

SUPREME COURT, AUCKLAND. JULY 12, SEPTEMBER 14, 1945. FAIR, J.

DAVIS v. MANKTELOW

War Emergency Legislation—Strike and Lockout Regulations—Offences—Party to a Strike—Evidence—Exclusion of Reasonable Possibility of Unavoidable Absence from Work—Amount of Evidence required to support Prosecution—Strike and Lockout Emergency Regulations, 1939 (Serial No. 1939/204), Reg. 3 (a)

An employee may not be convicted of the offence of being “a party to a strike,” within the meaning of Reg. 3 (a) of the Strike and Lockout Emergency Regulations 1939 if the evidence does not exclude the reasonable hypothesis that, although a strike took place, the employee may have been absent not from a desire to participate in it, but owing to sickness, bereavement, or unavoidable personal obligations.

Woolmington v. Director of Public Prosecutions ([1935] A.C. 462), *Peacock v. The King* ((1911) 13 C.L.R. 619), and *Dolling v. Bird* ([1924] N.Z.L.R. 545 ; [1923] G.L.R. 607) applied.

So held, on the facts, by *Fair, J.*, allowing an appeal from the conviction of the appellant.

Observations on the undesirability of presenting only the minimum evidence necessary to support prosecutions for offences.

APPEAL under s. 303 of the Justices of the Peace Act, 1927, from a decision of a Stipendiary Magistrate given at Auckland on May 25, 1945. The appellant was charged before him under the Strike and Lockout Emergency Regulations 1939 with being a party to a strike on April 26, 1945, at Auckland, while in the employ of the Auckland Gas Co., Ltd.

The case stated set 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 Co., Ltd., 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 12 noon on April 28, 1945.

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 Co., Ltd.'s, gasworks is an essential undertaking within the meaning of the Industrial Man-power Emergency Regulations, 1944 (Serial No. 1944/8).

The Magistrate further stated—

I inferred from the foregoing facts that the retort-house workers of the Auckland Gas Co., Ltd.'s, gasworks 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 convicted and fined £3 and costs £2 12s., and it is from that conviction and fine that this appeal was brought.

Haigh, for the appellant.

Lisle Alderton, for the respondent.

Cur adv. vult.

FAIR, J. 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 26 and 12 noon on April 28. 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. Director of Public Prosecutions* ([1935] A.C. 462), where it is said: "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" ([1935] A.C. 481, 482). So in *Peacock v. The King* (1911) 13 C.L.R. 619, 634, where the statement in *R. v. Hodge* (1838) 2 Lewin 227; 168 E.R. 1136, 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'" (1838) 2 Lewin 227, 228; 168 E.R. 1136, 1137). This passage was adopted by *Griffith*, C.J. (1911) 13 C.L.R. 619, 638). See also *Dolling v. Bird* ([1924] N.Z.L.R. 545, 546, 547; [1923] G.L.R. 607, 608).

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.

Appeal allowed.

Solicitor for the appellant : *F. H. Haigh* (Auckland).

Solicitors for the respondent : *Lisle Alderton and Kingston* (Auckland).
