PP

v.

INTRAKOTA CONSOLIDATED BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CRIMINAL APPEAL NO: 2-63-9-98]
14 APRIL 1999

CRIMINAL LAW: *Environmental Quality Act 1974 - Section 22(1) - Excessive emission of smoke - Whether a strict liability offence - Defence of due diligence - Applicability - Environmental Quality Act 1974, ss. 22(1), 22(3), 43, 43(2)*

The respondent was charged under s. 22(1) of the Environmental Quality (Amendment) Act, 1996 ('the Act') when one of its buses was found to have emitted smoke in excess of the prescribed 50 HSU limit. In the court below, the respondent admitted the excessive emission. The respondent however argued that it had exercised all such diligence as to prevent the commission of the offence and was therefore exempted from liability by virtue of s. 43(2) of the Act. Through its sole witness ('SD1'), the respondent specifically adduced evidence that it had carried out regular inspections and maintenance of the bus engine. SD1 also testified that the diesel fuel which the company had sourced from Caltex and Petronas could be the cause of the excessive smoke emission. The prosecution did not rebut SD1's evidence, and that being so the learned Sessions Court Judge acquitted and discharged the respondent. The Public Prosecutor appealed.

Held:

[1] It cannot be disputed that over and above the usual defences, s. 43 of the Act provides the diligence defence. Also, s. 43(2) dispels any suggestion that a strict liability is intended.

[2] The evidence of SD1 was not only not challenged but the prosecution also did not apply to call rebuttal evidence to contest such evidence. In the absence of these steps, the evidence of SD1 stands as credible evidence.

[2a] There is therefore credible evidence that not only that the respondent company had carried out regular inspection and maintenance according to the manufacturer's specifications, but it had also not allowed its agents to obtain diesel fuel from other sources other than Caltex and Petronas. In the circumstances, the learned Sessions Court judge was properly

entitled to find that he was satisfied that the respondent had exercised all such diligence as to prevent excessive emission of smoke from the bus engine.

[3] This case should not be read as a charter to pollute. It serves to illustrate, in view of s. 43 of the Act, that evidence of fact of breach alone is insufficient to secure a conviction. The prosecution must be prepared to contest and be able to rebut defence of diligence raised by the accused.

[Appeal dismissed.]

Case(s) referred to:
PP v. Abang Abdul Rahman [1982] 1 MLJ 346 ***(refd)***
PP v. Mohd Isa Awang & Anor (unreported) ***(refd)***
Tan Kim Lue v. PP [1971] 1 MLJ 174 ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***

Legislation referred to:
Environmental Quality Act 1974, ss. 22(1), 43(2)

For the appellant - Yaacub Hj Chik DPP
For the respondent - CL Lim; M/s Azam Lim & Pang

Reported by WA Sharif

JUDGMENT

Abdul Wahab Patail J:

This is an appeal by the Public Prosecutor against the decision on 19 August 1998 by the learned judge of the Sessions Court to acquit and discharge the respondent in respect of a charge under s. 22(1) Akta Kualiti Alam Sekeliling 1974 (Pindaan) 1996 (the Act) punishable under s. 22(3) thereof.

In submissions before this Court there is no dispute that the smoke emission limit of 50 HSU was exceeded. The sole witness when the defence was called is Nazda Kusuma bin Mohd. Nazar (SD1), who is the engineering manager of the Respondent company. He gave evidence as follows:

Pemeriksaan Utama:

Jenis enjin bas ini ialah enjin Cummins dan telah menepati ciri enjin EURO-i. Enjin ini telah menepati Standard Piawaian di Eropah. Enjin ini telah menggunakan minyak disel. Syarikat kami ada membuat pemeriksaan mingguan dan juga pemeriksaan bulanan kepada enjin ini. Pemeriksaan bas akan dilakukan pada had dan masa yang telah ditetapkan. Bas WDM 296 telah diperiksa pada bulan September 1996 iaitu pada 13 hb. Bas WDM 296 ini telah diperiksa sebulan sekali. Pemeriksaan juga ada dibuat pada bulan Januari 1997 iaitu pada

l4 hb. Pemeriksaan bas ini telah dibuat berdasarkan OPTARE Maintenance Program. Setiap maintenance ini dibahagikan kepada lapan ROTA. Pemeriksaan berasaskan kepada ROTA ini adalah sebagaimana yang telah dikehendaki oleh pembuat enjin ini. Enjin ini telah mengeluarkan asap hitam kerana terdapat kekotoran di bahagian injector enjin ini. Kekotoran ini juga adalah kerana standard minyak diesel ini yang dibekalkan di Malaysia adalah tidak sesuai digunakan oleh enjin ini. Pengeluaran asap hitam ini boleh dikurangkan kepada kurang 50 h.s.u tetapi hanya untuk sekejap sahaja. Ini adalah kerana dari masa ke semasa injector ini akan menjadi kotor dan mengeluarkan asap hitam yang berlebihan. Bagi masa ini enjin ini hendaklah menggunakan minyak diesel yang diluluskan oleh SIRIM iaitu [M.S. 123]. Kami tidak ada pilihan lain kecuali mesti menggunakan minyak diesel ini kerana ianya telah mematuhi standard di Malaysia.

