1982 December 21

[A. LOIZOU, STYLIANIDES, PIKIS, JJ.]

YIANNAKIS SHISTRIS,

Appellant,

v.

CYPRUS TOURISM ORGANIZATION,

Respondent.

(*Criminal Appeal No.* 4307).

Tourist Places of Entertainment Law, 1979 (*Law* 91/79)—*Sections* 12(2) *and* 16(4) *of the Law—Create a criminal offence—Collection of* 3% *on every bill of a customer—Proprietor of a Tourist Centre not only has a right but a duty to collect it—Failure to discharge this duty amounts to an offence under the above sections—Sections* 4, 5 *and* 16 *of the Law not contrary to Articles* 25 *and* 28 *of the Constitution.*

Constitutional Law—Right to practise any profession or to carry on any occupation, trade or business—Article 25 *of the Constitution—Nothing in this Article limiting the right of the State to subject the exercise of a trade or profession to any number of licences—Sections* 4, 5, 12 *and* 16 *of the Tourist Places of Entertainment Law,* 1979 (*Law* 91/79) *not contrary to the above Articles.*

Constitutional Law—Equality—Principle of equality—Article 28 *of the Constitution—Classification of restaurants into tourist centres and non-tourist centres—Under the Tourist Places of Entertainment Law,* 1979 (*Law* 91/79)—*Reasonable and made for a purpose that is legitimate and is intended to regulate tourist industry for the public good—Not contrary to Article* 28 *of the Constitution.*

The appellant was found guilty on three counts of the offences of operating a tourist centre without a permit, contrary to sections 4, 5, 16 and 19 of the Tourist Places of Entertainment Law, 1979 (Law 91/79) of omitting to collect the specified 3% percentage on every account calculated by reference to the

quantum of the bill of the customers, contrary to section 12* and 16(4)** of the same Law and of failing to keep records showing the daily receipts made by his tourist centre contrary to section 12 of the Law.

The appellant alleged that the customers refused to pay the 3% whereupon his reaction was that they might pay or withhold payment at will.

Upon appeal against conviction counsel for the appellant mainly contended:

(1) That sections 12(2) and 16(4) of Law 91/79 do not create a criminal offence because:

(i) they are contrary to the provisions of Article 12 of the Constitution. (ii) They are contrary to the principle nullum crimen nulla pena sine lege. (iii) They are contrary to the principle that no accused person is punished for the act and/or omission of another person.

(2) That sections 4, 5, 12 and 16 of Law 91/79 were unconstitutional as being contrary to Article 25 of the Constitution, which protects the right of every person to practise any profession or to carry on any occupation, trade or business.

It was argued in this connection that as the restaurant of the appellant was already licensed under the relevant laws of the local Authority of Aglandjia village where it is situated, namely, the Improvement Board thereof, the requirement for obtaining an additional licence under Law 91/79 constituted a restriction which is not warranted by para. 2 of Article 25*** of the Constitution.

(3) That sections 4, 5, 12 and 16 of Law 91/79 are unconstitutional as contravening Article 28 of the Constitution which recognizes to all persons equality before the law, the administration and justice in that the classification of restaurants into tourist centres and non-tourist centres in towns, constitutes an arbitrary classification based on an illusory distinction.

It was argued in this respect that appellant discharged his

* Section 12 is quoted at pp. 75–76 post.

** Section 16(4) is quoted at pp. 76–77 post.

*** Article 25.2 is quoted at p. 81 post.

duty under the Law once he informed his customers of the 3% tax and they refused to pay.

Held, (1) that there is a clear statutory provision creating an offence in respect of acts or omissions offending section 12(2) of Law 91/79 in the provision of section 16(4) which expressly, clearly and unambiguously says so; that consequently, there is a criminal offence created by law and in respect of which the sentence to be imposed is provided by section 16(4) of the Law. that an offence may be created by the combination of two or more sections of the Law; that so long as the legislative intent is clearly manifested the Courts will give effect to it as the trial Judge did in the present case; that the law makes it an offence of the proprietor of a tourist centre to fail or omit to collect the 3% charge; that he not only has a right but a duty to collect it; that on his own admission the accused in this case ignored his duty and failed to discharge his obligation; that the law was, therefore, rightly applied and the accused correctly convicted; accordingly contention (1) must fail.

