

an inmate of the house the section would apply, but here the effective cause was the lighting of the lamp.

HOOD, J.

1915

R. v. NICHOLSON.

Woinarski, K.C., for the Crown—The section covers both the cases put. The principle to be applied is the same as in manslaughter, where negligence by act or omission, which is a contributory cause of death, is sufficient.

Hood, J. I shall not take the case from the jury. I do not agree with the view suggested by counsel for the prisoner. If a man were by gross negligence to leave a loaded gun about, so that a child might get it, and the child, having got it, caused injury to a third person, why should not the owner of the gun be liable under this section? It would be the negligence of the man that caused the injury.

[The case having been left to the jury, evidence for the defence was called, and a verdict of not guilty was returned.]

Verdict of not guilty.

Solicitor for the Crown: *Guinness*, Crown Solicitor.

Solicitors for the prisoner: *Malleson, Stewart, Stawell and Nankivell*.

W. S. S.

DUNCAN v. ELLIS.

F.C.

1916

February.

Factories and Shops—Offence created by Statute—Mens rea—Wages board determination—Payment of lower rate of wages than rate provided—"Improver"—False statement of age—Factories and Shops Act 1915 (No. 2650), ss. 194, 221, 226, 228.

In a prosecution under sec. 226 of the *Factories and Shops Act 1915* for employing a person at a lower rate of wages than the rate determined by a special board, it is a good defence that the defendant paid such wages under a reasonable belief in facts which, if true, would have rendered him not guilty of an offence under the Act.

Billingham v. Oaten ([1911] V.L.R. 44), *Moffatt v. Hassett* ([1907] V.L.R. 515), and *Hall v. Bartlett* ([1898] 24 V.L.R. 1) approved.

Sherras v. De Rutzen ([1895] 1 Q.B. 918 followed.

ORDER TO REVIEW RETURNABLE BEFORE FULL COURT.

The defendant, Wm. Ellis, was prosecuted in the Court of

F.C.
 1916
 DUNCAN
 v.
 ELLIS.

Petty Sessions at South Melbourne, for that, being the owner of a factory within the meaning of the *Factories and Shops Act* 1915, he unlawfully employed one Tozer at a lower rate of wages than the rate determined by the determination of the Painters' Wages Board.

It was admitted by the defendant that Tozer had been paid less than the wages to which he was entitled under the wages board determination, but the defendant said that he had paid the wages under the belief that Tozer was an improver, and he detailed the circumstances under which he had engaged Tozer, and the representations made by Tozer as to his age, which, if true, showed Tozer to be an improver.

The facts appear fully in the judgment of Madden, C.J., *infra*.

The magistrates found that the defendant believed what Tozer had told him, and they dismissed the information.

An order *nisi* to review this decision was obtained by the complainant, on the following grounds:—

1. That on the facts proved the defendant should have been convicted.

2. That even if the defendant at the time of the employment of Arthur Ernest Tozer believed him to be an improver, and paid him as such, such belief afforded no defence.

3. That to constitute the offence charged it was not necessary that the defendant should have acted with *mens rea* or with intent to contravene the provisions of the *Factories and Shops Act* 1915.

The order *nisi* was made returnable before the Full Court.

Pigott to move the order absolute.

Starke to show cause—I submit that if the defendant had a *bonâ fide* reasonable belief in facts which if true would render him not guilty of the offence charged, that is a good defence: *Moffatt v. Hassett* (a); *Billingham v. Oaten* (b); *R. v. Tolson* (c); *Sherras v. De Rutzen* (d); *Hall v. Bartlett* (e); *The King v. Erson* (f). Sec. 221 shows that sec. 226 of the *Factories and*

(a) [1907] V.L.R. 515.

(b) [1911] V.L.R. 44, at p. 48.

(c) [1889] 23 Q.B.D. 168.

(d) [1895] 1 Q.B. 918.

(e) [1898] 24 V.L.R. 1.

(f) [1914] V.L.R. 144.

Shops Act 1915 cannot be considered an absolute prohibition in all cases.

F.C.

1916

DUNCAN

v.

ELLIS.

Pigott in reply—Sec. 226 is an absolute prohibition and any person doing any of the acts therein prohibited is guilty of an offence, no matter what his state of mind may have been. Subsec. (2) shows that the section is dealing both with cases where knowledge and wilfulness were present and where they were not. (He referred to *R. v. Tolson (g)*.) Here there is no finding that the defendant's belief was based on reasonable grounds.

