PUBLIC PROSECUTOR v. ISMAIL BIN ISHAK & 59 ORS.

[A.Cr.J. (Harun J.) September 11, 1975]
[Kuala Lumpur — Criminal Appeal No. 61 of 1975]

Criminal Law and Procedure — Unlawful assembly — Mass arrest — 60 accused held for taking part in unlawful assembly — Magistrate's decision to acquit — Prosecution's appeal against decision — Failure on part of prosecution to prove beyond reasonable doubt — Magistrate's decision upheld — Police Act 1967, ss. 27(5)(a), & 8 — Penal Code, s. 144 — Evidence Act, 1950, s. 106.

The facts are briefly as follows. Sixty accused persons were charged before the Magistrate's Court for the following offence:

"That you on December 3, 1974 at about 10.50 a.m. in the compound of Masjid Negara, Jalan Hishamuddin, in the Federal Territory of Kuala Lumpur did take part in an unlawful assembly for which no licence has been issued and thereby committed an offence under sub-section (5)(a) of section 27 of the Police Act No. 41 of 1967 and punishable under sub-section (8) of the same section."

The learned Magistrate in making a finding of no case to answer at the close of the case for the prosecution held that the prosecution had to prove three ingredients to the charge, *viz*:

(i) "that there was an assembly on date and time in question;
(ii) that no licence was issued to hold the assembly; and
(iii) that the 60 accused persons did take part in the assembly."

The learned magistrate found that there was an assembly at the material time but he held that the prosecution had failed to prove that no licence was issued to hold the assembly and also that the prosecution had failed to prove beyond reasonable doubt that the sixty respondents did take part in the assembly.

The Public Prosecutor appealed to the court against the aforesaid decision.

Held: (1) the learned magistrate erred in holding that it was the duty of the prosecution to prove that no licence was issued. It was for the accused to show that they had such a licence if called upon their defence, and this would have been a complete answer to the charge;

(2) there is a distinction between "taking part" under the Police Act and "being a member of or is found at an unlawful assembly" under the Penal Code. "Taking part" calls for a more active part than mere presence;

(3) it was not the intention of the legislature that all persons who were merely found at an assembly for which no licence had been issued under section 27 of the Police Act should be guilty of an offence;

(4) the learned magistrate was right in finding that the prosecution had failed to prove beyond reasonable doubt that the sixty respondents did take part in the assembly and the appeal must therefore be dismissed.

Cases referred to:-

(1) *Public Prosecutor* v. *Koh Chin Mong* [1962] M.L.J. 104.
(2) *John* v. *Humphreys* [1955] 1 W.L.R. 325.
(3) *R.* v. *Oliver* [1944] K.B. 68.

CRIMINAL APPEAL.

Haji Abdullah bin Ngah (Deputy Public Prosecutor), (*Lamin Yunus* (Deputy Public Prosecutor with him) for the appellant.

G. Sri Ram for respondents Nos. 31-40.

Karam Singh for respondents Nos. 41-50.

Wong Weng Kwai for respondents Nos. 21-30.

Sham Sunder for respondents Nos. 1-20.

Atma Singh for respondents Nos. 51-60.

Harun J.: This is an appeal by the Public Prosecutor against the decision of the learned magistrate, Kuala Lumpur in acquitting and discharging the 60 respondents at the close of the case for the prosecution in respect of a charge under section 27(5)(a) of the Police Act, 1967. The facts briefly are as follows: —

On December 3, 1974 at about 9.00 a.m. a crowd of about 5,000 assembled at the Selangor Club Padang. Some members of the crowd carried banners and others spoke through loud-hailers apparently demonstrating about something or against someone. Two magistrates were brought in a police vehicle and one of them declared the assembly unlawful and ordered it to disperse, presumably under sections 83 & 84 of the Criminal Procedure Code. The magistrate gave the crowd three minutes to disperse and when it did not do so after the three minutes, he ordered the police to take action. The police fired tear gas into the crowd and it began to disperse but the police action was such that the crowd could only disperse towards Masjid Negara. Meanwhile, at Masjid Negara there were already some people in the mosque, some in the compound of the mosque and some outside along Jalan Young. The crowd that was dispersing from the Selangor Club Padang was followed by the police and entered the mosque. Then at about 10.00 a.m. the crowd in the compound of the mosque began moving out through the Jalan Venning gate. The Senior Police Officer who was in charge of the Police outside the mosque decided that the crowd should not be allowed to go out of the compound of the mosque and on to the public road. He intimated his decision to the Control Centre, presumably his superiors, who agreed with him and sent him reinforcements. As a result, the crowd was driven back into the mosque including the crowd at Jalan Young who had not been in the mosque before. Then stones, bottles and other missiles were thrown by the crowd at the police. According to the mosque officials, the crowd was peaceful until the police charged on them and fired tear gas. The Senior Police Officer reported these developments to the Control Centre and received orders to take dispersal action, cordon off the mosque and arrest as many demonstrators as possible. He did all three. He fired tear gas to disperse the crowd but as the mosque compound was cordoned off and its exits sealed by the police the demonstrators could not disperse. He then ordered his men to enter the mosque and arrest as many people as possible. There were about 3,000 people in the mosque then and of these, 1,092 men and women were arrested. According to the Senior Police Officer who issued the Order to make the arrests in the mosque, the arrests were made indiscriminately, that is to say, to arrest anyone found in the mosque and in the compound. The number arrested, however, was subject to the availability of transport. The 60 respondents before this court were part of the 1,092 men arrested. From their addresses on the charge sheet they all appear to be students of institutions of higher education in Kuala Lumpur, *viz*. The University of Malaya, the University Kebangsaan, the National Institute of Technology and the MARA Institute of Technology.