(2) That nothing in Article 25 limits the right of the State to subject the exercise of a trade or profession to any number of licences; that so long as the conditions imposed are reasonable the law will be upheld and this is so in this case where the licence required was designed to safeguard public interest in tourism whose proper promotion and protection is to everybody's benefit, not least persons in the position of the accused; accordingly contention (2) should fail.

(3) That this classification of restaurants into tourist centres and non-tourist centres appears reasonable and was made for a purpose that is legitimate and is intended to regulate tourist industry for the public good; and is not contrary to article 28 of the Constitution; accordingly contention (3) should fail.

Appeal dismissed.

Cases referred to:

King v. Chapman [1931] 2 K.B. 606 at p. 609;

Tuck & Sons v. Priester [1887] 19 Q.B. D 629 at p. 638;

London and North Eastern Railway Co. v. Berriman [1946] 1 All E.R. 255 at p. 270;

Vane v. *Yiannopoulos* [1964] 3 All E.R. 820 at pp. 829, 830, 831;

Raynolds v. *G.M. Austin & Sons Ltd.* [1951] 1 All E.R. 606 at p. 610.

Appeal against conviction.

Appeal against conviction and sentence by Yiannaks Shistris who was convicted on the 9th March, 1982 at the District Court of Nicosia (Criminal Case No. 9392/81) on one count of the offence of operating a tourist centre without a permit contrary to sections 4, 5, 16 and 19 of the Tourist Places of Entertainment Law, 1979 (Law No. 91/1979 as amended by Laws 50/80 and 7/81) on one count of the offence of omitting to collect the specified percentage on every account contrary to sections 12 and 16 of the above laws and regulation 8 of the Tourist Places of Entertainment Regulations, 1980 and on one count of the offence of failing to keep records showing the daily receipts contrary to section 12 and regulation 8 of the above laws and regulations and was sentenced by Ioannides. D.J. to pay £10.- fine on count 1, £8.- fine on count 2 and £8.- fine on count 3.

L.N. Clerides with *C. Clerides*, for the appellant.

M. Eliades with *A. Paschalides*, for the respondent.

A. Loizou, J. gave the following judgment of the Court. The appellant was found guilty and convicted on the following three offences:-

(1) Operating without a permit a tourist centre, contrary to sections 4, 5, 16 and 19 of the Tourist Places of Entertainment Law, 1979 (Law 91/1979 as amended by Laws No. 50 of 1980 and No. 7 of 1981), hereinafter referred to as "the Law".

(2) Omission to collect the specified percentage on every account calculated by reference to the quantum of the bill of the customer, contrary to sections 12 and 16 of Regulations enacted thereunder by the Council of Ministers No. 19.811 dated 11.12.1980 and regulation 8 of the Tourist Places of Entertainment Regulations of 1980, Notification No. 203/80.

(3) Failure to keep records showing the daily receipts made

by his Tourist Centre, contrary to section 12 of the Law and regulation 8 of the aforesaid regulations.

He appeals against his conviction on all three counts on a number of grounds to which we shall refer in due course. The particulars for these two counts, as amended by order of the Court at the beginning of the trial, are, as regards Count 2, that he, between the 24th April, 1981 and the 30th April, 1981, in Nicosia, omitted to collect a percentage of 3% on every account of the clients of the Tourist Centre "Shistris" and pay same to the Cyprus Tourism Organization. Those of Count 3 are that he, between the 24th April, 1981, and the 30th April, 1981, omitted to keep records showing the daily receipts made by the Tourist Centre "Shistris" and submit same to the Cyprus Tourism Organization.

The facts of the case were not really in dispute and the particulars of the two counts were duly born out by the evidence adduced. It may be added, however, that the appellant in his evidence alleged that the clients refused to pay the 3% whereupon his reaction was they might pay or withhold payment at will. The learned trial Judge took the view, rightly in our opinion, that appellant's conduct did not reveal a proper inclination to discharge his duties under the law. He added that the appellant should have been telling his clients that in accordance with the Law they ought to pay 3% and he himself ought to have included the 3% charge on every account for collection. He did no such a thing and is himself quoted as saying "Since the clients did not accept to pay the 3%, I considered the whole procedure not capable of carrying it out and I stopped", and he added that he omitted to demand payment of the 3% or debit the accounts of his customers with this statutory charge.

