

CRIMINAL REVISION.

Before Mr Justice Baguley, and Mr. Justice Mosely.

SHWE PHONE AND OTHERS

v.

THE CHAIRMAN, DISTRICT COUNCIL,
MERGUI.*

1938

Feb. 8.

Burma Ferries Act, ss. 12, 15—Plying for hire—Rule 4A, ultra vires.

A person is said to ply for hire in a ferry when he waits or attends on the bank or in the stream regularly, for hire by the public or by anybody who chooses to employ him to cross the river or convey goods across the river.

Rule 4A made under s. 12 of the Burma Ferries Act is *ultra vires*. The rule as required by s. 12 must be consistent with the Act but the rule as framed contravenes the provisions of s. 15 of the Act.

Enuoose for the applicants.

The case in the first instance came up for hearing before Baguley J. Subsequently it was heard by a Bench composed of Baguley and Mosely JJ.

BAGULEY, J.—This order covers these four cases which are all of a similar nature.

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The present applicants were sent up for trial under section 27 of the Burma Ferries Act for conveying for hire passengers, in contravention of section 15. Section 15 runs as follows :

" 15. No person shall ply a ferry boat for hire or establish, maintain or work a ferry or convey for hire any passenger, animal, vehicle or goods, between points within, or within two miles from, the limits of a public ferry, except with the sanction of the Superintendent or of the lessee of such public ferry : "

All the applicants appear to be persons who kept boats at different points of the Tavoy-Mergui road for

* Criminal Revision Nos. 606B to 609B of 1937 from the orders of the 1st Additional Special Power Magistrate of Mergui in Criminal Summary Trials Nos. 70 to 73 of 1937.

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carrying mails across, and at all these points, it will be seen, there is a public ferry under the control of the District Council. The prosecution was launched by the Chairman of the District Council and the proceedings were tried summarily. The judgments are all on similar lines, and it seems to me that the learned Magistrate had really missed the point. He says

“The only point for decision is whether section 15 has been contravened by the first accused for carrying the aforesaid passengers free of charge or on payment of usual tolls to the lessee of the public ferry concerned.”

I do not exactly understand what this means but if he means that the point was whether the section had been contravened by carrying passengers either free of charge or on payment of tolls, it seems to me he had missed the whole point. Section 15 says a person shall not ply a ferry boat for hire, or convey for hire any passengers, etc., within the limits of a public ferry. I should say that the two things are quite distinct. If a man plies for hire, if he has a boat in a convenient position, tries to attract the attention of people so that they should cross over in his boat, and so on, he would commit the offence even if he never got a passenger. A taxi-cab is said to be plying for hire if it is crawling down the street with the driver on the look out for possible hirers.

This offence should be quite distinct from a person conveying for hire, that is, for monetary gain or otherwise, any passenger across the ferry. He might not be plying for hire but if he happened to be there on some lawful occasion and the would-be passenger asked him to take him across the ferry for four annas and he did take him across the ferry and did receive the four annas, then it seems to me he would be committing a breach of section 15.

This section has been considered by this Court in Criminal Revision No. 31B of 1937, where the facts were similar but were not exactly on all fours, and in that case, on application by the accused who had been convicted by the Magistrate, the conviction was set aside because the learned Judge of this Court who dealt with the case considered that Rule 4 of the Rules framed under the Ferries Act would apply. Rule 4 purports to have been made for regulation of traffic of ferries, and therefore to have been framed under section 12B of the Act, which is as follows :

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" 4. The lessee of a ferry shall not interfere with any person swimming cattle across the stream or with any boat employed by its owner in conveying himself, his property, or any other person or property across the stream, provided such boat does not ply for hire."

As I understand that rule it might be held to mean that a person who, in an isolated case, took a person or goods across the stream for fee or reward would not be liable to be interfered with, and therefore apparently would not be committing a breach of section 15. If the lessee could not interfere with a man who did this, he could not, I think, prosecute him because, of course, prosecuting a man is certainly interfering with him. Nevertheless, it seems to me that the rule directly contravenes section 15 which says

" No person shall convey for hire any passenger, animal, vehicle or goods, except with the sanction of the Superintendent or of the lessee of such public ferry."

Rule 4 therefore seems to me to be *ultra vires* because section 12 only gives the Governor power to make rules consistent with the Act.

This being the view that I take of the matter, and as a declaration that the rule is *ultra vires* should,

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I think, be made by a Bench of this Court, I pass no final orders in the matter but direct that these revision applications be heard by an ordinary or Full Bench as My Lord the Chief Justice may direct.

MOSELY, J.—These cases came up for hearing before Mr. Justice Baguley and were referred by him to this Bench.

We are dealing here with four applications, Criminal Revision Nos. 606B, 607B, 608B and 609B of 1937, in which the applicants were convicted under section 15/27 of the Burma Ferries Act and fined Rs. 5 each. The applicants are employees at two different ferries of the contractor for the mail from Ye to Mergui. In Criminal Revision No. 606B of 1937, the accused boatman in charge of the contractor's boat used to carry the mail parcels across the river at the Tamok-Lut Lut ferry. He admitted conveying passengers in "a hired boat", by which I take it was meant in the contractor's boat for hire. In Criminal Revision No. 607B of 1937, the two accused boatmen of the contractor's boat at the Kywegu-Kyaukpya ferry admitted conveying or carrying passengers, but said that they were servants of Government Officials whom they carried free.

