RECENT CASES

Andrew v. *Public Prosecutor* [1]

Statutory Interpretation — Meaning of "to drive".

The appellant was at the wheel of a vehicle which was under tow when the vehicle struck against a bullock cart which he, and the vehicle towing him, were overtaking. He was charged with committing an offence under the Road Traffic Ordinance, section 36 (1) — driving a vehicle without reasonable consideration for other persons using the road. He was convicted in the Magistrates Court and appealed, relying upon the proposition of Lord Goddard C.J. in *Wallace* v. *Major*[2] in which his Lordship had stated: [3]

> that ordinarily speaking, giving the ordinary meaning to the words in the English language, it is difficult to see how a person who is merely at the steering wheel of a car, having nothing to do with making the car go, is driving the vehicle.

The Deputy Public Prosecutor relied on another decision of Lord Goddard, C.J., in *Saycell* v. *Bool*[4] in which his Lordship had held that a person who had released the brakes of a lorry when it was at the head of an incline and had steered it down the road was "driving" the vehicle contrary to the (English) Road Traffic Act, 1930, section 7.

Neal J., after considering the English cases, stated: [5]

> From those authorities I have reached the conclusion that in the English language the words "to drive" are capable of a wide number of meanings dependent upon the context in which they are used and at its lowest mean no more than steering a moving vehicle, and that the actual meaning to be accorded to the word "driving" will vary in accordance with the actual provision of the law upon which the charge in any particular case is based.

His Lordship then pointed out that there were significant differences between the wording of the English and Malayan legislation and stated: [6]

> In my opinion it must be noted — and I think emphasised — that in England under section 4 the legislature has not insisted upon a driving licence being

1. (1962) 28 M.L.J. 1.
2. [1946] K.B. 473.
3. At p. 477.
4. [1948] 2 All E.E. E3.
6. At p. 2.
6. At p. 3.

> held by a person in charge of a trailer whereas in the Federation since a trailer (and, in this case, the towed vehicle) is clearly within the stipulated classes of motor vehicle a *licence to drive* under section 25 is necessary. The Federation Legislature has made it clear that it is their intention that the term, "driving", should include control of a trailer and, as far as I can advise myself, the only possible control of a trailer is by steering.

The difference to which Neal J. referred was principally the wide definition of "vehicle" to be found in the Federation Ordinance which is not to be found in the English Act. It was this that led him to the conclusion that in the Federation driving includes control of a trailer.

Public Prosecutor v. *Ross*[7]

Criminal law — mens rea.

The respondent was charged for permitting a continuous rubber sheeting machine to be operated without a certificate of fitness as required by the Machinery Ordinance, 1953, section 6(1). The Magistrate dismissed the charge on the ground that there was no evidence that the respondent had permitted the operation of the machine or even that he had knowledge that the machine was being operated. Ismail Khan J., allowing the appeal of the Public Prosecutor, held that the principle applicable was that stated by Atkin L.J. (as he then was) in *Mousell* v. *London & North Western Railway Co.,*[8] and held: [9]

> It is clear that the prohibition contemplated by section 6(1) of the Ordinance is an absolute one and there is no obligation on the prosecution to prove *mens rea.* As Terrell J. observed in the case of *Rex* v. *G. H. Kiat* "the absolute prohibition. . . . .is justified by the consideration that the strictness of the rule is necessary for the public benefit and protection. A master is the only person in a position to control his servant and accordingly the owner is made responsible for the acts of his servant whether or not such servant has carried out his master's instructions."

Public Prosecutor v. *Low Ah Sang*[10]

Criminal law — conviction under repealed law.

The respondent was charged on 3 February, 1961, for an offence under the Emergency Regulations which was alleged to have been committed on 14 June, 1960. The Emergency Regulations were repealed with effect from 31 July, 1960.

The learned President of the Sessions Court acquitted the respondent on the ground that a man cannot be charged for an offence under a law which has been repealed.

The Deputy Public Prosecutor, on appeal, relied upon *Wicks* v. *Director of Public Prosecutions* [11] and *Postlethwaite* v. *Katz* [12] and these authorities were accepted

7. (1962) 28 M.L.J. 5.
8. [1917] 2 K.B. 836.
9. At p. 845.
10. (1962) 28 M.L.J. 13.
11. [1947] A.C. 362.
12. (1942) 59 T.L.R. 245.

by Hashim J. who referred to the observations of Kuppuswami Ayer J. in *Re T.S. Chocklingam:* [13]

> The question as to whether an offence was committed or not depends upon the state of the law when the offence was committed and not on the state as it is on the date when the prosecution is started.

