No B of 1943

IN THE HIGH COURT OF AUSTRALIA.

The King

v.

Alexander

ex parte Campbell

REASONS FOR JUDGMENT.

ORIGINAL

Delivered at Sydney.

on Wednesday, 5th May 43.

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ORIGINAL

THE KING.

v.

ALEXANDER EX PARTE CAMPBELL.

ORDER.

Order absolute with costs. Conviction set aside, ~~prosecutor~~ informant to pay costs of ~~respondents~~ defendant in Petty Sessions.

THE KING.

v.

ALEXANDER EX PARTE CAMPBELL.

REASONS FOR JUDGMENT. LATHAM C.J.

THE KING.

v.

ALEXANDER EX PARTE CAMPBELL.

REASONS FOR JUDGMENT. LATHAM C.J.

This is an appeal by way of statutory prohibition under the Justices Act 1902, sec. 112 (N.S.W.), by virtue of the Judiciary Act 1903-1940, sec. 39(2), from a conviction of Henry Bryan Campbell for an offence against the National Security (Coal Control) Regulations. Statutory Rule No. 189 of 1941 as amended, in particular, by Statutory Rule No. 328 of 1942. The last mentioned statutory rule inserted a new regulation, 27A, in the principal regulations. Reg. 27A, so far as relevant, provides in paragraph (1): "The owner, occupier, lessee or manager of a coal mine -

(a) .....

(b) shall not, except with the prior approval of the Central Reference Board or a Local Reference Board, fail, in or in relation to the operation of the coal mine, to observe any practice customarily observed in respect of employees and employment at the coal mine;"

The defendant was mine manager of the Corrimal Coal Mine. He was charged that, without the prior approval of the Central Reference Board or a Local Reference Board, he did fail in or in relation to the operation of the mine to observe a practice customarily observed in respect of employees and employment at the mine, the practice alleged being "the practice in No. 5 North Machine District of driving a cut-through four yards wide with a pick". The breach of the practice alleged was that he required one McMillan, a miner, to drive in the said district of the mine a cut-through five yards wide with a pick. The appellant was convicted and fined £25 with £11:16:0 costs.

Three charges, including the charge now in question, were brought against the manager and the evidence adduced was taken as given in respect of each charge. One of the other charges was also laid

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under reg. 27A(1)(b). It was a charge that the manager, without the prior approval of the Central Reference Board or Local Reference Board, failed to observe a practice customarily observed at the mine, namely the practice of paying four yard rates to miners employed driving a cut-through with a pick. Thus in one case the allegation of the informant is that there is a practice of paying four yard rates to miners driving all cut-throughs, even though they may vary in width. In the case under appeal the allegation is that there is a practice in the No. 5 North Machine District of the mine of having all cut-throughs of the same width, namely four yards, neither more nor less. The same evidence is relied upon to establish both allegations, but it is difficult to see how both practices can exist in the same part of the same mine.

There is no dispute as to the facts. The mine is divided into districts for the purpose of working. The miner McMillan was directed to drive a cut-through five yards wide with a pick in this district and he did it. No cut-through other than a four yard cut-through had been driven in that district by pick for many years. Wider cut-throughs had been driven by machine, but not by pick. In other parts of the mine there had been within quite recent times cut-throughs wider than five yards. Upon the basis of this evidence the informant contended that there was a practice customarily observed in respect of employees and employment at the mine to drive cut-throughs in the No. 5 North Machine District of the width only of four yards. If there was such a practice the manager of the mine was bound not to fail in observing it "except with the prior approval of the Central Reference Board or a Local Reference Board " - reg. 27A(1)(b). These boards are established under the National Security (Coal Mining Industry Employment) Regulations - Statutory Rule No. 25 of 1941 as amended. They are authorised to deal with industrial matters in pursuance of the regulations. No approval was given by either Board to the driving of a five yards cut-through.

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The industrial award which applies to the Corrimal mine provides for varying rates for headings, cut-throughs and bords according to whether the places are four yard places, five yard places, six yard places, or eight yard places. But a general provision in an award such as this applying to many coal mines does not exclude the possibility that in a particular coal mine there may be a practice that cut-throughs should be only of a particular width.

The evidence shows that the width of cut-throughs is, or, in a particular case, may be, important with respect to the ventilation of the mine, so as to provide an adequate supply of air free from dangerous gas. The appellant gave evidence, which was not contradicted, that, in order to give adequate ventilation in the place where McMillan was driving, it was necessary to drive the cut-through at a width of five yards. Other expert witnesses supported the evidence of the appellant that the width of cut-throughs should be varied from time to time in accordance with various factors, such as the possible future use of the place as a main wheeling road which would eventually pass large quantities of air, the roof conditions, the size of the equipment which might have to pass through the place, and generally matters affecting the safety and efficient working of the mine.

