**THE PEOPLE v BROWN (1974) ZR 135 (HC)**

HIGH COURT

DOYLE CJ 35

5th APRIL 1974

(HPR 127 of 1974)

**Flynote**

**Criminal law - Offences - Meaning of - Whether employment without an employment permit an offence under the law.**40

**Headnote**

The defendant was charged and convicted of being in paid employment without an employment permit.

**1974 ZR p136**

DOYLE CJ

*Held,* on review:

   (i)   All penal statutes must be construed strictly.

   (ii)   The absence of any statement of criminal liability and of a penalty in a statute *prima facie* indicates that no crime was intended 5 to be created by the statute.

   (iii)   As the Immigration and Deportation Act, Cap. 122, did not prescribe any penalty or impose any criminal liability for engaging in paid employment without an employment permit, the accused was convicted of an offence unknown to law, and the 10 conviction was therefore to be quashed.

Cases cited:

   (1)   *R v Baraitser,* 1931 CPD 418.

   (2)   *R v Haas,* 1939 EDL 174.

   (3)   *R v Lloyd,* 25 NRLR 59.

   (4)   *R v Forlee,* 1917 TPD 52. 15

   (5)   *Inspector of Police, Durban v Moodley,* 1929 PHH 96 (N).

   (6)   *R v de Beer,* 1930 TPD 329.

   (7)   *R v Swarts,* 1938 PHH 14 (7).

   (8)   *R v Bornman,* 1912 TPD 66.

   (9)   *R v Zinn* (1946) AD 346. 20

   (10)   *R v Letoani,* 1950 (3) SA 669 (O).

Legislation referred to:

Immigration and Deportation Act, Cap. 122, ss. 9, 19 (1), 26, 29, 30.

Interpretation Act, Cap. 2, s. 3.

*Defendant in person.*25

*E  Sakala, Acting Director of Public Prosecutions,* for The People.

**Judgment**

**Doyle CJ:** The defendant was, on the 2nd day of April, 1974, charged with an alleged offence described on the information as follows:

   "Being engaged in paid employment without employment permit, 30 contrary to section 19 (1) as read with section 30 of the Immigration and Deportation Act, cap. 122 of the Laws of Zambia. COLIN BROWN between the 1st day of May, 1970, and the 28th day of February, 1974, at Lusaka in the Lusaka District of the Central Province of the Republic of Zambia, engaged in paid 35 employment, namely, as a Manager, with Associated Enterprises, an employer resident in Zambia."

To this information the defendant pleaded guilty, and was convicted as charged and sentenced to 4 months' imprisonment with hard labour by the learned Magistrate, Class I, at Lusaka.

Subsequently, 40 the acting Senior Resident Magistrate had doubts about the validity of the conviction and sent it to the High Court for consideration.

**1974 ZR p137**

DOYLE CJ

As *prima facie* the statute had not expressly created this offence, I decided to examine the question for the purpose of review. For that purpose I sought the assistance of the learned Director of Public Prosecutions. Normally a case is reviewed in chambers and that was the practice which was to be adopted. As, however, publicity was given to the fact 5 that a review might take place I adjourned the matter into open court.

At the hearing the learned Director of Public Prosecutions stated that he intended to support the conviction and, accordingly, the matter was adjourned shortly so that the defendant could himself appear.

I mention these matters because some surprise appears to have been 10 expressed in public that the court should act speedily in matters like this and that there was something strange in the fact that it would be heard in chambers.

The learned Director of Public Prosecutions has based his argument first of all upon the Interpretation Act. The Interpretation Act defines 15 offences as meaning any crime, felony, misdemeanour, contravention or other breach of, or failure to comply with, any written law for which a penalty Is provided. He argued that section 30 of the Immigration and Deportation Act refers to offences and that, therefore, the definition must be imported from the Interpretation Act. In my opinion this argument 20 is circular. Section 30 states*, inter alia* that an offence is composed of two factors:

*(a)*   there must be a contravention, breach or failure to comply with a written law; and

*(b)*   there must be a penalty provision. 25

If the word offence, as referred to in section 30, means offence as defined in the Interpretation Act, then section 30 is nugatory. It is section 30 itself which provides the penalty which is necessary in order to make a contravention of the Act an offence. To illustrate this I will set out section 30 as it would read if the Interpretation Act definition were 30 inserted. It would be as follows: "Any person guilty of an offence under this Act, being a contravention of the Act for which a penalty has been provided, shall be liable on conviction to imprisonment for a period of 12 months or to a fine of K500, or to both such imprisonment and such fine.''