The respondents were charged the following day as follows: —

"That you on December 3, 1974 at about 10.50 a.m. at the Masjid Negara, Jalan Sultan Hishamuddin, in the City of Kuala Lumpur, were members of an unlawful assembly, the common object of which was show of criminal force against the police in dispersing the said assembly and that you have thereby committed an offence punishable under section 143 of the Penal Code."

At the commencement of the trial on March 17, 1975, however, the prosecution altered the charge to an offence under the Police Act as follows: —

"That you on December 3, 1974 at about 10.50 a.m. in the compound of Masjid Negara, Jalan Hishamuddin, in the Federal Territory of Kuala Lumpur did take part in an unlawful assembly for which no licence has been issued and thereby committed an offence under sub-section (5)(a) of section 27 of the Police Act No. 41 of 1967 and punishable under sub-section (8) of the same section."

This alteration, in my view, has caused some confusion in the conduct of this case, particularly with regard to the evidence that is necessary to prove a charge under section 143 of the Penal Code and which is irrelevant in respect of a charge under section 27(5)(a) of the Police Act, 1967 but was nevertheless adduced at the trial.

Section 27 of the Police Act is contained in Part VII of that Act which deals with duties and powers of police officers. Section 27 itself deals with police powers "to regulate assemblies, meetings and processions." This power is exercised by a form of licensing before convening, collecting or forming any assembly, meeting or procession. Failure to obtain a licence is made an offence.

Section 27(5) of the Police Act provides as follows: —

"27. (5) Any assembly, meeting or procession—

(a) which takes place without a licence issued under the provisions of sub-section (2); or

(b) in which three or more persons taking part neglect or refuse to obey any order given under the provisions of sub-section (1) or sub-section (3),

shall be deemed to be an unlawful assembly, and all persons taking part in such assembly, meeting or procession and, in the case of an assembly, meeting or procession for which no licence has been issued, all persons taking part in convening, collecting or directing such assembly, meeting or procession, shall be guilty of an offence."

The learned magistrate in making a finding of no case to answer at the close of the case for the prosecution held that the prosecution had to prove three ingredients to the charge, *viz*:

(i) "that there was an assembly on date and time in question;

(ii) that no licence was issued to hold the assembly; and

(iii) that the 60 accused persons did take part in the assembly."

"Assembly" is not defined in the Police Act and must therefore be given its ordinary meaning. According to the dictionary, it means "the coming together of two persons or things; a gathering of persons." In my view there was ample evidence in this case for the learned magistrate to hold that there was an assembly at the Masjid Negara at the material time. In doing so, however, it is not clear to which assembly the learned magistrate was referring since by 10.50 a.m. there were at least three assemblies at Masjid Negara, *viz*:

(a) the assembly in the mosque and its compound which had gathered earlier;

(b) the assembly at Jalan Young and which had been driven into the mosque by the police; and

(c) the assembly at the Selangor Club Padang and which had re-assembled at the mosque.

There is no evidence that these three assemblies were acting in concert with one another. This point is of importance when considering the charge in relation to the facts of this case — since a charge under section 27(5)(a) of the Police Act is related to the provisions of sub-section (2) thereof which deals with the *intention* of convening or collecting an assembly. It follows that persons who assemble at a particular place without a licence should have at least collected there voluntarily. This can only apply to the crowd that had first assembled at Masjid Negara and the demonstrators from the Selangor Club Padang who subsequently re-assembled at the mosque. It can be said that the Jalan Young group and the Selangor Club Padang group each constituted an assembly of its own since both groups had collected at these places voluntarily and it was open to the prosecution to charge each group separately for holding an unlawful assembly at these places. The charge, however, alleges an unlawful assembly at Masjid Negara and nowhere else. As the Jalan Young group was driven into the mosque compound by the police, they cannot be said to be there voluntarily and therefore cannot be accused of being an unlawful assembly at Masjid Negara. Nonetheless, the original group at Masjid Negara and the re-assembled group from the Selangor Club Padang each constituted themselves into an assembly within the meaning of section 27(5)(a) of the Police Act.

