IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.596/83

BETWEEN M.R. FORD LIMITED

Appellant

A N D LABOUR DEPARTMENT

Respondent

Hearing: 2 February 1984

Counsel: Carolyn M. Risk for Appellant
B.M. Stanaway for Respondent

Judgment: 7/2/84

JUDGMENT OF ROPER J.

This is, on its face, an appeal against both conviction and sentence on a charge pursuant to s.8(2) of the Construction Act 1959 of commencing notifiable work without first having notified the Construction Safety Inspector of the Department of Labour of the nature of the work and the time when it was intended to commence such work. The Appellant company was fined $250.

The Appellant is a plumbing contractor and in January and February 1983 carried out repairs to the roof of the premises of Alloy Steel (N.Z.) Ltd in Sockburn. It was common ground that the work was of such a nature as to require 24 hour prior notification to the Construction Safety Inspector before commencement. On the 1st February a Mr Grenfell, an employee of the Appellant fell partly through perspex roofing on the premises but was able to save himself and sustained no injury. On the 4th February another employee Mr Pepperell fell through the perspex roofing to his death.

The Appellant was charged with three offences, namely the breach of s.8(2), and two charges pursuant to Reg. 34A(1) of the Construction Regulations 1961 of causing or permitting a workman to walk over or work on brittle

roofing material without adequate safety precautions. The two latter charges, which concerned the incidents involving Messrs Grenfell and Pepperell were ultimately dismissed and I am not concerned with them.

The questions which arise on this appeal are whether failure to notify was proved beyond reasonable doubt, and whether the learned trial Judge, in finding it proven, reversed the onus of proof.

Notification of the proposed work was sent to the Labour Department specifying the due date of commencement of the work as the 20th January 1983 with an estimated time to complete of four to six weeks. The notice is signed on behalf of the Appellant company but is undated. Mr Hallams, a Construction Safety Inspector, gave evidence that the notification was not made to the Department until the 7th February, which was six days after Mr Grenfell's accident and three days after Mr Pepperell's.

The notification form which was produced by Mr Hallams bears a Department of Labour date stamp for the 7th February 1983. Mr Hallams was questioned by the Court on the matter as follows:-

"Q. Where did you get the form from?
A. It came through our system.
Q. That document came into your hands on 7 February?
A. Yes.
Q. It came through the office system?
A. Yes.
Q. So you are unable to say from your own personal knowledge what day it came into the office?
A. Theoretically, no.
Q. Well I think if you want the Court to have affirmative evidence of when it was received you will have to call evidence of who received it."

At that point the Prosecutor indicated that a Mr Pitcher had received the document into the Department but that he was seriously ill in hospital following a heart attack. The Trial Judge then said:-

"I will receive it at the moment as something that has gone in on 7 February."

Mr Hallams was later cross-examined as follows:-

"Q. Now you have produced as an exhibit the completed pink form?
A. Yes.
Q. And it was you who put in the date there, 7 February?
A. That is correct.
Q. And the date on it was 20 January?
A. The commencement date, yes.
Q. And you say you received it on 7th?
A. Correct.
Q. How many people work in your Department?
A. Six in our office.
Q. Where does mail go to in the Department of Labour?
A. The records room then straight to me.
Q. How many people work in the records room?
A. Three.
Q. Who opens the mail?
A. I can't tell you.
Q. You don't know what happens with the mail?
A. If I can elaborate, those items come to us within 24 hours of arrival in the office. They are so important that we get them straight away because we go on the road we must be very sure we are not going on a site and accusing a builder or an employer of doing notifiable work without notification.
Q. That is your usual practice?
A. Yes.
Q. But you can't account for the rest of the staff at the Labour Department?
A. No."

The reference in the second question to Mr Hallams putting in a date concerned the insertion by him of a date "7.2.83" in the position on the form where the person giving notice would normally insert a date, and does not refer to the Department date stamp.

Mr Hallams was re-examined and questioned by the Court on the issue to this effect:-

"Q. With respect to the enquiry as to the formality of how the notifications arrived on your desk could you not elaborate a little bit further on that?

A. In 9 cases out of 10 the employer himself brings the notifications to the office and this may well have happened in this case. If they are not sent to the building they are either dropped into a letter box in the front door of the building to enable us to get them in a hurry or they are posted to us. I could elaborate on that one. I know that on the occasion we received that one from Mr Ford we received some other ones from Mr Ford and it was because of my feelings for the state of Mr Ford's mind at the time, he was very upset and I genuinely believe it was an oversight on his part in not filling in the date at the bottom and at that time I saw no harm whatsoever - nothing coming out of us putting the date in.

TO THE COURT

Q. We are just trying to get clear who put the date on the bottom?

A. I put the date.

RE-EXAMINATION CONTINUES

Q. But the date stamp would have been recorded?

A. It was on there before I recorded it.

Q. In other words Mr Hallams we had not received a notification prior to those two accidents?

A. That is correct.

TO THE COURT

Q. Mr Hallams had not received it but what inference I draw from the date stamp is for me.

A. The date stamp would have been put on 7 February would have been put on before it came to my desk so all I did was duplicate that date.

Q. Yes, I understand."

In his reserved decision the Trial Judge dealt with the notification issue in this way:-

" The only point in issue with regard to the failure to give notice was whether the evidence was sufficient to prove the alleged failure.

Mr Hallams produced a notice in writing (Exhibit 4). He said that no earlier notice had been received by the Department. This document came into his hands on 7 February 1983. The document is date stamped by the Department that day but the stamp was not placed on it by Mr Hallams. He explained the system in operation in the office and said that such notices are regarded as of urgent importance

and are forwarded to the inspector concerned within 24 hours of receipt in the office. No evidence was called as to the precise date and time of actual receipt by mail or other delivery by the officer who received it. When the matter was being examined in the course of the evidence Mr Nee said from the floor of the Court that the officer concerned was in hospital as a result of heart attack.

