APPELLATE CRIMINAL.

Before McNair and Khundkar JJ.

1939

July 28, 31 ;
Aug. 1, 2, 14.

LEGAL REMEMBRANCER, BENGAL

v.

L. N. BIRLA.*

Factories—*Occupier of a factory, how far liable under the Act—Procedure when the occupier charges some other person as the actual offender—Factories Act (XXV of 1934), ss. 60, 71.*

The primary responsibility for any contravention of the Factories Act is laid upon the person in ultimate control, namely, the occupier and he can avoid liability by giving the proof required by s. 71 of the Act. That section requires proof not only of the actual offender, but that the controlling authority has not shirked his responsibility but has used due diligence to enforce the execution of the Act, and that the offence was committed without his knowledge, consent, or connivance.

Consequently, when an occupier, against whom a prosecution under the Act has been instituted and who has made an application under s. 71 against another person as the actual offender, does not adduce any proof to satisfy the requirements of s. 71, cls. (*a*) and (*b*), he cannot be discharged from liability on the plea of guilty only of the person whom he has charged as the offender.

The procedure laid down under s. 71 is a special one which is different in many ways to the procedure contemplated by the Code of Criminal Procedure. After the commission of the offence is proved by the prosecution the onus of proof shifts to the occupier and, in order to discharge it, he is entitled to call evidence or give evidence himself, the Crown and the other accused having a right to cross-examine him if he chooses to give evidence and any witnesses he may call. The Crown is also entitled to adduce rebutting evidence.

Government of Bengal v. *Murray* (1) referred to.

CRIMINAL APPEAL.

These were an appeal and a Rule obtained by the Local Government against one L. N. Birla, occupier of the Keshoram Cotton Mills, Ltd., and one B. K. Rana, an employee of the firm, for an offence relating to inadequate fencing of the mill machinery. The

*Government Appeal No. 6 of 1939, against the order of H. Barori, Deputy Magistrate of Alipore, dated Mar. 28, 1939.

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appeal was directed against an order of discharge amounting to an acquittal of L. N. Birla and the Rule was to show cause why the conviction of B. K. Rana in connection with that offence should not be set aside. The circumstances giving rise to the appeal and the Rule are fully set out in the judgment of the Court.

The Advocate-General, Sir Asoka Roy, and *Anil Chandra Ray Chaudhuri* for the Crown. The Magistrate had no jurisdiction to discharge Birla from liability merely on the plea of guilty by Rana. The only effect of that plea is to dispense with the proof that Rana had actually committed the offence. Under s. 60, the entire responsibility for any contravention of the Act is put upon the occupier or the manager as the case may be. He can be discharged from the liability only upon proving certain circumstances required by s. 71, apart from the question as to who actually committed the offence. No evidence was adduced, nor is there any finding by the Magistrate, to satisfy cls. (*a*) and (*b*) of s. 71. Birla was represented in Court by a *mukhteâr* whose statement under ss. 242 and 342 Cr. P. C. certainly cannot stand for proof of these circumstances. The Court was further wrong in the procedure which was adopted. The procedure under s. 71 is quite different from the ordinary procedure laid down in the Code of Criminal Procedure. After the proof of the commission of the offence, the onus is shifted to the occupier and, in view of the language of s. 60, he ceases to be an accused person for all practical purposes. He would be convicted straight away unless he can prove certain facts some of which it is difficult to see how he will be able to prove unless he gives evidence himself. He is perhaps the only competent person to prove that the offence was committed without his knowledge, consent or connivance. Although under the Indian law an accused is not generally entitled to give evidence, the very provision of s. 71, by necessary implication, abrogates that law. The Court was

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also wrong in refusing permission to the Crown to prove that no due diligence had been exercised by the occupier. The recent amendment of the English Factories Act, 1937, makes the position expressly clear. Even though the Indian Act has not introduced similar provision, from the very nature of the entire proceeding, it is clear that the Crown, being interested in the elements required to be proved by the occupier, would be entitled to call rebutting evidence. The order of discharge of Birla should be set aside and it necessarily follows that the conviction of Rana should be also set aside. [The proper procedure under s. 71 was then fully explained. *Discussed Government of Bengal* v. *Murray* (1).]