The first ground argued on behalf of the appellant was that the trial Judge wrongly found the appellant guilty on the second count because: (a) Sections 12(2) and 16(4) of the Law do not create a criminal offence as: (i) They are contrary to the provisions of Article 12 of the Constitution. (ii) They are contrary to the principle nullum crimen nulla pena sine lege. (iii) They are contrary to the principle that no accused person is punished for the act and/or omission of another person.

Section 12 of the Law reads as follows:-

"12. (1) Δι' ἀποφάσεως τοῦ Ὑπουργικοῦ Συμβουλίου δύναται

νὰ ὁρίζηται ποσοστὸν μέχρις ὕψους δέκα ἐπὶ τοῖς ἑκατὸν ἐπὶ παντὸς λογαριασμοῦ τῶν πελατῶν τουριστικῶν κέντρων, ἐξαιρουμένων φόρων καὶ δικαιώματος ὑπηρεσίας: Νοεῖται ὅτι τὸ Ὑπουργικὸν Συμβούλιον δύναται δι' ἀποφάσεώς του νὰ ἐξαιρέσῃ, ἐν ὅλῳ ἢ ἐν μέρει, ἐκ τοῦ ὡς προείρηται ποσοστοῦ οἱαδήποτε τουριστικὰ κέντρα εὑρισκόμενα εἰς ὀρεινὰ θέρετρα, ὡς ἤθελε καθορισθῇ ἐν τῇ τοιαύτῃ ἀποφάσει.

(2) Τὸ οὕτω ὁριζόμενον ποσοστὸν ἐπιβαρύνει τὸν πελάτην καὶ εἰσπράττεται ὑπὸ τοῦ ἐπιχειρηματίου καὶ ἀποδίδεται τῇ εὐθύνῃ τούτου εἰς τὸν Ὀργανισμὸν οὐχὶ ἀργότερον τῆς 15ης τοῦ ἑπομένου μηνὸς συμφώνως πρὸς ἐγκυκλίους ὁδηγίας τοῦ Ὀργανισμοῦ.

(3) Ἕκαστος ἐπιχειρηματίας δέον ὅπως τηρῇ στοιχεῖα δεικνύοντα τὰς ὑπὸ τοῦ τουριστικοῦ κέντρου γενομένας ἡμερησίας εἰσπράξεις συμφώνως πρὸς ἐγκυκλίους ὁδηγίας τοῦ Ὀργανισμοῦ".

And in English:

("(1) By decision of the Council of Ministers a percentage may be fixed up to a level of 10% on every account of a client of a tourist centre, except the taxes and the service.

Provided that the Council of Ministers may by its decision exempt in whole or in particular from the aforesaid percentage any touristic centre found in mountain resort as it may be specified in such decision.

(2) The percentage so fixed is imposed on the client and collected by the businessman and paid at his own responsibility to the Organization, not later than the 15th of the following next month, in accordance with the circulars instructions of the Organization.

(3) Each businessman must keep records showing the daily receipts made by the Tourist Centre in accordance with circular instructions of the Organization").

Section 16(4) of the Law reads as follows:-

"16. (4) Πᾶν πρόσωπον παραβαῖνον ἢ παραλεῖπον νὰ συμμορφωθῇ πρὸς οἱανδήποτε διάταξιν τοῦ παρόντος Νόμου ἐν τῇ

ὁποίᾳ δὲν γίνεται εἰδικὴ περὶ τούτου πρόνοια εἶναι ἔνοχον ἀδικήματος καὶ ὑπόκειται εἰς χρηματικὴν ποινὴν μὴ ὑπερβαίνουσαν τὰς ἑκατὸν λίρας".

And in English:

("Every person which contravenes or omits to comply with any provision of this law in which no special provision is made about it, is guilty of an offence and is liable to a fine not exceeding the sum of C£100").

It has been argued that sections 12(2) and (3) do not create an offence as they do not expressly lay down that noncompliance therewith constitutes an offence. It was urged that their wording is directive and not penally prohibitive. The law is not cast in terms imperative. The position remains unchanged, it was argued, even if we read section 12 in conjunction with section 16(4). The product of this combination is too vague to be held as creating a criminal offence.

In support of this proposition we were referred to the case of *King* v. *Chapman* [1931] 2 K.B. 606, where Lord Hewart, C.J., at p. 609, envisages the definiteness required to create an offence:–

"Much argument has taken place and may yet take place on the meaning of the words 'of twenty–three years of age', but we have come to the conclusion that in this case the observations, based upon a series of cases, which are to be found in Maxwell on the Interpretation of Statutes, 7th ed., p. 244, apply. They are as follows: 'Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself' ".