His lordship rejected the argument that the wording of the Proclamation ending the Emergency contained a "contrary intention" within the meaning of the Interpretation and General Clauses Ordinance, section 13.

Lim Thong Eng v. *Sungei Choh Rubber Co. Ltd.*[14]

Industrial law — vicarious liability — safety regulations.

The plaintiff crushed his hand whilst operating a machine in the defendant's rubber factory. He claimed damages on the grounds of the defendant's negligence and breach of statutory duty.

Ong J. found that the plaintiff was employed by one Yeoh Ah Sai to work in the defendant's factory pursuant to a contract between the defendants and Yeoh Ah Sai. His Lordship held therefore that the plaintiff was employed by an independent contractor and not by the defendant: [15]

> Consequently, there was between the plaintiff and the defendant no relationship of master and servant, or employer and employee, nor even a contract for services. The defendant thus owed the plaintiff no duty of care at common law and the claim for negligence fails.

Regarding the alternative claim for damages for breach of statutory duty Ong J., following *John Summers & Sons Ltd.* v. *Frost,*[16] held that Rule 30(vi) of the Safety Rules applied to all persons working in a factory whether employed by the occupier or not. His Lordship further held that there had in fact been an omission to equip the machinery in conformity with the Rules and that the plaintiff's injury was a direct consequence of such omission. Judgment was therefore entered for the plaintiff in the sum of $12,298.

Yap Choon Kong v. *Returning Officer, Kluang*[17]

Election petition — returning officer's decision.

The plaintiffs, who were members of the Labour Party, brought a petition under the Election Offences Ordinance, 1954, section 32 to determine whether certain persons returned to certain wards in the Township of Kluang were duly elected. They claimed (1) that the Returning Officer was wrong in law in holding that they were disqualified, under the Local Government Elections Act, 1960, Sch. II, para. 2(g) to stand for election and (2) that the persons who had, in consequence of their disqualification, been returned unopposed were, at the time of their election disqualified persons under the Constitution of the Town Council of Kluang, Art.5(d).

13. A.I.R. 1945 Madras 521.

14. (1962) 28 M.L.J. 15.

15. At p. 17.

16. [1955] A.C. 740.

17. (1962) 28 M.L.J. 19.

The ground upon which the Returning Officer had held the petitioners disqualified was that they were civilian employees of the United Kingdom armed forces stationed in Malaya and that they were therefore persons holding "whole time office in any public service" within the meaning of the Local Government Elections Act, 1960, Sch. II, para. 2 (g). The argument on behalf of the Returning Officer, on this point, was that it was not open to the petitioners to dispute the ruling of the Returning Officer by way of an election petition, on the ground that under the Local Government (Conduct of Elections) Regulations, 1960, reg. 11 (5) (c):

> The decision of the returning officer shall be final and conclusive for the purposes of the election in respect of which the proceedings are being held, and shall not be called in question in any Court.

The only exception to this is that found in the Election Offences Ordinances, 1954, section 32 (b) which provides that an election may be declared void on an election petition on the ground of:

> non-compliance with the provisions of any written law relating to any election, if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election.

It was argued for the Returning Officer that whatever might have taken place at the election in question there had been no non-compliance with any written law governing the election and that therefore no election petition could be brought on such grounds. This argument was accepted by Adams J.

A very similar argument also defeated the petitioners alternative claim, namely, that the Alliance candidates were disqualified under the Constitution of the Township of Kluang, Art.5(d) on the ground that they did not possess sufficient proficiency in the English language. The argument which prevailed with Adams J. was that an election petition could only be brought on one of the grounds specified in reg. 11 of the Local Government (Conduct of Elections) Regulations, 1960 and since lack of proficiency in English is not a ground specified in reg. 11 no election petition would lie.

Pahang Lin Siong Motor Co. Ltd. v. *Cheong Swee Khai*[18]

Damages — personal injuries.