The Coal Mines Regulation Act 1912-1931 provides for the appointment of competent persons to procure the observance of regulations under the Act. Sec. 4 of the Act provides that every mine shall be under a manager, who shall be responsible for the control, management and direction of the mine. The qualifications of a manager are fixed by the statute. Sec. 5 requires the manager or an under-manager to exercise daily personal supervision of the mine, and sec. 5A contains provisions for the appointment of a competent person as deputy to make inspections and carry out duties necessary for examining for the presence of gas, escertaining the sufficiency of ventilation, and the state of roof and sides.

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Under the Coal Mines Regulation Act 1912 (see sec. 57) special rules were made for the conduct and guidance of the persons acting in the management of the Corrimal mine or employed in or about the mine. Rule 1 provided that the manager should have full charge and control of all persons employed and all operations in the mine, and that he should in all respects comply with the requirements of the Act and the special rules. The duties of the under-manager were prescribed, and, in particular, under rule 14 it was his duty to see that an adequate quantity of air was constantly supplied to the workmen. Under Rules 15 and 16 he was to take steps to avoid dangers from gas. Under rule 35 the surveyor was bound to carry out the instructions of the manager for driving underground workings. He was to set out, inter alia, the widths of workings as the manager might from time to time direct, and to see that the miners strictly adhered to their instructions. Under rule 133 the miners were bound to pay particular attention to the driving instructions and marks given by the surveyor. Rule 136 provided that the miners must work the seam of coal or other mineral strictly in accordance with the instructions of the manager, "who alone shall have control of the method of working". Rule 196 provided that no workman should interfere with the functions of the manager, or other officer, or the mining operations, in any department.

In 1941 the Act was amended and the rules were amended. The regulations which replace the former rules are contained in the Sixth Schedule to the amending Act. These regulations are to the same general effect as the rules for which they have been substituted. The relevant regulations are Nos. 1, 11, 12, 13, 56, 164 and 208, corresponding respectively to former special rules 1, 14, 15, 16, 35, 136 and 196. Reg. 209 in the Sixth Schedule provides that every person shall in all matters relating to the management and working of the mine obey strictly the orders of the manager, under-manager or other official or person placed in authority.

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The question which arises is whether the evidence shows that there was a practice customarily observed in respect of employees and employment at the mine that the width of cut-throughs driven by a pick in the No. 5 North Machine District should be four yards, neither more nor less. The practice to which the regulation refers is not merely a practice, it is "a practice customarily observed". Some effect must be given to the words "customarily observed". I read the words as referring to a practice which is usually observed in respect of employees and employment. The words doubtless include any practice which is, as between the employer and the employees, regarded as applying in relation to and governing, in respect of a particular matter, the employment of the employees. Failure to observe such a practice would amount to a breach of one of the terms of the contract of employment for which the law provides remedies. But reg. 27A would have little if any effect in protecting practices if it were limited to such cases. The regulation is intended to make some addition to the law in the direction of preserving practices which otherwise might lawfully (i.e. without any breach of duty) be changed by one party or the other - by employers or employees. The words "practices customarily observed" may, in my opinion, be interpreted as applying, not only to customs which have become part of a contract, but as including also practices which are established and recognised between employers and employees in the sense that they are usually observed, though neither party is contractually bound to continue to observe them. Variation of such a practice by one party or the other, though not unlawful, may easily lead to industrial disputes and so become an appropriate matter for reference to a Board which is appointed to deal with industrial matters.

It has not been contended in the present case that the evidence establishes any kind of contractual obligation between employers and employees that cut-throughs shall always be four yards

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wide. The question, in my view, is whether there is evidence of the existence of a practice customarily observed in the other and wider sense which I have stated. If the practice is established there is no doubt about the failure to observe it in the present case.

