[HIGH COURT OF AUSTRALIA.]

DUNCAN . . . . . APPELLANT;
INFORMANT,

AND

ELLIS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 15, 16.

Barton, Isaacs, Gavan Duffy and Rich JJ.

*Employer and Employee—Offence—Employer paying less than minimum wages—Mens rea—Factories and Shops Act* 1915 (*Vict.*) (*No.* 2650), *sec.* 226.

Sec. 226 of the *Factories and Shops Act* 1915 (Vict.) provides: "(1) Where a price or rate of payment for any person or persons or classes of persons has been determined by a Special Board and is in force, then any person—(*a*) who either directly or indirectly, or under any pretence or device, attempts to employ or employs or authorizes or permits to be employed any person apprentice or improver at a lower price or rate of wages or piece-work (as the case be) than the price or rate so determined . . . shall be guilty of an offence against this Act . . . (2) The registration of the factory of any person who is convicted under this Act of a third offence shall without further or other authority than this Act be forthwith cancelled by the chief inspector, provided that such person knowingly and wilfully committed each of such offences."

*Held*, that knowledge or wilfulness is not necessary to constitute an offence under sec. 226 (1) (*a*), and, therefore, that it is not a defence to a prosecution for such an offence that the defendant reasonably believed in a state of facts which if true would have disproved the charge.

*Hall* v. *Bartlett*, 24 V.L.R., 1; 20 A.L.T., 37; and dictum in *Billingham* v. *Oaten*, (1911) V.L.R., 44, at p. 48; 32 A.L.T., 170, at p. 171, overruled.

Decision of the Supreme Court of Victoria: *Duncan* v. *Ellis*, (1916) V.L.R., 131; 37 A.L.T., 162, reversed.

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APPEAL from the Supreme Court of Victoria.

At the Court of Petty Sessions at South Melbourne an information was heard whereby James Thomas Duncan, an Inspector of Factories and Shops, charged that, after the coming into operation of a Special Board appointed under the provisions of the *Factories and Shops Act* 1915, William Ellis, trading as W. Ellis & Son, in respect of the week ending 4th September 1915 unlawfully employed one Arthur Ernest Tozer at a lower rate of wages than that determined by the Special Board. It appeared that at the time in question Tozer, who was a painter by trade, was of such an age that he was entitled to be paid wages at the rate fixed by the Special Board for a journeyman painter, but that the defendant, on Tozer's false statement as to his age, paid him wages at a lower rate, to which he would have been entitled if he had been young enough to be an improver.

The Magistrates dismissed the information stating that they accepted the defendant's statement that he believed Tozer to be an improver and paid him as such.

The informant obtained an order *nisi* to review that decision, which was discharged by the Full Court: *Duncan* v. *Ellis* (1).

From the decision of the Full Court the informant now, by special leave, appealed to the High Court.

*Pigott* (with him *Shelton*), for the appellant. The prohibition in sec. 226 (1) (*a*) of the *Factories and Shops Act* 1915 is absolute. The Act is one to promote public health and well-being, and to prevent sweating. It is reasonable to suppose that the Legislature intended that knowledge and wilfulness should not be necessary to constitute an offence against the sub-section. Where in the Act the Legislature meant that knowledge or wilfulness is necessary to constitute an offence or that a prohibition should be qualified, they have expressly said so. See secs. 27 (3), 33 (2), 46 (3), 75 (*c*), 226 (2), 234. Secs. 228 and 229 make provisions for the exculpation of a person who has committed an offence against other sections of the Act if it is shown that the real offender was an agent of his. Those provisions indicate that the prohibition in sec. 226 (1) (*a*) is

(1) (1916) V.L.R., 131; 37 A.L.T., 162.

absolute. That is also borne out by the provision in sec. 226 (2) for the cancellation of the registration of a factory the owner of which has been convicted of an offence against the Act, "provided that such person knowingly and wilfully committed such offence."

*Starke*, for the respondent. It has been decided in *Billingham* v. *Oaten* (1) and *Hall* v. *Bartlett* (2) that knowledge and wilfulness are necessary to constitute an offence under sec. 226 (1) (*a*). *Primâ facie* knowledge and wilfulness are necessary to constitute such an offence. It is improbable that the prohibition was intended to be absolute, because the facts may not be within the knowledge of the defendant, and also because of the magnitude of the penalties. Sec. 226 (2) supports this view, for the question of knowledge or wilfulness must be determined by a judicial inquiry and that can only be held on the prosecution for the offence. Secs. 228 and 229 cannot be used to interpret sec. 226, because they apply only to cases where an occupier of a factory or shop is charged as such with an offence. The history of sec. 226 shows that the prohibition in sub-sec. 1 (*a*) was not intended to be absolute. In the *Factories and Shops Act* 1905, sec. 119, of which sec. 226 is a re-enactment, was in the Part relating to Special Boards and not in the Part relating to factories and work-rooms. The proviso to sec. 226 (2) was not introduced until long after sec. 226 (1) (*a*) was enacted, and cannot be used to interpret it.