Kami juga ada membuat ujian injector ini dengan menggunakan minyak diesel Singapura, Malaysia dan Thailand. Kami mendapati minyak diesel Malaysia masih mempunyai standard yang rendah. Ini adalah faktor yang telah menyebabkan berlakunya pengeluaran asap yang berlebihan dan bukan disebabkan oleh enjin yang tidak bermutu.

t.t.: Mohamad Bin K. Abd. Rahman.

The defence set up was therefore that the respondent company had exercised all such diligence as to prevent the commission of the offence. The argument then is that the diesel fuel obtained from Petronas and Caltex, is the cause of the excessive smoke emission.

The defence relies on s. 43(2) of the Act which reads as follows:

43. Offences by bodies of other and by servants and agents.

(1) Where than offence against this Act or any regulations made thereunder has been committed by a company, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, manager, or other similar officer or a partner of the company, firm, society or other body of persons or was purporting to act in such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he has exercised all such diligence as to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

(2) Whenever it is proved to the satisfaction of the court that a contravention of the provisions of this Act or any regulations made thereunder has been committed by any clerk, servant or agent when acting in the course of his employment the principal shall also be held liable for such contravention and to the penalty provided thereof unless he proves to the satisfaction of the court that the same was committed without his knowledge or consent or **that he had exercised all such diligence as to prevent the same and to ensure the observance of such provisions:**

Provided that nothing in this section shall be deemed to exempt such clerk, servant or agent from liability in respect of any penalty provided by this Act or regulations made thereunder for any contravention proved to have been committed by him.

The section clearly dispels any suggestion that a strict liability is intended. Over and above the usual defences, the Act provides the diligence defence under s. 43. The prosecution had submitted before the learned judge of the Sessions Court after having cross-examined SD1 as follows:

Pemeriksaan Balas:

Pihak Syarikat saya memang ada meter untuk memeriksa asap. Kami tidak menggunakan meter ujian asap ini tetapi ada menggunakan 'visual test'. Sekarang ini Syarikat kami ada 800 buah bas. Saya tidak tahu berapa bas syarikat saya yang telah disaman kerana pengeluaran asap yang berlebihan. Kami pernah menghantar surat kepada pihak Petronas bertanyakan mengenai standard minyak dieselnya. Petronas telah memberi jawapan minyak dieselnya telah mematuhi Standard Piawaian Malaysia. Minyak diesel bas saya telah dibekalkan oleh Petronas dan Caltex. Saya tidak tahu samada minyak diesel Petronas telah rnematuhi European Standard ataupun tidak. Bas ini telah diselenggarakan pada tiap-tiap minggu dan tiap-tiap bulan. Kami ada membuat pemeriksaan asap apabila hendak di hantar bas ini ke Puspakom. Bas ini telah mendapat kelulusan Puspakom.

Asap yang dilepaskan oleh bas yang diluluskan oleh Puspakom ialah 50 h.s.u. Kami telah mengambil langkah-langkah yang sepatutnya untuk mematuhi kehendak pembekal enjin ini. Tidak ada langkah yang lain yang telah diambil oleh syarikat saya untuk mengurangkan asap hitam ini kecuali dengan membuat pemeriksaan dan menyelenggarakan enjin ini.

t.t.: Mohamad Bin K. Abd. Rahman.

From the above, the evidence by SD1 was not challenged by the prosecution as to the expertise of SD1 who is the engineering manager, or as to the ground that the Respondent inspected and maintained the engine every week and monthly, or that the quality of diesel available in Malaysia is of low standards below that of neighboring countries. It appears from the record that although various questions were asked during cross-examination, the record does not show that apart from asking those questions, the prosecution did in fact lay out in what respects it disputed those answers. While it is not necessary to be cross in cross-examination, it is not enough to merely ask questions as if in examination in chief. The fact that you do not accept his answer must be made clear. This is done by the device 'I put it to you that ...' When that is done the party bringing the witness is put on notice what is challenged, and could proceed to substantiate the assertions of the witness made in examination-in-chief. If not challenged in cross-examination, the assertions in examination-in-chief stands as undisputed evidence.