The respondent was a passenger in a motor bus owned by the appellant and suffered severe personal injuries when the bus was involved in a collision with a lorry. He sued the owner and driver of the bus and obtained judgment for $27,400.

The defendants appealed, and the plaintiffs cross-appealed on the ground that the $25,000 awarded as general damages were inadequate. The appeal was withdrawn so that only the cross-appeal as to the quantum of damages remained. The Chief Justice stated that the principles applicable to the question of the quantum of damages were those stated by Birkett L.J. (as he then was) in *Bird* v. *Cocking & Sons Ltd.*[19] and Singleton L.J. in *Walden* v. *War Office*[20] but continued by pointing out that two considerations should be borne in mind when considering the application of those principles in Malaya: [21]

18. (1962) 28 M.L.J. 29.

19. [1951] 2 T.L.R. 1260.

20. [1956] 1 All E.E. 108.

21. At p. 31.

> The first of these is that local social, economic and industrial conditions are poles apart from conditions in England and Scotland and any tendency to take a particular line in relation to assessment of damages in cases of this type from a consideration of English and Scottish cases is not calculated to produce very useful results. Times may be changing but this is still not an industrial country. The economy is still, generally speaking, a peasant economy in which the typical figures are the small cultivator and the small trader. This in its turn, although of course strictly speaking it does not affect the value of money, produces the consequence that small sums of capital are more difficult to acquire and more sought after than in England and, when acquired, are much more prized and are of much greater economic utility..... Again, it must be remembered that, generally speaking, money wages are lower in this country than in England.

The Chief Justice did not, therefore, feel disposed to accept the appellant's contention that the general damages were so low as to justify the interference of the Court of Appeal, either on the principle enunciated by Greer L.J. in *Flint* v. *Lovell*[22] — "an entirely erroneous estimate of the damages to which the plaintiff is entitled" — nor on that of Denning L.J. (as he then was) in *McCarthy* v. *Coldair Ltd.*[23] — "Good gracious me — as low as that."

Chee Kim Seng v. *Public Prosecutor*[24]

Criminal law — homicide — direction to jury.

The appellants were charged with murder. The first appellant was so convicted: the second appellant was convicted of culpable homicide not amounting to murder. The first appellant had only pleaded accident, and the trial judge had therefore put the issue to the jury, in his case, as a matter either of conviction for murder, or acquittal (*i.e.,* he did not put to them the possibility of culpable homicide not amounting to murder).

The Chief Justice held that although only the defence of accident had been relied upon nevertheless the possibility of defences other than that of accident should have been put to the jury. In this his Lordship followed the principle enunciated by Lord Reading C.J. in *R.* v. *Hopper*[25] (and approved by the House of Lords in *Mancini* v. *Director of Public Prosecutions*)[26] to the effect that:[27]

> Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the Judge to put such questions as appear to him properly to arise upon the evidence even although counsel may not have raised some question himself.

On this ground the Court of Criminal Appeal substituted a verdict of guilty of culpable homicide not amounting to murder.

22. [1935] 1 K.B. 354.

23. [1951] 2 T.L.R. 1226.

24. (1962) 28 M.L.J. 32.

25. [1915] 2 K.B. 481.

26. [1942] A.C. 1.

27. At p. 436.

Kok Hoong v. *Leong Cheong Kweng Mines Ltd.*[28]

Procedure — estoppel per rem judicatam — default judgment.

The plaintiff and defendant had entered into an agreement for the hire of certain machinery. In 1954 the plaintiff obtained judgment by default for $22,500 for arrears under the agreement. In the present action he claimed return of the machinery together with further arrears. The defendant attempted to dispute the validity of the agreement and plaintiff claimed estoppel *per rem judicatam* arising from the 1954 default judgment.

Counsel for the defendant argued, however, that whereas the default judgment was for arrears of rent, the present action was for the return of the machinery and that therefore there was no *eadem quaestio* and therefore no *res* which could be said to be *judicata.* Ong J. disagreed: [29]

> With the greatest respect to counsel, I regret that I am unable to agree with this argument because it seems to me to be setting up a distinction without any difference. The truth of the matter is that a judgment for the plaintiff in Civil Suit No. 272 of 1954 was not a judgment for him for a sum of $22,500 at large; it was a judgment for him on a claim for that sum being rents in arrear under a hiring agreement of machinery of which the plaintiff was the owner.