The fact that a practice has always or generally been followed or observed does not in itself, in my opinion, establish the existence of a practice "customarily observed" in this sense. It is necessary to take into account the nature of the practice in relation to the respective duties of employer and employees. Either of two conclusions would be consistent with the mere fact that in No. 5 District the cut-throughs made with a pick had always been four yards wide. One conclusion would be that the manager had, in discharging his responsibilities as manager, from time to time determined that the cut-throughs should be of that width, because he was satisfied that that width was sufficient and proper. But it is contended for the informant that the proper conclusion is that the parties, that is, employers and employees, had, by their conduct, agreed, at least in an informal manner, that this width should be continued as a regular procedure, i.e. be "observed", so as to bind them in the absence of any new understanding to the contrary. What then is the proper conclusion to draw from the whole of the evidence in the present case, i.e. from the evidence as to the actual widths of cut-throughs in the setting of other relevant proved facts? We have not had the benefit of the reasons of the Magistrate for his decision. The appeal is an appeal in the ordinary sense upon fact as well as law - The King v. Darling Island etc. Co. Ltd. ex parte Halliday & another 60 C.L.R. 601 at p. 619.

The Court must take into account, not only the fact that cut-throughs by a pick had been four yards wide in the machine district in question, but also the fact that it had for many years been and still

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was, under rules and regulations which bound both the employer and the employees, the responsibility of the manager, through the surveyor, to determine the width of cut-throughs; that it was the duty of the manager to see that employees were adequately supplied with air and protected against dangerous gas; that the width of a cut-through in a particular place would affect the air supply; that the width of cut-throughs might be affected by plans as to the future development and use of the passage which would be provided by the cut-through; that the last mentioned subject would be a matter of which only the management, and not the miners, could have knowledge; and, in particular, that the manager was responsible for all matters affecting safety. I refer particularly to regs. 208 and 209 under the 1941 Act. In my opinion the evidence does not show that there was a practice as between employer and employee that cut-throughs should, in the district in question, be of four yards width. There is no evidence to show that cut-throughs were made four yards wide because all concerned, manager and miners, were observing a practice which they recognised as established. The cut-throughs were four yards wide because the manager decided that they should be of that width - he being charged by the law with the right and the duty of determining their width. In my opinion, the evidence does not establish the proposition necessary to support the charge.

A further question which arises is whether a practice as to the width of cut-throughs can be described as a practice observed "in respect of employees and employment" at the mine. I am doubtful whether such a matter can properly be so described. I should think that, even if, in the past, shafts at a mine had been of particular dimensions, or timber used for particular purposes had been of particular dimensions, or all cut-throughs had been of particular dimensions, these facts, however constant they might have been, would not represent a practice observed "in respect of employees and employment". In view, however, of my opinion that the practice alleged has not been established by evidence, it is not necessary to determine this further point. In my opinion the appeal should be allowed. The conviction should be set aside, and the respondent should pay the costs of the proceedings before the Magistrate and in this Court

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JUDGMENT. MR JUSTICE RICH

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Judgment. Rich,J.

The appellant - the Manager of the Corrimal mine was convicted of an offence against the National Security Act 1939-1940 in that he contravene regulation 27A of the National Security(Coal Control) Regulations made pursuant to this Act. The allegation in the information is that he failed in, or in relation to, the operation of the coal mine to observe a practice customarily observed in respect of employees and employment at the coal mine. The question whether the offence was committed depends on the proper construction of the phrase "practice customarily observed" and whether the evidence led in the case supports the contention that such a practice existed at the mine. It is a somewhat tautological phrase because "practice" is synonymou with a custom - custom as the word is used in ordinary and common parlance and not in a technical sense,cf. Attorney-General v. Corporation of Great Yarmouth, 21 Beav. 625,635. Similarly it is said that where as here the word custom is not used in a technical sense it is only equivalent to "usage" Prestney v. Mayor &c of Colchester,21 C.D.111 at p.129. Accordingly I

think that in order to prove that such a practice customarily existed the evidence must at least establish that the method of working the mine was uniform in character and in constant and habitual use and that the operatic at the mine were conducted on this footing by owners and miners alike. And after a careful consideration of the evidence I consider that it does not prove that a practice existed such as alleged.

The order nisi should be made absolute.

R. V ALEXANDER & ANOTHER

EX PARTE CAMPBELL.

JUDGMENT STARKE J.

Rule Nisi for Writ of Prohibition pursuant to the provisions of the Justices Act 1902 (N.S.W.) and the Appellate Rules of this Court, Section IV.

The prosecutor Campbell was charged with an offence under the National Security (Coal Control) Regulations, Statutory Rules No. 328 of 1942, r. 27A. The regulation, so far as material, is as follows:-

"27A. (1) The owner, occupier, lessee or manager of a coal mine...

(b) shall not, except with the prior approval of the Central Reference Board or a Local Reference Board, fail, in or in relation to the operation of the coal mine, to observe any practice customarily observed in respect of employees and employment at the coal mine."