Also we have been referred to the case of *Tuck & Sons* v. *Priester* [1887] 19 Q.B.D. p. 629, and in particular to what was said by Lord Esher, M.R., at p. 638:

"But then comes the question whether the plaintiffs are also entitled to recover penalties under s.6. We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which

will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections".

And at page 645 by Lindley, L.J.:

"It seems to me that we should be treading upon very dangerous ground, and, having regard to the well-settled rule that the Court will not hold that a penalty has been incurred, unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it, I think we ought to keep on the safe side and say that the words 'unlawfully made' are sufficiently ambiguous to enable the defendant to escape from the penalty which is imposed by s.6".

It was submitted that the words "no provision is made" to be found in section 16(4) are virtually meaningless and add nothing to legislative intent.

The position is summed up as hereinbelow indicated in *Halsbury's Laws of England*, 3rd Ed., Vol. 36, at p. 415, paras. 630 and 631:

"630–*Meaning of penal statute.* A statute is to be regarded as penal for purposes of construction if it imposes a fine, penalty or forfeiture, other than a penalty in the nature of liquidated damages, or other penalties which are in the nature of civil remedies.

631–*Construction.* It is a general rule that penal enactments are to be construed strictly, and not extended beyond their clear meaning. At the present day, this general rule means no more than that if, after the ordinary rules of construction have first been applied, as they must be, there remains any doubt or ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt".

Elsewhere in *Halsbury's Laws of England*, Vol. 10, 3rd Ed., pages 271 and 272, criminal liability is portrayed in the following perspective:

"501–*Definition of crime.* Criminal law and procedure deal with the nature, prosecution, and punishment of crime.

> A crime is an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment. While a crime is often also an injury to a private person, who has a remedy in a civil action, it is as an act or default contrary to the order, peace, and well-being of society that a crime is punishable by the State".

The case of *London & North Eastern Railway Co.* v. *Berriman* [1946] 1 All E.R., p. 255, at p. 270, offers another useful illustration of the principle:-

> "It was suggested, my Lords, that some distinction is to be made in the application of this rule according to the avowed purpose of the Act. It would, I think, be unfortunate if any decision of this House gave any colour to such a suggestion. Wherever the Legislature prescribes a duty and a penalty for the breach of it, it must be assumed that the duty is prescribed in the interests of the community or some part of it and the penalty is prescribed as a sanction for its performance. Whether the purpose is, as it was in Tuck's case, the protection of copyright, or, as in the case before your Lordships, the protection of the life and limb of certain workers, the same principle prevails. A man is not to be put in peril upon an ambiguity, however much or little the purpose of the Act appeals to the predilection of the Court".

Another submission raised in support of the argument that the law does not render the restaurateur criminally liable was based on the principle that criminal liability cannot depend on the act of a third party, in this case the willingness of the customer to pay the specified charge of 3%. Therefore, we were invited to hold that the whole concept of criminal liability of the keeper of the tourist centre is ill-founded. In support of this submission we were referred to the case of *Vane* v. *Yiannopoulos* [1964] 3 All E.R., p. 820, at pp. 829, 830, and 831. At page 829 it is stated:

> "It is open to Parliament to provide that a particular act is wrongful and that a person who does the act is guilty of an offence. In general our criminal law requires that

there should be mens rea in order to establish guilt. Parliament may, however, enact that mens rea is not necessary. There may be strict liability. So also it might be enacted that a person is guilty of an offence if his servant or agent does some act and does it with mens rea. It might be enacted that a person is guilty of an offence if some other person not his servant or agent does some act and does it with mens rea. It might be enacted that a person is guilty of an offence if there is mens rea either in him or in the person doing the act. It might be enacted that a person is guilty of an offence if an act is done by some other person even though there is no mens rea in anyone".

Reference was also made to *Reynolds* v. *G. M. Austin & Sons Ltd.* [1951] 1 All E.R., p. 606, at p. 610, where it is stated:

"What was suggested and proved was that one of the conditions which would have entitled the journey to be regarded as a special occasion had been broken, not by the respondents, but by someone for whom they had no responsibility. To make them guilty of an offence the breach must, in my opinion, have been committed by them or to their knowledge".