I accept Mr Hallams evidence. In my opinion it is sufficient proof that notification was not made until 6/7 February 1983. While no onus rests on the defendant the nature of the case is such that it admits of explanation or contradiction and in the complete absence of any such evidence I cannot do otherwise than adopt the conclusion which I have drawn from Mr Hallams evidence (see Cross on Evidence third N.Z. edition page 53 and Purdie v. Maxwell 1960 N.Z.L.R. 599).

For these reasons I reject the submission made by the defendant. This charge has been proved."

In the Purdie case F.B. Adams J. said at page 603:-

" I should not have felt it necessary to discuss the law on this topic again but for the fact that, in Hall v. Dunlop /1959/ N.Z.L.R. 1031, 1036, Henry J. has suggested that Nicholls v. King /1951/ N.Z.L.R. 91; /1951/ G.L.R. 54 rests on dicta which ought to be re-examined. I find myself, if I may be permitted to say so with all respect, in entire agreement with the learned Judge's decision in so far as is dealt with the particular case before him, and completely in accord with all the authorities he cited in the ensuing portion of his judgment. I agree, in particular, that it is not a question of an onus of proof resting on the person accused (ibid., 1033), and believe that the view I venture to hold is admirably expressed in the passage quoted by the learned Judge from the judgment of Holroyd J. in R. v. Burdett (1820) 4 B. & Ald. 95; 106 E.R. 873 where the latter said: 'This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it

would be in the defendant's power to produce, if the fact directly or presumptively proved were not true' (ibid., 140; 890).

I would respectfully adopt also the following words which were quoted from the judgment of Abbott C.J. in the same case: 'No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends to be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends'? (ibid., 161; 898).

I believe, with respect, that those passages set forth a fundamental process of reasoning which has always been applied by the Courts, even in criminal cases. It has been so in my experience, subject only to the statutory provisions which prohibit comment on failure to testify, but which do not purport to apply, and, in my opinion, cannot be applied, to the tribunal itself, whether it be a jury, or a Judge or a Magistrate. The tribunal itself remains always free to act on the principle set forth in the last two quotations. In the words of Abbott C.J., can human reason do otherwise?"

Miss Risk submitted that in the present case insufficient had been proved to warrant an adverse conclusion against the Appellant, and referred to the judgment of Wilson J. in Hall v. Commissioner of Inland Revenue [1965] N.Z.L.R. 184, where he said at page 188:-

" As to the second point on which the learned Magistrate misdirected himself, it is not, as a general rule, sufficient in a criminal proceeding for the prosecution to establish a prima facie case. If such a case simply shows a state of affairs which is consistent with guilt, but is also consistent with innocence, that is not enough to warrant a conviction and no onus is thereby cast on the defendant to explain away the appearance of guilt. It is only when the prima facie case points overwhelmingly to guilt (as in the case of possession

> of recently stolen property) that an adverse inference may legitimately be drawn from the defendant's silence."

I think perhaps that Wilson J. may have overstated the position when he referred to the necessity for the prima facie case to point "overwhelmingly" to guilt, and there is support for my reservation in the judgment of Wild C.J. in Police v. Digby (No. 2) /1971/ N.Z.L.R. 1134 at page 1136 where he said:-

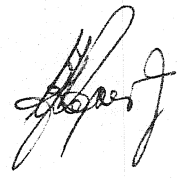
> " On Question 1 Mr Mahon pointed out, and I accept, that in forming his conclusion White J. took into account the fact that, though he could have given evidence as to matters leading up to the accident, Digby gave no evidence. Mr Mahon submitted, first, that where at the end of the case for the prosecution the facts are, as he put it, equivocal, the Court is not entitled to draw an inference from the silence of the defendant. But he conceded, secondly, that if at that point there is a prima facie case and no answer is made the Court is entitled to draw an inference. He argued, and agreed that he had to argue, that the present case was in the first category. He said that at no stage had the Judge said to him, 'But the prosecution made out a prima facie case'. When I asked him he was unable to recall, however, whether he had submitted to the Magistrate that there was no prima facie case. Whether or not Mr Mahon's first proposition is a question that ought to go to the Court of Appeal need not in my opinion be considered because it does not and could not arise in this case, it being abundantly plain that the prosecution did make out a prima facie case. That White J. took that view is clear from a reading of his judgment, including particularly his references to the Magistrate's findings of fact that Digby was on the wrong side of the road and that his carelessness was the proximate cause, the contents of Digby's statement to the police, and the evidence of the condition of his car. I am satisfied, therefore, that in the light of Mr Mahon's concession, which I think was rightly made, that the first question does not arise in this case."

I do not see this as a case where the learned Judge reversed the onus of proof, and indeed it is not really appropriate to regard it as a case where it was

necessary to draw an adverse inference from silence. Evidence was given on behalf of the Appellant company but the matter of the time of notification of the work did not receive a mention, and that evidence followed the learned Judge's express intimation at the end of the prosecution case that a prima facie case had been established. In my view the evidence of Mr Hallams established a strong prima facie case, particularly when regard is had for the fact that if the notification was filed in time it must have remained unnoticed in the Labour Department Office for almost three weeks because the specified date of commencement of the work was the 20th January and the Act requires the notification to be made 24 hours before the commencement date.

In my view the Trial Judge's decision was the right one and the appeal against conviction is therefore dismissed.

Miss Risk made no submissions on the appeal against sentence, whether through inadvertence, confidence in her submissions on the appeal against conviction, or because it was not to be pursued I know not. The appeal against sentence is therefore adjourned to a date to be fixed.



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