Having held that there was an *eadem quaestio* his Lordship relied upon in *Re South American and Mexican Co. Ex parte Bank of England*[30] in which Lord Herschell said:[31]

> The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end.

His Lordship concluded: [32]

> It seems to me clear beyond dispute that a judgment for rent claimed by the plaintiff as owner of chattels hired necessarily and directly involves, where there was no dispute, a declaration as to their ownership. The root of the plaintiff's title to the rent is his ownership. . . . I am of opinion that, when the hiring agreement was specifically pleaded, any question as to its validity was concluded once judgment had been entered for the rent claimed thereunder. That judgment not having been set aside still stands.

Counsel for the defence further relied upon *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* [33] but Ong J. observed: [34]

> I do not think, however, that it would be right to conclude that their Lordships have gone so far as to lay down that a default judgment can in no case create an estoppel *per rem judicatam*

28. (1962) 28 M.L.J. 35.

29. At p. 37.

30. [1895] 1 Ch. 37.

31. At p. 50.

32. At p. 38.

33. [1939] A.C. 1.

34. At p. 38.

and concluded: [35]

> No other authority has been cited in support of the proposition that a judgment by default cannot raise an estoppel *per rem judicatam.* My own researches in this direction have been unproductive and I am compelled to conclude that, within the limits laid down by Lord Maugham and Lord Wright, a judgment by default is as good as any other to raise an estoppel.

Chan Wing & Sons Realty Co. Ltd. v. *Asia Insurance* [36]

Nuisance — vibration — measure of damages.

The defendants, in carrying out piling operations, caused serious structural damage to the plaintiff's adjacent property. The plaintiffs sued for $50,000 for rebuilding and replacement and for $720.00 for loss of rent.

The defendant argued that the damage resulted, not from vibrations due to the piling, but from structural defects in the building itself. Ong J. rejected this defence and, relying upon *Hoare & Co.* v. *Mc Alpine* [37] said: [38]

> I am satisfied and find as a fact that all the serious structural damage had resulted before any withdrawal of support by underground water could have started even to take effect.

On the general question of whether causing vibrations constituted an actionable nuisance his lordship stated: [39]

> Setting up vibration by piling operations which cause injury to another's property amounts to an actionable nuisance. The principle is no longer open to question.

The other question argued in the case was that of the quantum of damages. On this point Ong J. accepted the defendants' contention, based on Moss v. *Christchurch Rural District Council* [40] that the measure of damages in such cases is not the cost of re-instatement or re-building but the difference between the money value of the property before and after the damage. His lordship therefore reduced the damages on this head from $50,000.00 to $10,000.00.

Tan Wang Keng v. *Public Prosecutor* [41]

Criminal law — attempt — mens rea.

The appellant was charged under the Dangerous Drugs Ordinance with exporting opium from Johore to Singapore. Since the appellant had been on the causeway in Johore territory at the time when his car was stopped the charge was amended to

35. At p. 39.

36. (1962) 28 M.L.J. 40.

37. [1923] 1 Ch. 167.

38. At p. 41.

39. At p. 42.

40. [1925] 2 K.B. 750.

41. (1962) 28 M.L.J. 47.

one of attempting to export opium. The accused pleaded that he was unaware of the presence of opium in his car and that therefore he could not be found guilty of the attempt since he did not possess the necessary *mens rea.* This argument was rejected by Adams J. on the ground that the completed offence was one of absolute prohibition and that therefore although an attempt normally requires *mens rea* an attempt to commit an offence of absolute prohibition does not so require: [42]

> Generally speaking in an attempt there must be both *actus reus* and *mens rea.* There must be a deed done which the law regards as marking the commission of the particular offence and there must be proof that the offender was actuated by the intention to go further and achieve a definite end which is a specific crime. . . . .

His lordship then referred to Stroud and Russell and continued: [43]

> But all these references refer to a crime in the normal meaning of the word where there must be the *actus reus* and *mens rea* before it can be committed. The offence with which we are dealing is a statutory offence created for the general benefit of mankind. . . . .I see nothing illogical in holding that where there is an absolute prohibition against the doing of an act there may also be an absolute prohibition against the making of an attempt and that a purely involuntary attempt is an offence.

G. W. BARTHOLOMEW.

42. At p. 48.

43. At p. 49.