In Criminal Revision No. 608B of 1937, the accused boatman at the Tamok-Lut Lut ferry admitted carrying passengers, on two occasions one day, and on another occasion the next day in the mail parcel boat, but said that he did it free, and in Criminal Revision No. 609B of 1937 the same accused made the same plea on a similar charge. In these last three cases the Magistrate convicted the accused without deciding whether they carried for hire or not. He quoted and misunderstood an executive instruction by the Commissioner of the Moulmein Division which said that passengers could not be carried in the contractor's boat across the ferry on

payment of the usual tolls without the consent of the lessee or Chairman of the District Council, *vide* section 15 of the Burma Ferries Act. But the question to be decided in these last three cases was whether any tolls had been paid, for I understand the Commissioner's letter as meaning tolls paid by the passengers to the contractor.

Section 15 of the Act says as follows :

"No person shall ply a ferry boat for hire or establish, maintain or work a ferry, or convey for hire any passenger, animal, vehicle or goods, between points within, or within two miles from, the limits of a public ferry, except with the sanction of the Superintendent or of the lessee of such public ferry : Provided that the Governor may, by notification, exempt any persons or classes of persons from the operation of this section."

It seems to me perfectly clear that in the first case, Criminal Revision No. 606B of 1937, the applicant-accused, Shwe Phone, admitted conveying passengers for hire within the limits of a public ferry without the aforesaid sanction, and his application must be dismissed.

As regards the other three applications, there was no proof that the accused conveyed any passengers for hire, which was the offence with which they were charged. The question might, however, arise as to whether they plied a ferry boat for hire.

The expression "to ply for hire" was considered in Criminal Revision No. 31B of 1937 by Mr. Justice Spargo. That was a case where the contractor himself who conveyed the parcels between Ye and Tavoy was prosecuted by the lessee of the Ye ferry for conveying the parcels for hire across that ferry. It was held that he could not be prosecuted by reason of the provisions of rule 4 framed under the Burma Ferries Act, because he did not "ply for hire." I would agree in the present

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connection with what was there said about "plying for hire." A person is said to ply for hire in a ferry when he waits or attends on the bank or in the stream regularly (that is to say not uninterruptedly, for it might be done sporadically, but regularly in the sense of repeatedly,—making a business of it), for hire by the public or by anybody who chooses to employ him to cross the river or convey goods across the river. I would not necessarily agree with what was said there, that because the accused in that case only crossed once in each direction daily he was not plying for hire, but I would agree that it is an essential part of the term that the person plying for hire offers his services to the public.

We are not concerned in the present case with rule 4 or, as it is now, rule 4A. Rule 4 was omitted from the rules framed by Local Government Notification No. 188 of 26-10-36, and was not re-enacted until Notification No. 176 of 21-9-37, when it was re-enacted as rule 4A. Rule 4A reads as follows :

"4A. The lessee of a ferry shall not interfere with any person swimming cattle across the stream or with any boat employed by its owner in conveying himself, his property, or any other person or property across the stream, provided such boat does not ply for hire."

The offences now being considered were committed in the interval, after rule 4 was omitted and before it was re-enacted as rule 4A.

As it was not proved in one of these cases, No. 607B, that any hire was taken, or that the two accused made a practice of soliciting custom for hire, it cannot be said that the accused plied a ferry boat for hire, any more than that they conveyed for hire any passengers.

The application of the applicants in Criminal Revision No. 607B, will be allowed, and they will be acquitted and the fine, if paid, will be refunded to them.

The applicant in Criminal Revision 606B admitted the offence. The applicant in Nos. 608B and 609B Mg. Pyo Nyein was shown to have taken passengers three times in one day and once the next day. He must be presumed not to have done it gratuitously, and was therefore both conveying for hire and plying for hire.

The applications of the applicants in Criminal Revisions Nos. 606B, 608B and 609B will be dismissed.

It is desirable, however, I think, to say something in this connection about rule 4A. This rule purports in the Notification to have been made under section 12 of the Burma Ferries Act. Section 12 provides that the Governor may frame rules, *consistent with the Act*,—

- (a) for the superintendence and management of . . . ferries,
- (b) to (i) for other matters *ejusdem generis*, and
- (j) generally, for carrying out the purposes and objects of this Act.

It certainly cannot be said that rule 4A is a rule consistent with the Act framed for carrying out its purposes and objects ; that could only be said after issue of a notification under the proviso to section 15 exempting persons from the operation of the section. But, it would be unnecessary to frame such a rule as rule 4A if a notification were properly issued under the proviso to section 15.

It may be said that rule 4A, as framed, would amount to exemption, for if a lessee cannot interfere with any boat employed by its owner in conveying property, no doubt the lessee could not prosecute the owner. But as framed under section 12, the rule is clearly *ultra vires*. It would be simpler, and in accordance with law, if a notification were issued under the proviso to section 15 exempting such classes of persons.

BAGULEY, J.—I agree.

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