The learned Director of Public Prosecutions also referred to a passage or at least part of passage which I have continued in the 6th Edition of *Lansdown's South African Criminal Law and Procedure,* which at page 2 states:

   "Penalty 40

   Secondly, there must be a punishment provided by law for the violation. The punishment need not be defined within certain limits; it may be left to the discretion of the judge. But there must be some punishment available. If a statute forbids an act which was legal prior to the passing of the statute, but prescribes no 45

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DOYLE CJ

   penalty for contravention, is any crime created? Where the Legislature, by imperative and not merely directory words, prohibits an act or imposes a duty, and when serious prejudice to the public interests would result if the court did not regard the provision as 5 carrying a penal sanction, then a breach of such prohibition or duty will in general be treated as an offence, and the omission of any penalty will not prevent the contravention from being punishable - *R v Baraitser* [1]; *R v Haas* [2]*; see R v Lloyd* [3]*; R v Forlee* [4]*; Inspector of Police*, *Durban v Moodley* [5]; *R v de* 10 *Beer* [6]; and *R v Swarts* [7]. In such circumstances the punishment is in the discretion of the court. But of course it must be clear, upon a consideration of the language used and all the other relevant circumstances, that it was the intention of the Legislature that the forbidden conduct should be punished by the court. The 15 absence of any statement of criminal liability and of any provision for penalty will often convey the *prima facie* indication that no crime was intended to be created, and this will particularly be the case when, elsewhere in the same or an analogous enactment, such a statement or provision appears in attachment with prohibitions 20 (see *R v Bornman* [8]; *R v Zinn* [9]) which declared the Transvaal Besluit 104 of 25th September, 1871, to be a non-criminal provision; and *R v Letoani* [10], which similarly regarded a regulation about travelling on the railways without a ticket."

He argued that section 29, which expressly creates a number of offences, 25 was merely a section which dealt with offences which were not otherwise offences under the Act.

I would draw attention to the fact that the passage referred to refers not only to a breach of a prohibition but a breach of a duty. Quite apart from the prohibition set out in section 19 (1), there are duties laid upon 30 various persons, for instance, there is a duty on the minister under section 26 to deport certain persons who have been convicted. The learned Director has argued that this is a discretionary duty. I am unable to find any discretion. There are also various other duties laid upon persons, such as prohibited immigrants under section 26, and arriving persons 35 under section 9. Even accepting that the law is as described in the passage cited, are all these matters to be offences? If not, which of them? Some of these in fact have been expressly made offences under section 29, which is itself significant. It seems to me that the passage cited by the learned Director of Public Prosecutions is against him as it goes on to state, as 40 already cited, that the absence of any statement of criminal liability and provision of a penalty will often convey the *prima facie*indication that no crime was intended to be created and this will be particularly the case when, elsewhere in the same enactment, there are provisions which are clearly coupled with penalties. Section 29 of the Act sets out a number of 45 matters which are expressly stated to be offences and section 30, which immediately follows, then goes on to state that offences are subject to the stated penalty. In my view, section 30 clearly refers to the matters set out in section 29.

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DOYLE CJ

In a well - known passage from *The Gauntlet*, reported at [1871 - 73] L.RP.C. Vol. IV 184, Lord Justice James had this to say:

   "No doubt all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain 5 the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the 10 enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair commonsense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt 15 or ambiguity would clearly not be found or made in the same language in any other instrument."

I very much doubt if the principles cited from Lansdown, which related to South African law, which is based on Roman Dutch Law, are applicable to our law based on the common law. I know of no case in the 20 Zambian or English law reports where, the statute having forbidden an act without either declaring it to be an offence or imposing a penalty, the court has ruled that that contravention is an offence subject to a penalty of the court's own making.

In my opinion, even within the principles set out in the South 25 African authorities, it does not seem to me that there is any absolute requirement for the court in this case to infer an offence. Had the legislature wished to make this contravention an offence it was very simple for it to have done so. I do not see that any great damage is done to the State by not having it as an offence. A person who is here without a work 30 permit and overstays his welcome may be declared to be a prohibited immigrant and may be deported. Were he to sue on his contract in civil law, he would find himself in difficulties. These provisions seem to me to be quite adequate. The legislature has determined under section 29 (6) that an employer of a person without a work permit commits an offence; 35 it may well be that the legislature consider that sufficient. I see no good reason why the court should be assiduous to find an offence where the legislature has not clearly so stated. While it might be that the matter is within the spirit of the Act as referred to in the passage I have quoted from *The Gauntlet,* it clearly is not within the express words.

In my opinion, the defendant has been convicted of an offence unknown to the law, an offence which does not exist. Accordingly, I must quash the conviction and sentence and direct that the defendant be released from any custody which relates to this particular charge.

*Order accordingly* 45

**1974 ZR p140**