

DAVIS V. MANKTELOW.

1945, July 12, September 14. Supreme Court, Auckland.
Fair J.

War Emergency Legislation—Control of Industrial Manpower—Taking part in “strike”—Evidence necessary to convict—Strike and Lockout Emergency Regulations 1939.

Where upon an appeal from the decision of a Stipendiary Magistrate convicting appellant of becoming a party to a strike in breach of the Strike and Lockout Emergency Regulations 1939 it appeared from the facts, stated in the judgment, that the evidence, which was sufficient to justify the finding that, uncontradicted, it proved that there was a “strike” within the meaning of the regulations, did not exclude the reasonable hypothesis that although a strike took place the appellant might have been absent not from any desire to participate in it but owing to an unavoidable cause, the Court held that there was insufficient evidence to warrant the conviction and allowed the appeal. *Woolmington v. The Director of Public Prosecutions* (1935, A.C. 462) applied.

Haigh for appellant.

Alderton for respondent.

FAIR J.—I regret that my decision in this matter has been delayed owing to my absence on circuit.

This is an appeal on law from a decision of the Magistrate given at Auckland on May 25, 1945. The appellant was charged before him under the Strike and Lockout Emergency Regulations 1939 with becoming a party to a strike on the 26th day of April, 1945, at Auckland, while in the employ of the Auckland Gas Company Ltd.

The case stated sets out that, upon the hearing of the information the following facts were proved or admitted:

“1. The appellant is an employee of the Auckland Gas Company Limited, and as such worked in the retort house.

2. On the night of April 26-27, 1945, the defendant was due to commence work at midnight and remain at work until 8 a.m. on April 27, 1945.

3. The members of the night shift did not turn up for work at midnight, nor at any time prior to 8 a.m. on April 27, 1945.

4. On April 26, 1945, the day shift of retort house workers did not turn up at 8 a.m., the hour they were due to start. They began work at 9 a.m. At 12.30 p.m. no retort house workers except the shift foreman were working although the day shift was required to work until 4 p.m. The day shift foreman worked until 4 p.m. Thereafter no work was done by any of the day, afternoon or night shifts until 4 p.m.

5. Work should have been continued in the retort house between 12.30 p.m. on April 26 and 12 noon on April 28, but (except for the work done on April 26 by the day shift foreman) no work was done in the retort house.

6. Work in the retort house is continuous throughout the twenty-four hours of each day and is undertaken in three shifts namely, the day shift from 8 a.m. to 4 p.m., the afternoon shift from 4 p.m. to midnight, and the night shift from midnight to 8 a.m.

7. Sixteen retorts are attended to by each shift during each four hours.

8. The Auckland Gas Company Limited’s gas works is an essential undertaking within the meaning of the Industrial Manpower Emergency Regulations 1944 (Serial Number 1944/8).”

The Magistrate further states:—

“I inferred from the foregoing facts that the retort house workers of the Auckland Gas Company Limited’s gas works

went on strike within the meaning of the Strike and Lockout Emergency Regulations 1939 (Serial No. 1939/204) and that the defendant was a party to the strike. The ground of my decision was that where a strike of workers in any essential undertaking or part of an essential undertaking takes place, and any worker in that undertaking or part of an undertaking fails to appear at work during his prescribed working hours during the continuance of the strike, such failure is *prima facie* evidence that he is a party to the strike; but such *prima facie* evidence may be rebutted by evidence which raises a doubt as to whether or not his absence from work was due to other causes, such as incapacity, bereavement, or private engagement.”

The appellant was thereupon convicted and fined £3 and costs £2 12s. and it is from this conviction and fine that this appeal is brought.

At the hearing of the appeal I ruled that the evidence was sufficient to justify the finding that, uncontradicted, it proved that there was a “strike,” within the meaning of the regulations, of the gas workers, during the period between 12.30 p.m. on April 26th and 12 noon on April 28th. While this is so, it seems that, in my view, there was almost the minimum of evidence to establish this fact. It appears that it might, without difficulty have been supplemented and greatly strengthened by further evidence to the effect that no facts existed which lawfully entitled the men to absent themselves from work during the period in question. It might also have been proved that all the absentees had been working immediately prior to the alleged strike; and had returned immediately after: had on both occasions appeared in good health: and none of them had given reason for his absence. In prosecutions for offences it is undesirable that the minimum of evidence necessary to support the charge should be presented; both for the reason that the commission of an offence should be proved as clearly as possible: and to avoid any minor omissions impairing the completeness of the evidence such a course is desirable.

On the question as to whether the evidence proves, even *prima facie*, that the appellant was a party to the strike the position appears to me to be different. This is in the nature of a criminal charge, and the accused was liable to a fine of £100, or to a term of imprisonment not exceeding twelve months. The guiding principles in all such cases have been recently restated by the House of Lords in *Woolmington v. The Director of Public Prosecutions* (1935, A.C. 462) where it is said at page 481, “Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.” So in *Peacock v. The King* (13 C.L.R. 619 at page 634) where the statement in *R. v. Hodge* (2 Lewin C.C. 227), as follows, is cited, “That the case was made up of circumstances entirely; and that, before they could find the prisoner guilty, they must be satisfied, ‘not only that those circumstances were

consistent with his having committed the act, but they must also be satisfied *that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.*'' This passage was adopted by Griffith C.J. at page 638. See also *Dolling v. Bird* (1923, G.L.R. 607; 1924, N.Z.L.R. 545) at pages 608, 609.

Upon the facts as stated the evidence does not exclude the reasonable hypothesis that, although a strike took place, the appellant may have been absent, not from a desire to participate in it, but owing to sickness, bereavement or unavoidable personal obligations. The number of workers in the strike does not appear from the case, but it must occur in all industries that men are occasionally absent owing to unavoidable causes, and at a time when they would have been at work, if they were able to follow their own wishes. If the accused had been asked for an explanation of his absence before the information was filed, and had failed to give one that might well have been considered as negating unavoidable absence as a reasonable hypothesis. But there was no evidence of this nature, or other evidence excluding this possibility as a reasonable hypothesis, i.e. a reasonably possible cause of his absence.

Consequently it appears to the Court that there was insufficient evidence to warrant the conviction, and the appeal must be allowed and the conviction quashed. The appellant will be allowed £5 5s. costs and disbursements.

Solicitors: for appellant: *F. H. Haigh*, Auckland; for respondent: *Lisle, Alderton & Kingston*, Auckland.