BARTON J. This was a prosecution by an Inspector under sec. 226 of the *Factories and Shops Act* 1915, which, so far as is material, provides that "(1) Where a price or rate of payment for any person or persons or classes of persons has been determined by a Special Board and is in force, then any person—(*a*) who either directly or indirectly, or under any pretence or device, attempts to employ or employs or authorizes or permits to be employed any person apprentice or improver at a lower price or rate of wages or piece-work (as the case may be) than the price or rate so determined . . . . shall be guilty of an

(1) (1911) V.L.R., 44; 32 A.L.T., 170. (2) 24 V.L.R., 1; 20 A.L.T., 37.

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offence against this Act." The penalty is then set out, also a proviso and other matter to which reference will be made hereafter.

The offence charged was employing one Tozer at a lower rate of wages than that determined by a Special Board. The defence was that the defendant, in whose service Tozer had been for some time, had engaged him, on his false representation as to his age, at a wage which was the wage of an improver, or at any rate less than the rate ordered, not knowing that he was entitled to a higher wage assigned under the order of the Special Board to one of his real age. The Magistrates having dismissed the information and the Inspector having obtained an order *nisi* to review, the Full Court discharged the order, apparently on the ground that the defendant, now the respondent, was in point of fact imposed upon by the person whom he took into his service, and that he acted without knowledge or wilfulness, as he paid the lower rate of wages under the full belief that the employee's statement of his age was correct. As the case comes before us, it is conceded that the employer acted not only under imposition, but with a reasonable belief in the truth of a state of facts which if it had really existed would have afforded him a defence, and the question is whether the defendant is nevertheless finable under the section.

It is contended by Mr. *Pigott* that the primary object of the Act is the benefit of the public in the sense that it is an Act not merely for regulating certain trade matters, but, generally speaking, one of social reform—an Act for improving the condition of wage earners and others, not only for their sake but for the public betterment which will ensue from these provisions. It is for the Legislature to judge whether they will or will not make the provisions. We are not concerned with the question whether the Legislature made provisions which in view of the public interest were wise ones, but for the purpose of construction we are to be guided by what we see as the scope and object of the Act, and for that purpose I think the argument of Mr. *Pigott* is correct.

In the case of *Sherras* v. *De Rutzen* (1) *Wright* J. lays down a principle which is very generally followed, and which Mr. *Starke*

(1) (1895) 1 Q.B., 918, at p. 921.

stated at the beginning of his argument. "There is a presumption," his Lordship said, "that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the Statute creating the offence or by the subject matter with which it deals, and both must be considered." Then he mentions three classes of cases which are exceptions to the rule. The first is a class of acts "which . . . are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty." The second class, he says, comprises some, and perhaps all, public nuisances. The third class consists of "cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right." These then are the exceptions to the principle that an offence is not committed unless there is, to put it broadly, a thing done which the person knows to be forbidden, or an intention to do that which he has done and which is in fact forbidden.

The question is whether this case comes within any of the exceptions. It seems to me that it comes within the first exception stated by *Wright* J.—that is to say, although the act is not criminal in any real sense, it is one of many prohibited by this Statute in the public interest and is penalized in that interest.

The further question has been raised, whether for the displacement of the presumption the words of other sections of the Statute creating the offence are to be relied on. On that question I do not propose to make any extensive comment upon the various sections of this Statute, for sec. 226 itself seems to me to be sufficiently clear for the purpose in which we are now engaged. The provision I have read is not the only one in the section, but there is a second sub-section which provides that "The registration of the factory" (which shows by the way that the sub-section is aimed at persons who occupy factories among others) "of any person who is convicted under this Act of a third offence shall without further or other authority than this Act be forthwith cancelled by the chief inspector, provided that such person knowingly and wilfully committed each of such offences." We have in the first sub-section a prohibition against attempting to employ