Narendra Kumar Basu, *Santosh Kumar Basu*, and *Ajit Kumar Basu* for L. N. Birla. The whole appeal by the Local Government seems to be unreal. All that the Crown is concerned with is that when an offence has been committed the actual offender should be punished. In the present case, the actual offender has been convicted on his own plea and it matters little as to who is the person from whose pocket the fine comes. The Court can certainly be satisfied from the statement under s. 342 of the Code of Criminal Procedure that the occupier had exercised all reasonable care and diligence. There was enough materials in this case to justify the discharge. The accused himself was not entitled to give evidence and the only way he could prove some of the circumstances was by his statement which the Court was entitled to take into consideration. That the statement was made by the agent representing him makes no difference. That express provision had to be made in the English Act shows that the procedure under the Indian Act was not the same as under the English Act. There is nothing on the record to show that the Crown wanted to call rebutting evidence and there is no affidavit in support of the statement made in the petition of

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appeal which should, therefore, be ignored. The discharge of Birla was proper and there was no illegality in the procedure adopted and the appeal should be dismissed.

Sudhangshu Sekhar Mukherji for B. K. Rana.

Cur. adv. vult.

McNAIR, J. The Local Government has appealed against the discharge of L. N. Birla in a case under ss. 60(*a*)(*iii*), 32(*a*) and 24(*1*)(*c*) of the Factories Act, 1934, and r. 46 of the Bengal Factories Rules, 1935. In the connected proceeding, Revision No. 599 of 1939, a Rule has been issued at the instance of the Local Government calling upon B. K. Rana to show cause why the order of conviction and sentence passed upon him under the same sections of the Factories Act and the Factories Rules should not be set aside and such further or other order be made as to this Court may seem fit and proper.

These cases are two out of six cases instituted by the Local Government against L. N. Birla for various alleged contraventions of the Factories Act and the rules made thereunder.

The Keshoram Cotton Mills, Ltd., is the occupier of the factory and L. N. Birla is admittedly one of the directors of that company.

Proceedings have been instituted against Birla as the person responsible for the alleged offences, and Birla has, in each case before us, complained against Rana as the "actual offender" and has claimed discharge from liability under the provisions of s. 71 of the Act.

The Local Government contended that the procedure adopted by the trying Magistrate was irregular and that the conviction of Rana and the acquittal of Birla was in each case without jurisdiction and illegal.

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We have called for the records in all the connected cases and we are satisfied that the learned Magistrate adopted the same procedure at each trial.

The proceedings arose out of an inspection by Mr. R. C. Parsons, Inspector of Factories, Bengal, of the Keshoram Cotton Mill as on the 1st and 3rd August, 1938, when he found that various provisions of the Factories Act had been contravened.

In the appeal before us, the contravention related to inadequate fencing of the mill machinery. Under s. 60 of the Act the "manager and occupier shall each "be punishable for such contravention". Mr. Wright, who was the manager at the time of the inspection, had already left.

Section 70(*2*) of the Act provides that :—

> Where the occupier of a factory is a company, any one of the directors thereof.....may be prosecuted and punished.....for any offence for which the occupier of the factory is punishable.

The company had not given notice as permitted by the proviso to s. 70(*2*) nominating a director to be "the occupier", and Birla was therefore *prima facie* punishable as one of the directors.

Section 71(*1*) of the Factories Act provides :—

> Where the occupier or manager of a factory is charged with an offence against this Act, he shall be entitled upon complaint duly made by him to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge ; and if, after the commission of the offence has been proved, the occupier or manager of the factory proves to the satisfaction of the Court—
>
> (*a*) that he has used due diligence to enforce the execution of this Act, and
>
> (*b*) that the said other person committed the offence in question without his knowledge, consent or connivance,
>
> that other person shall be convicted of the offence and shall be liable to the like fine as if he were the occupier or manager, and the occupier or manager shall be discharged from any liability under this Act.

The Inspector's complaint was received on October 10, 1938. On November 19, Birla availed himself of the provisions of s. 71(*1*) of the Factories Act and

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complained against Rana, praying that he might be brought before the Court at the hearing of Birla's case. Notice was issued to Rana on some date between November 22 and 27.

On February 20, 1939, the Magistrate heard law points. Rana was absent and the defence undertook to produce him.

After various adjournments the case again came on for trial on March 28, when Birla was represented under the provisions of s. 205 of the Code of Criminal Procedure by his *mukhteâr*, Nani Lal Ghosh, who was examined under s. 242 and pleaded not guilty.

Inspector Parsons then gave evidence of the commission of the offence and was cross-examined on behalf of Birla.

Rana was offered an opportunity to cross-examine the witness but refused.

The learned Magistrate then further examined Nani Lal Ghosh under s. 342 of the Code of Criminal Procedure. When he stated:—

> I am innocent. Rana was in charge, it was he who committed the offence. I had no knowledge about the matter or gave consent in the matter.

The learned Magistrate held that the offence had been committed. He then started a fresh order sheet and proceeded with the trial of Rana on the complaint of Birla.