No doubt section 12 of the Law set out in this judgment is a taxing provision in the sense that it imposes on a customer of a tourist centre a tax specified by decision of the Council of Ministers on the basis of a percentage on every account as provided by subsection 1 thereof. And this provision confers the authority of a law for such imposition required for its legality and constitutionality envisaged by Article 24 of the Constitution. In addition to imposing a tax, it casts a duty on the restaurateur to collect same and account for it to the Organization. Thus there are created by this statutory provision two obligations. One on the customer to pay a tax as specified in the said section and another on the businessman to collect same and hand it over to the Organization. There is nothing uncertain, vague or unambiguous in its wording leaving a doubt. Had this been the case, it should, on the principles of construction regarding penal or taxing statutes earlier referred to in this judgment, be resolved in favour of the citizen or the tax-payer.

Moreover, the proprietor of a tourist centre and in that respect the appellant, is not called upon to pay for the misdeed of another person, as suggested. There is a clear statutory provision creating an offence in respect of acts or omission offending section 12(2) of the Law in the provision of section 16(4) which expressly, clearly and unambiguously says so. Consequently, there is a criminal offence created by law and in respect of which the sentence to be imposed is provided by section 16(4) of the Law. An offence may be created by the combination of two or more sections of the Law. So long as the legislative intent is clearly manifested the Courts will give effect to it as the trial Judge did in the present case. The law makes it an offence of the proprietor of a tourist centre to fail or omit to collect the 3% charge. He not only has a right but a duty to collect it. On his own admission the accused in this case ignored his duty and failed to discharge his obligation. The law was, therefore, rightly applied and the accused correctly convicted.

There remains to examine the constitutionality of sections 4, 5, 12 and 16 of the Law as against articles 25 and 28 of the Constitution. With regard to Article 25 of the Constitution, which protects the right of every person to practise any profession or to carry on any occupation, trade or business, it was argued by counsel that as the restaurant of the appellant was already licensed under the relevant laws of the local Authority of Aglandjia village where it is situated, namely, the Improvement Board thereof, the requirement for obtaining an additional licence under Law 91/79 constitutes a restriction which is not warranted by para. 2 of Article 25 of the Constitution which provides as follows:-

> "The exercise of this right may be subject to such formalities, conditions or restrictions as are prescribed by law and relate exclusively to the qualifications usually required for the exercise of any profession or are necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person or in the public interest:

Provided that no such formalities, conditions or restrictions purporting to be in the public interest shall be prescribed by a law if such formality, condition or restriction is contrary to the interests of either Community".

Nothing in Article 25 limits the right of the State to subject the exercise of a trade or profession to any number of licences. So long as the conditions imposed are reasonable the law will be upheld. And so in this case, where the licence required was designed to safeguard public interest in tourism. Its proper promotion and protection is, in our judgment, to everybody's benefit, not least persons in the position of the accused.

In so far as Article 28 of the Constitution is concerned that is the article recognizing to all persons equality before the law, the administration and justice, and protecting every person in the enjoyment of his rights and liberties provided for in our Constitution without any direct or indirect discrimination, it has been argued that the classification of restaurants into tourist centres and non-tourist centres in towns, constitutes an arbitrary classification based on an illusory distinction. We find ourselves unable to uphold this submission because the classification appears reasonable and made for a purpose that is legitimate intended to regulate tourist industry for the public good.

The last ground raised concerns the adequacy of the evidence before the Court to sustain the conviction. We have been referred to the relevant passage in the judgment from which it transpires that what the appellant claimed to have done was to inform the customers of the 3% tax and leave it to them to pay; once they refused he left matters at that, being content that he discharged his duty under the Law. We reject this submission of counsel because section 12(2) of the Law imposes a mandatory duty on the person running a tourist centre to collect a tax which is imposed by law on his customers. Section 12(2) of the Law reads as follows:-

"The so fixed amount burdens the client and is collected by the business-man and handed on his own responsibility to the Organization not later than the 15th of the next month in accordance with the circular instructions of Organization".

It is clear from the aforesaid wording that the businessman has no option but to comply with the law and to aid in its effective enforcement and not to leave the payment of the said imposition to the will or whim of the tax-payer. As the appellant claimed to have done in this case and felt that he had discharged the duty imposed upon him by law. He could not, in our view, be absolved of his responsibilities by the mere refusal of the client to meet his obligations cast by law; nor can one leave it to the discretion of the customer whether he will pay the charge. He can only discharge his duty by collecting the tax.

For all the above reasons this appeal is dismissed.

Appeal dismissed.