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or employing any person at a lower rate of wages than that determined by a Special Board. Leaving aside for the moment the question of the scope and object of the Act as a measure of social reform, the question whether proof of the commission of the act forbidden constitutes *per se* an offence or whether there must also be proof of guilty knowledge—to use a term of convenience—depends mainly upon the construction of this section, and I think it is sufficiently clear for us to say what is meant. For in sec. 226 a clear distinction is drawn between sub-sec. 1 (*a*) and sub-sec. 2, and the distinction observed is such as to show very strongly what is the meaning of sub-sec. 1 (*a*), which we have to construe. It is true that there is nothing in that sub-section to enable one to come to a conclusion. By itself it might be, according to the class of cases to which it belongs, either a case in which proof of guilty knowledge—again using a term of convenience—is required or one in which it is not required. But sub-sec. 2 seems to me to show that it is intended by sub-sec. 1 (*a*) that knowledge should not be essential to the commission of an offence created by it. It may be that it is a grave hardship that a person who is deceived should nevertheless be fined, but that is a question for the Legislature and not for us.

Inasmuch as by the proviso to sub-sec. 2 knowledge and wilfulness are required for each of three offences in order to enable the registration of a factory to be cancelled, and inasmuch as sub-sec. 1 (*a*) is silent as to knowledge and wilfulness in doing the act charged here, it seems to be intended that while for the cases aimed at by sub-sec. 2 knowledge and wilfulness are exacted, they are not exacted with reference to the offences created by sub-sec. 1 (*a*). That is sufficient in my view to dispose of the case, and I do not propose to comment upon the various sections of the Act, of which a number of others have been pointed out by Mr. *Pigott* in which the Legislature seem to have drawn a distinction between offences committed with knowledge or wilfulness and those in which knowledge or wilfulness are not concerned. It is competent for the Legislature to draw that distinction, and it seems to me that they have drawn it in this section when we read it as a whole, and, having drawn

it, they have made a person who does that which this person has done finable under the Act.

This appeal will have to be allowed, and I think that, after the appellant's undertaking on the grant of special leave, and after the statement we have heard from Mr. *Pigott*, we are justified in giving the costs of this appeal against the appellant. We do not propose to give any costs of the order to review or of the proceedings before the Police Court.

We are all agreed that, as the case is one in which a conviction should be ordered and as the Supreme Court could have made that order and imposed a penalty, we should now fix it. We think that the fine should be a nominal one, and we fix it at one shilling.

ISAACS J. read the following judgment:—

I agree that this appeal should succeed. This Act is one of those instances where the Legislature have deliberately used language which itself indicates what facts will amount to an offence or, in other words, a contravention of the law. They are dealing with a subject of great public concern, and dealing with it as a matter of public policy. The Special Board's determinations as to hours and wages as well as the statutory provisions as to safety and sanitation are not merely to affect the specific relations of the individual employer and the individual employee, as by sec. 225 with respect to wages, but through them also to protect the whole class of employees in the trade, as by sec. 226. It is manifest that to allow the words or the acts of either of these two individuals to render permissible a breach of the regulations as to wages or hours would leave such possibilities of collusion as to go far to render the whole enactment illusory. In some cases there may be honest errors, in others there might be known or wilful breaches of the Act. The fundamental notion of the Act is the inability of employees to bargain effectively for themselves as to their surroundings and their remuneration, and therefore, in order to protect them as a class and carry out the professed object of the enactment, the Legislature have found themselves compelled to lay down a rigid rule, precluding inquiry as to accident, or inadvertence, or negligence, or other persons' acts,

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except where it has expressly or by necessary intendment introduced those factors as in sec. 226 (2) and in sec. 229; just as in revenue Acts and licensing Acts, and others of a similar nature, Parliament, balancing the advantages and disadvantages of the case, have in many instances, of which this is one, required the employer at his peril to know the circumstances under which he carries on his own business. The Supreme Court, therefore, in applying the rule of reasonable belief to this case have introduced an exception which is not found in the Act itself in connection with this offence, and which, having regard to the subject matter and general structure of the Statute, is by necessary implication excluded from it.

GAVAN DUFFY J. In my opinion the provisions of secs. 226 (2) and 229 render it impossible to put the limitation upon sec. 226 (1) which is suggested by the argument of Mr. *Starke*.

RICH J. I agree. Adopting the words of the Privy Council in *Bank of New South Wales* v. *Piper* (1), the omission of the words "knowingly and wilfully" from the first sub-section of sec. 226 cannot be considered unintentional.

*Appeal allowed. Judgment appealed from and order of Court of Petty Sessions discharged. Defendant convicted and fined one shilling. Appellant to pay costs of appeal to High Court.*

Solicitor for the appellant, *E. J. D. Guinness*, Crown Solicitor for Victoria.

Solicitors for the respondent, *Gillott, Moir & Ahern*.

B. L.

(1) (1897) A.C., 383, at p. 389.