Rana, on being examined under s. 342 of the Code of Criminal Procedure, pleaded guilty. The learned advocate for the Crown at that stage contended that, in view of the provisions of ss. 60 and 71(*1*) of the Factories Act, Rana could not be convicted nor Birla discharged until Birla had proved the matter set out in cls. (*a*) and (*b*) of s. 71(*1*), *viz.*, that he had used due diligence to enforce the execution of the Act, and that Rana had committed the offence without his knowledge, consent or connivance. The Magistrate overruled this plea and refused to allow

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the learned advocate for the Crown to adduce evidence that no due diligence had been exercised by the occupier of the factory in connection with these offences.

The learned advocate for Birla contends that the latter plea does not appear on the record and that although the petition contains a statement to that effect, the petition is not verified by an affidavit.

We find from the connected records that the Crown has in some instance put in a petition praying for leave to adduce evidence and we see no reason for disbelieving the statement in the petition that the learned Magistrate said that he would note the plea of the Crown and that it was unnecessary to put in a petition in each case. Rana was convicted on his plea of guilty and fined Rs. 50 and Birla was discharged. The contention on behalf of the Crown is that Birla is the "occupier" and, as such, primarily liable if an offence has been committed, and that he can only avoid punishment by proving due diligence and lack of knowledge, *etc.*, as provided by s. 71 (*1*) (*a*) and (*b*) of the Factories Act.

Until he has given such proof to the satisfaction of the Court he cannot be discharged.

In the present instance Birla has not given evidence himself and he has not called evidence on which the learned Magistrate could come to a finding that Birla had proved to his satisfaction the facts required by s. 71(*1*)(*a*) and (*b*).

The words of s. 71 of the Factories Act, 1934, are identical with the words of s. 42 of the Factories Act, 1911, and it was held in *Government of Bengal* v. *Murray* (1), where the procedure under s. 42 of the former Act was explained, that it was incumbent on the manager or occupier to give evidence himself in

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order to discharge the onus which is upon him, when he avails himself of the provisions of the Act which alone grant him exemption from liability.

In *Murray's* case (*supra*), the manager, Murray, gave evidence on oath and was acquitted on his own sworn testimony. The Crown appealed on the ground, amongst others, that Murray as an accused could not give evidence. This Court held that the procedure adopted by the Magistrate was not irregular and on this point stated as follows:—

"The structure of the portion of the section quoted above" [*i.e.*, s. 41(*1*) of the Act of 1911] "indicates that one proceeding is split up into two proceedings "and that while the manager or occupier is accused of having committed an "offence under the Act, he is also a complainant on his complaint against the "other person or persons he has brought in. In the proceeding in which the "manager or the occupier is the complainant, he is liable to be cross-examined "by the other person or persons who has or have been brought before the "Court on his complaint. This, of course, must mean that the manager or "occupier *qua* complainant must give evidence himself. The procedure "indicated above is a special one prescribed by the Act and it would appear "from an examination of the record in this case that the Magistrate has in "no way departed from that procedure. In our opinion, there is no substance "in the objection that the manager or occupier who initially is charged with an "offence against the Act cannot go into the witness box and give evidence "himself. In the circumstances contemplated in the latter part of the section "quoted above he goes into the witness box not as an accused in the case "originally started against him but in his own right as a complainant on "his complaint against the other person or persons whom he has brought in."

As stated by the learned Judges in the judgment quoted:—

The procedure is a special one provided by the Act.

The offence is a statutory offence and the legislature has laid down the procedure to be adopted in ascertaining whether the offence has or has not been committed, and the person or persons responsible. The learned Advocate-General has drawn our attention to the words of s. 141 of the English Factory and Workshop Act, 1901, which, except for a provision as to costs, is almost identical with the words of s. 71 of the Indian Act. Undoubtedly the draftsman of the Indian Act took the English section as his model, but apparently he was unmindful at the time of the

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very considerable difference in the criminal procedure of the two countries, which, in England, permits the accused to give evidence on oath. Be that as it may, the procedure to be adopted in the trial of cases under the Factories Act has been laid down by that Act and a Bench of this Court has held that, according to that procedure, the manager or occupier is not only a competent witness, but "*qua* complainant he "must give evidence himself".

It is difficult to conceive how otherwise he could satisfy the Court that the "other person committed "the offence without his knowledge, consent or "connivance".

It is certainly not proved by the statements of Nani Lal Ghosh under s. 242 or 342 of the Code of Criminal Procedure.

It is true that s. 342(*3*) permits the Court to take into consideration the answers given by the accused. That is very different to saying that an admission of the offence by one of the accused is proof that the other accused had used due diligence to prevent the offence, or that the offence was committed without his connivance. For the defence, reference has been made to a number of cases to support the contention that the statement by Nani Lal Ghosh may be taken for all purposes as the statement of Birla. Admitting that to be so, the authorities do not assist us in the present enquiry, for they do not contemplate a provision such as that contained in s. 71(*1*) requiring the "occupier" to adduce proof. In the case before us the Magistrate had no power to convict Rana or discharge Birla until the proof envisaged by s. 71(*1*) (*a*) and (*b*) was before him. No such proof was given and no findings on those matters are recorded.

