salisbury, as yet unreported, judgment dated the 28th August, 1940). However desirable it may be that reasons for making it should be specified in an Order, the absence of those reasons does not invalidate the Order provided the Governor had power to make it, which he had in the present case. In these circumstances, the appellant's first ground of appeal must fail.

5. In the charge, the particulars of the offence allege that the appellant failed to obey the Order in question on Saturday, the 4th January, 1941. The particulars are silent as to the nature of that failure. The evidence, however, explains that the appellant did not appear at work on that date and that he did not obtain leave to absent himself. Further, that he was also absent from work on Friday, the 3rd January and Monday, the 6th January. He was not expected to work on Sunday, the 5th January.

6. In Ex. B dated the 3rd January, the appellant asked for leave of absence that day. As this request was not refused the appellant appears to have taken it for granted. Again, in Ex. C, dated the 6th January, the appellant again asked for leave of absence that day. The reply was his arrest about midday. The appellant's explanation was that he spent Friday, the 3rd January in bed, since when he had not been well enough to work. He says that, though not drunk, he was suffering from the effects of drink that day, besides which he had fever and doctored himself with quinine. The letter Ex. B makes no reference to his indisposition that day, but gives another reason for requesting leave. The letter Ex. C, however, makes mention of his being indisposed that day.

7. With regard to his absence from work on the 4th January, the appellant, in his Memorandum of Appeal (Ground 2), complains that there has been no finding of fact by the Court that he was physically fit and capable of performing his duties as a fitter that day. The learned Solicitor-General, who appeared on behalf of the Crown, very fairly agreed that this objection was well founded and that there should have been a finding of fact by the Magistrate in this connection, because indisposition was substantially the appellant's defence. On this point alone the case could be remitted to the Magistrate to record a finding. But no good purpose would be served by doing so because it seems that the appellant should succeed on the second part of the third ground in his Memorandum of Appeal.

8. This third ground urges that it is not sufficient for the prosecution to prove mere absence from duty as proof of failure to continue work. I agree. In my opinion, failure to continue work must be evidenced by some definite conduct of intention not to work. A reference to the concluding sentence in Ex. C " will be down to-morrow sure " indicates that the appellant had every intention of continuing to work on Tuesday, the 7th January. Generally speaking, I am in agreement with the Magistrate that the Governor's Order, Ex. A, overrides the contractual terms entered into between the parties (the appellant and the mine) in

so far as it adds to or varies that contract. The contract itself, however, still exists between the parties, but it has not been produced and proved by the prosecution. I cannot assume, despite the evidence of Mr. Hyam, that in no circumstances—sickness or otherwise—does the contract permit the appellant to be absent from work. If the appellant were really indisposed on Saturday, the 4th January, as he alleged, I should find it difficult to hold—in any event in the absence of proof of the terms of the contract—that he nevertheless was required to appear at work. It would seem that the appellant has performed his duties satisfactorily since the 11th September, 1940. It is doubtful if the previous conviction of the 6th September, 1940, is strictly relevant; it relates to a date prior to the 11th September, 1940, and it is not explained in what respect he then contravened an Order issued under the Regulations.

9. In effect, the appellant appears hitherto to have obeyed Ex. A; there is no proof that in no circumstances could he be absent himself from work; there is no finding that he was not indisposed on Saturday, the 4th January. Furthermore, in the circumstances of this case, I am unable to regard absence from work, in itself, as a failure to obey an Order to continue work. There should be proof of intention not to continue work.

10. For the foregoing reasons the appeal is allowed, the conviction quashed and the sentence set aside.

11. It remains only to refer to the fourth ground of appeal. As regards this, there is no evidence whatsoever that the Magistrate had been instrumental in procuring Ex. A. If he had, it would have been proper for some other Magistrate to try the case.