MADDEN, C.J. In this case the defendant was prosecuted in the Court below for that, being the owner of a factory within the meaning of the *Factories and Shops Act*, he employed one Tozer, who in fact was a painter within the meaning of the Act, as an improver, and paid him wages appropriate to an improver, and not appropriate under the determination of the wages board to a painter. In the Court below the employer, the defendant Ellis, gave evidence that he had a vacancy for an improver, and advertised in so many words for an improver; that the man Tozer came to him a few days afterwards, and, referring to the advertisement, said—"Have you got an improver yet?"; that Ellis replied that he had not, and that Tozer said—"Then will you take me?" Ellis asked where he had been working and what he had been getting, and Tozer replied "Nine shillings a day." Ellis said, "I will take you on." The man's own representations, the wages he had been getting, and the wages he expected, all suggested that he came there as an improver seeking an improver's place. He was fair, and appeared to be under 21. The defendant said that he believed that Tozer was an improver, and was only nineteen years of age. He believed consequently he was under the age when he would cease to be an improver, and ineligible to be employed as an improver without a licence. He also says that he spoke to Tozer on another occasion when he saw him speaking to a girl, and asked him when he was going to marry, and that Tozer said—"I am not going to get married yet. I am too young; I am only a kid; I am nineteen." So that after he entered the employment he still represented that he was only nineteen. The defendant told the magistrates these facts. They

F.C.

1916

DUNCAN

v.

ELLIS.

Madden, C.J.

saw Tozer, and could judge for themselves whether the story told by Ellis was likely to be true, and whether he was likely reasonably to have believed Tozer was only nineteen, when as a fact he was twenty-four.

The magistrates' finding expressly was that the defendant believed what Tozer had told him, and they therefore dismissed the charge. They held, in fact, that he had acted in the reasonable belief of a state of facts, which if true would have been an answer to the charge.

It is said that the magistrates did not find in so many words that there were reasonable grounds for the defendant's belief. But as the whole of the facts which appeared in evidence are presented here, it is clear that they held that the defendant did believe these alleged facts, and that the alleged facts were reasonable for him to believe, and that they therefore dismissed the charge against him.

The question then is whether such a defence is admissible under sec. 226 of the *Factories and Shops Act* 1915, on which the prosecution was based. It 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 may be) than the price or rate so determined . . . shall be guilty of an offence against this Act . . . " As one looks at these words, they appear to me on the face of them to contemplate a condition of mind which, knowing that something proposed to be done is a violation of the law, resolves to do that something, although it involves a disobedience of the board's award, or else it shows that, in order to procure disobedience, a pretence or device is resorted to. The words "pretence or device" peculiarly apply to a deliberate plan or scheme. If he resorts to a device, he plans a scheme. If he "attempts to employ," the very attempt involves an actual knowledge of what he is attempting to do and ought not to do. "Employs or authorizes or permits to be employed": if he employs a given person, that also seems to carry an intention. If he "authorizes or permits to be employed," that, too, would seem to carry *ex vi*

termini an operation of the mind which is to be deliberated upon and thought out. Of course, as a matter of legal possibility, a man may employ a person though he never saw him, for his manager might employ the man without consulting him, and in that sense he might "authorize or permit." But the language is quite consistent with an actual intention. It is not what has been described here as prohibitive. Therefore it would appear to me that, according to the common interpretation of legislation which creates criminal or *quasi* criminal offences, the language here is such as to carry with it the ordinary rule which runs through the criminal law, that a person to be guilty of a criminal offence must intend to do the thing; must have a guilty mind; must know of the existence of the facts which make it wrong, and intend to do it.

F.C.

1916

DUNCAN

v.
ELLIS.Madden, C.J.

But, apart from that, the language of the majority of the Court in *R. v. Tolson* is to the effect that, with very rare exceptions, the law is, even where the language in the Statute creating the offence is very definite, that there is always connoted in it the necessity of a *mens rea*; and it is held there, too, that where the accused can show that he believed in a state of facts which if true would have afforded an answer to the charge, he is entitled to an acquittal, even although the language of the Statute is direct and specific. In *Sherras v. De Rutzen* (*h*), two learned Judges came to the conclusion that the conviction of a publican who had served drink to a constable, but under the supposition that he was off duty, was wrong when it was shown by the publican that he did not know, and had no reason to know, that the constable was on duty. Day, J., says, at page 920:—"I am clearly of opinion that this conviction ought to be quashed. This police constable comes into the appellant's house without his armlet, and with every appearance of being off duty . . . The appellant believed, and he had very natural grounds for believing, that the constable was off duty." Later he says that the only effect of the word "knowingly" is in his opinion to shift the *onus* of proof. Wright, J., says there is a certain series of cases in which a defence of that kind, that the defendant reasonably believed in a state of facts which, if they existed, would have been an answer to the charge, does not apply, and he enumerates them. And then he goes on:—"But except in such

F.C.

1916

DUNCAN

v.

ELLIS.

Madden, C.J.

cases as these, there must in general be guilty knowledge on the part of the defendant, or of someone whom he has put in his place to act for him generally, or in the particular matter, in order to constitute an offence. It is plain that if guilty knowledge is not necessary, no care on the part of the publican could save him from a conviction, since it would be as easy for a constable to deny that he was on duty, or to produce a forged permission from his superior officer, as to remove his armlet before entering the public-house."