The charge was that the prosecutor, the Manager of the Corrimal Colliery, failed to observe a practice at No 5 North Machine District of driving a "cut-through" four yards wide with a pick and required an employee at the colliery without the prior approval required by the regulation, to drive in No. 5 North Machine District of the mine a "cut-through" five yards wide with a pick. It appears

that a higher rate of payment is made for coal won at a four-yard "cut-through" than for coal won at a five-yard "cut-through".

What is a practice customarily observed in respect of employees and employment within the meaning of the regulation? A custom in the legal sense is a usage which by long continuance has acquired the force of a law or right, e.g., trade usages or customs. But that is not the sense, I think, in which the words "a practice customarily observed" are used in this loosely drawn regulation. Arbitration Awards often provide that the award shall not interfere with existing customs and practices except in so far as it expressly interferes with them. And that the customs and practices being in substance agreements between the parties, discontinuance of them which alters existing conditions shall entitle any of the parties to have the award altered to fit the altered condition. See, for instance, clause 16A of the Award in Australasian Coal and Shale Employees' Federation v Brown (No. 251 of 1938), (No. 92 of 1942). That, I think, is nearer the meaning of the regulation now under consideration. It relates to some habitual or usual practice in the operation of a coal mine which, though it may not be a term of the contract of service, is nevertheless one that has in substance become an arranged course of working at a coal mine established by some negotiation between the employers and the employees or their union or by the conduct of the parties. Such, I suppose, were practices now often regulated by industrial awards, such as "bank to bank", "the last to come the first to go", "crib time", "customary places" and so forth (Cf. Regulations No. 168 of 1942, r. 27B; No. 328 of 1942, r. 27C).

The question whether the practice alleged in any particular case is one customarily observed in a coal mine

then becomes one of fact subject however to an appellate Court being satisfied that there is evidence to support the conclusion reached. In the present case the award under which the employees worked at the Corrimal Colliery provided for the payment that should be made in respect of pick-won coal from "headings", "cut-throughs" and "bords" at four-yard, five-yard, six-yard and eight-yard places (See Exhibit 4, Hibble Award, clause 1). So far as the award was concerned the managers of a mine were free to select any width of "cut through" suitable for their purposes, the safety or the ventilation of the mine.

No doubt in the Corrimal Colliery the practice was to drive four-yard "cut-throughs," but there were exceptions. This was not because of any arrangement or negotiation with the men or their union but because the width in general was most suitable for the working of the colliery. And the evidence, I think, makes it clear enough that the men did not object to a five-yard "cut-through" so long as they were paid a four-yard rate.

In my opinion there is no evidence that supports the conclusion that it was a customary practice, in the sense already indicated, to work a four-yard cut-through, and no other, at the Corrimal Colliery or in No. 5 North Machine District of the Colliery.

The Rule Nisi should be made absolute and the conviction of the prosecutor set aside.

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JUDGMENT. McTIERNAN J.

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JUDGMENT. McTIERNAN J.

The evidence proves that the miners working in No. 5 North Machine District of the Corrimal Colliery habitually drove a cut-through four yards wide with a pick and that a miner working in that district of the mine was required to drive a cut-through five yards wide with a pick. The appellant was the Manager of the mine and gave the order to the miner to drive the cut-through five yards wide with a pick. The Manager did not obtain the prior approval of the Central Reference Board or a Local Reference Board. The question is whether, by failing to obtain this approval, he contravened Reg. 27A (1)(b) of the National Security (Coal Control) Regulations. The order was given "in relation to the operation of the mine" and if the giving of the order was a departure from a practice "customarily observed in respect of employees and employment at the coal mine" the offence was complete. The width of a cut-through to be driven by a pick was a matter within the responsibility of the management. It was not a matter which the miners could determine for themselves. Their pay varied with the width of the cut-through which they drove with a pick. In my opinion the evidence establishes that it was a practice observed "in respect of the employees and employment" at the coal mine to require a miner to drive a cut-through four yards wide with a pick. The remaining question is whether the practice was "customarily observed" in respect of such employees and employment. There may be some redundancy in speaking of a practice that is "customarily observed"; for a practice may be described as a customary action. The words "customarily observed" in this context indicate that the practice is one which is not merely laid down to be observed, but that it is a practice which is so frequently or habitually observed that it can be described as

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"customarily observed". In my opinion the evidence proves that the practice of getting the miners to drive with a pick a cut-through four yards wide was a practice of that description. The need may arise for departing from such a practice. But this subregulation forbids the Manager to exercise whatever powers or authorities which he may have to alter it without the approval of the Central Reference Board or a Local Reference Board. In my opinion the appeal should be dismissed.