Mr. N. K. Basu for Birla complains that there should be an appeal by the Crown from the acquittal of his client when the actual offender has been convicted and he argues that the general policy of the law is

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to proceed against the person actually responsible for the offence. In support of this argument he refers to s. 71(*2*) of the Factories Act which empowers the Inspector to proceed against the actual offender without first proceeding against the occupier or manager. But s. 71(*2*) is by way of exception to the general rule that the person primarily responsible is the manager or occupier.

The whole scheme of the Factories Act appears to be to bring pressure on the controlling authority to see that the provisions which the legislature has made for the safety and welfare of employees are carried out.

Section 9 provides for the nomination of a "manager".

Section 2(*1*) defines "occupier".

Section 70 provides for the determination of the occupier in the case of a firm or company.

Section 60 provides that if there is any contravention of the Act, the manager or occupier shall each be punished.

Clearly the primary responsibility is laid upon the person in ultimate control and he can only avoid liability by giving the proof required by s. 71; and that section requires proof not only of the actual offender but proof that the controlling authority has not shirked his responsibility.

Then and not till then can he be discharged. This Court has already pointed out in *Murray's* case (*supra*) that the offence is an offence created by the statute and that the statute also provides the procedure for determining the offender.

That procedure is in many ways different to the procedure contemplated by the Criminal Procedure Code and no doubt that is the reason why the lower

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court has failed to appreciate the interpretation of the statute which has already been given in the case to which I have referred. It appears therefore desirable once again to set forth the procedure which in our view is contemplated by the legislature in s. 71(*1*) of the Factories Act, 1934.

The complaint is made in the first instance by the Inspector of Factories against the manager or occupier under s. 60 of the Factories Act.

The manager or occupier is then entitled under s. 71 to complain against the actual offender and if he does so, the actual offender is given notice and brought before the Court and the trial proceeds as against both persons complained against; for, as stated in *Murray's* case (*supra*)—

> The section contemplates both sets of complainants and accused being before the Court at the same time.

The carriage of proceedings is with the original complainant on whom the onus lies of proving that the offence has been committed.

Both parties complained against are concerned with the finding on this issue and both are entitled to cross-examine the prosecution-witnesses at this stage, and to lead evidence to disprove the charge, but being accused persons they would not be entitled to give evidence themselves.

If the prosecution fails to prove the offence both the accused must be acquitted.

If the offence is proved, the Court should record an order to that effect and the manager or occupier is guilty under s. 60 of the Act. Section 71, however, affords the manager or occupier an opportunity

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of escaping liability provided he can give satisfactory proof of the facts required by s. 71(*1*)(*a*) and (*b*).

The onus of proof is now shifted to the manager or occupier and he is entitled to call evidence or to give evidence himself. The actual offender, who is, if I may so name him, the ultimate accused, would be entitled to call evidence, but not to give evidence himself. The difference in procedure being due to the fact that the actual offender occupies the role only of an accused, whereas the occupier or manager at this stage, besides being an accused, has to discharge the onus of positive proof required by s. 71(*1*)(*a*) and (*b*), and in all probability he alone is capable of proving certain facts of which proof is thereby required.

In our view the Crown, which has initiated the proceedings, and has throughout retained the carriage of the proceedings, is entitled at this stage to cross-examine the occupier or manager if he gives evidence, and any witnesses called by him in support of his charge, and to call rebutting evidence.

The relevant section of the English Act on which the Indian section is based has placed the matter beyond all doubt by the insertion of the following proviso in the English Factories Act, 1937 :—

> The prosecution shall have the right in any such case to cross-examine the occupier or owner if he gives evidence and any witnesses called by him in support of his charge, and to call rebutting evidence.

It is true that no such proviso appears in the Indian Act, but it appears to us to be beyond doubt that such would be the rights of the prosecution in India as well as in England in the procedure contemplated by both the English and the Indian Acts.

In the result the appeal of the Legal Remembrancer is allowed, and the Rule in Revision No. 599 of 1939 is made absolute. The conviction of Rana and the discharge of Birla are both set aside.

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The learned advocate for Birla has stated that his client pleads guilty and prays that this Court will now deal with the case. The Crown has no objection. We find Birla guilty. He is convicted of the offence and fined Rs. 100 or in default, simple imprisonment for one month. Rana is acquitted and the fine, if paid by him, must be refunded.

KHUNDKAR J. I agree.

Appeal allowed; accused convicted.

A. C. R. C.