Therefore, except in that line of cases indicated by Wright, J., the general principle of the law is that a *bond fide* reasonable belief in facts which if true would have made the man not guilty is open as a defence unless you have it definitely excluded in the Act by language imperative and distinct. I therefore think that the meaning of the language itself and the authority of these cases make it incumbent on us to interpret this section as one in respect of which, if a charge is preferred, the defendant is at liberty to show a reasonable belief in facts which, if true, would have absolved him.

At one time I was pressed by sec. 194, which imposes certain obligations upon the Minister, the employer, and the improver. It provides by sub-sec. (2) that the employer of an improver shall at the termination of his employment give him a certificate in the form of the 8th Schedule, and by sub-sec. (3) that when an improver seeks employment from any employer he shall produce to that employer all certificates so given him. Those certificates would show the length of his experience. But the case from which I have just read seems to be an answer to the difficulty which that section raises. It points out that the constable had taken off his armlet, and it was said that when he came into the hotel the publican ought to have got evidence of the authority of his superior officer allowing him to have the drink. But the Court says that if guilty knowledge is not necessary no care could have saved the defendant from a conviction, "since it would be as easy for the constable to deny that he was on duty when asked, or to produce a forged permission from his superior officer, as to remove his armlet." It would have been just as easy for Tozer to have produced a false certificate from his last employer as to tell the lies which he did tell, for if Ellis's story is true, and the

magistrates believed it, everything he told Ellis was false, and Ellis accepted it. On that authority, and the interpretation of the Act, the position of Ellis was one in which the magistrates might well find that he honestly believed what Tozer said, and that there were reasonable grounds for believing it, and that if he honestly believed it he was not guilty of any such breach of this Act as is involved here.

F.C.

1916

DUNCAN

**v.
ELLIS.**

Madden, C.J.

Then it is said we ought not to read sec. 226 (a) as involving an intention to break the Statute, because in sub-sec. (2) there occur the words "knowingly and wilfully." If there was no other section in the Act than sec. 226 which had relevance to the matter suggested by Mr. Pigott's argument, I would say that the meaning of that sub-section would be that the element of knowledge and wilfulness might sometimes be present in the commission of the offences above described, and sometimes not. But sec. 228 seems to have been enacted in order to meet that very position, for it provides that if an offence for which the occupier of a factory is liable is committed by an agent, servant, or workman, he is liable to the same penalty as if he were the occupier. The result is, therefore, that an occupier may be liable for his own acts or for the acts of his agent, servant, or workman, and those persons may also be personally liable, and what sub-sec. (2) of sec. 226 is aiming at is that the factory licence may be forfeited where the occupier himself commits the offence, and not where the offence is committed by the agent, servant, or workman, although the occupier will be liable to a penalty. So I do not think sub-sec. (2) of sec. 226 derogates from the view we take. I think the decisions given on former cases are on right lines. Hodges, J., in *Billingham v. Oaten* (i) and *Moffatt v. Hassett* (k) considered the matter very carefully, and laid down the true test. In the case of *Hall v. Bartlett* (l) I myself took a similar view, though not expressing it in the distinct language of my brother Hodges. Cases of high authority in England support that view. That is the test the justices used here, and if they did not express it, it is clear that they acted on Ellis's evidence, and rightly acted on it. We think the order *nisi* should be discharged, with costs.

A'BECKETT, J. I agree that the order *nisi* should be discharged. If the argument for the informant prevailed it would

(i) [1911] V.L.R. 44.

(k) [1907] V.L.R. 515.

(l) [1898] 24 V.L.R. 1.

F.C.

1916

DUNCAN

v.

ELLIS.

A'Beckett, J.

amount to this, that however gross an imposition was practised upon an employer, by which he was led to pay wages which the wages board said should not be paid, he would be precluded from showing that an imposition had been practised. It is not an order *nisi* taken out because the magistrates have on insufficient evidence accepted the view that the defendant was imposed upon; it is taken out on the ground that the finding of the magistrates that he had been imposed upon, and had paid what he believed to be a correct wages board rate, was a fact quite immaterial. The evidence showed that the defendant had not paid the rate of wages which was payable under the wages board determination, but that the man concerned had represented himself to be a person who might properly be paid the rate that was paid to him. It was an imposition practised upon the defendant by a person, after which the defendant paid what under the wages board award would have been lawful, if what the person who practised the imposition said had been true, but what on the actual facts was an amount less than the award required. I think in these circumstances and having regard to the absence of any intention to commit, or knowledge of commission of, the offence, a defendant should not be precluded from showing that he did the acts complained of, not from ignorance arising from his own want of attention or knowledge, but as a result of the imposition. The defence was—"I did what I did through being imposed upon, and through believing in a state of facts which if they had been true would have made my act lawful." It is a specific defence of imposition, and I think it is a good defence, and that the order *nisi* should be discharged.

HODGES, J. I concur, and have nothing to add.

Order nisi discharged.

Solicitor for the complainant: *Guinness*, Crown Solicitor.

Solicitors for the defendant: *Gillott & Moir*.

R. H. G.

NOTE.—Special leave to appeal from this decision was given by the High Court of Australia on the 28th February 1916.