It ought to be remembered also that cross-examination itself is not evidence. The answers from cross-examination is evidence. Cross-examination serves to lay out and test the cross-examining party's argument against the relevant witness of the party that calls him. A failure to cross-examine in the circumstances can amount to an acceptance of the testimony. In *Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212, the Federal Court said:

> A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition in the appellant's trouser pockets remains unshaken. On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v. Garry* where Haslam J said at page 122:
>
> > In *Phipson on Evidence* 11th edition paragraph 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, *viz*., where '... the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy ... or when counsel indicates that be is merely abstaining for convenience, *eg*, to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all.'

The importance of cross-examining an opposing party's witness was emphasized in *Public Prosecutor v. Mohd. Isa bin Awang & Anor* (unreported) and applied by Tan Chiaw Thong J in *Public Prosecutor v. Abang Abdul Rahman* [1982] 1 MLJ 346, where the learned trial judge stated in his judgment on the matter of cross examination:

> It is right and proper that the witnesses should be challenged in the witness box, or at any rate that it should be made plain while the witness is in the box that his evidence is not accepted.

Sharma J in *Tan Kim Lue v. Public Prosecutor* [1971] 1 MLJ 174 had occasion to say on failure to cross-examine:

> This witness was never cross-examined by the prosecution at all. In spite of this the learned magistrate has convicted the appellant. This, I think, was entirely wrong. When the prosecution chooses not to cross-examine a witness the natural inference is that it accepts the evidence of that witness in its totality.

The evidence of SD1 was not only not challenged but the prosecution also did not apply to call rebuttal evidence to contest the evidence of SD1. In the absence of these steps, the evidence of SD1 stands as credible evidence. There is evidence therefore that not only the respondent company carried out regular inspection and maintenance according to the manufacturer's specifications, but in fact did not allow its agents to obtain diesel fuel from other sources, but restricted supply from Caltex and Petronas. The learned Judge of the Sessions Court was properly entitled to find that he was satisfied that the Respondent had exercised all such diligence as to prevent the same and to ensure the observance of such provisions.

In addition it was submitted the diesel fuel available in Malaysia was the cause of the excessive smoke emission. SD1 gave evidence to that effect. Given undisputed evidence that regular and frequent inspections and maintenance has been carried out, it is probable that the fuel may have something to do with the emissions. Again no evidence was adduced to rebut these assertions. Nevertheless no specific finding can be made as to whether the MS 123 standard for diesel fuel is lower than international standards, nor can a maintenance engineer be said to be an expert in fuel specification. Nevertheless his evidence that the injectors in the engine quickly become dirty with carbon regular inspection and maintenance is direct evidence and requires an answer. It may not necessarily be the MS 123 that is at fault. The diesel fuel supplied may well be lower than the MS 123 specification. The cause of that may not necessarily be that Petronas or Caltex is at fault. In the process of handling and delivery, the fuel may have been adulterated. That adulteration could be with or without the knowledge of the Respondent. The fact remains however, that there are valid questions on which no evidence has been led. In this respect it must always be kept in mind the onus is always upon the prosecution to prove its case beyond reasonable doubt.

At the end of the day, the prosecution evidence is primarily founded upon the evidence of SP1 and SP2, being the officers who conducted the smoke emissions tests. Although the defence as to the diesel fuel used being the cause of the smoke emissions was not laid out in cross-examination of prosecution witnesses. Generally such a failure affects the credibility of and the weight to be given to the defence. It may even be objected to. However, because the line of defence could not have been properly put to SP1 and SP2 in any case, no objection was taken to its relevance and admissibility, and SD1 was not challenged as to his competence as the evidence that he had given, it was proper for the learned judge of the Sessions Court to have accepted and to take the evidence into account.

Accepting for the above reasons the evidence of SD1, there is undisputed evidence regular inspections and maintenance is carried out in accordance with the recommendations of the manufacturer of the engines designed for reduced smoke emissions. It cannot be said that the learned judge of the Sessions Court had erred in being satisfied upon the evidence that or it had exercised all such diligence as to prevent the same and to ensure the observance of the provisions and to acquit and discharge the respondent company. This case should not be read as a charter to pollute. It serves to illustrate, in view of s. 43 that evidence of fact of breach alone is not sufficient to secure a conviction, but that the prosecution must be prepared to be contest and be able to rebut defence of diligence raised by the accused.

Accordingly the appeal is dismissed.