In considering the second ingredient, the learned magistrate held that the prosecution had failed to prove that no licence was issued to hold the assembly. The prosecution had called a Police Inspector who said that he was the licensing officer under the Police Act for the issue of licences to hold assemblies within the Federal Territory and according to his records, no licence was issued to hold an assembly on December 3, 1974 to anyone in the Federal Territory. The learned magistrate further held that either the OCPD or the clerk-in-charge of the records should have been called as the Police Inspector did not have exclusive authority to issue licences and as neither of them was called he invoked the presumption unfavourable to the prosecution under section 114(g) of the Evidence Act. He also held that the provisions of section 106 of the Evidence Act did not apply since only a small number of licences are involved under the Police Act "unlike Road Traffic Licences or ticket cases where the number of licences or tickets involved is so huge that perhaps it would be next to impossible to prove the negative of a positive assertion." I can find no authority for the proposition that the number of licences has anything to do with the application of section 106 of the Evidence Act. That section provides: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." The

application of section 106 of the Evidence Act was considered in *Public Prosecutor* v. *Koh Chin Mong*[1] where it was held that it is unnecessary to call a licensing officer to prove the non-issue of the licence and that the burden is on the accused to negative the averment of being unlicensed by producing the licence. True, most of the reported cases on this point arose out of Road Traffic offences as they did in *Koh Chin Mong's* case and in *John* v. *Humphreys*[2] but the case of *Rex* v. *Oliver*[3] is perhaps the most elaborate review of the authorities on the subject and that was a case of selling sugar without a licence. The law then, is that, where the obtaining of a licence is by statute a prerequisite to the doing of some act, the onus is on the person doing the act to prove that he has a licence, it being a fact peculiarly within his own knowledge. As a matter of law, therefore, I hold that the learned magistrate here has erred in holding that it was the duty of the prosecution to prove that no licence was issued. It is for the respondents to show that they had such a licence if called upon their defence, which would have been a complete answer to the charge. Until then, the assembly is deemed to be an unlawful assembly within the meaning of section 27(5)(a) of the Police Act.

Lastly, the learned magistrate held that the prosecution had failed to prove beyond reasonable doubt that the 60 respondents did take part in the assembly. In coming to this conclusion, the learned magistrate took into account that —

(i) there was an original crowd at Masjid Negara which included innocent persons who were there before the incident for some other purpose and remained there on grounds of curiosity;

(ii) the Masjid Negara is a public place of worship and open to the public at all times;

(iii) the 60 respondents have not been positively identified as being members of an unlawful assembly;

(iv) that when the police dispersed the crowd towards Masjid Negara, innocent bystanders could have been swept along and become part of the crowd;

(v) the prosecution has not attempted to link any of the persons shown in the photographs as demonstrating to those before the court; and

(vi) finally, under section 27 of the Police Act, there is no presumption that a person found in the vicinity of an assembly is presumed to be a member thereof unless the contrary is proved.

It is obvious that the learned magistrate was dealing with the crowd from the Selangor Club Padang. A perusal of the evidence shows that a major portion of the prosecution's case is concerned with the demonstrators at the Selangor Club Padang. In his final submission, the learned Deputy Public Prosecutor said: "The crowd came from Selangor Padang and went into compound of mosque. They could have gone straight instead of stopping." This argument was again repeated at the hearing of the appeal. The prosecution's case, therefore, was that by re-assembling at Masjid Negara after being dispersed from the Selangor Club Padang, the respondents took part in an unlawful assembly. If that be the case, then the prosecution must show that the 60 respondents were the persons who had taken part in the assembly at the Selangor Club Padang and subsequently re-assembled at Masjid Negara.

What the 5,000 people did at the Selangor Club Padang was obviously wrong. It was an unlawful assembly. There is no doubt about that. But what this court must satisfy itself with is whether the respondents did take part in the unlawful assembly. The law on identification is that it is for the prosecution to prove beyond a reasonable doubt that it was the accused person who committed the offence or act. In a case such as this, it is perhaps, impossible for the prosecution to identify individually every participant in the assembly, but there should be some form of positive identification. If the assembly had been surrounded by the police at the Selangor Club Padang and the arrests made then and there, that would probably be the positive proof of the identification required. Alternatively, if the police had used a fire-engine to splash chemically-coloured water on those taking part at the Selangor Club Padang, dispersed them and followed them to the Masjid Negara and the arrests made there of those with stained-shirts could have amounted to positive identification without the risk of arresting innocent persons. What is the evidence of identification we have here? It has been clearly established from the prosecution's case that at the time of the arrests at Masjid Negara, there were three separate assemblies. According to the prosecution, the arrests were made indiscriminately. What is clear is that there was confusion at the time the arrests were made at Masjid Negara and the police had great difficulty in making any form of identification. In fact, it was conceded by the prosecution that no attempt was made at identification except after the arrests were made. There is impeccable evidence to show where the 1,092 arrested persons were sent to and how they were brought to court. If it is alleged that the 60 respondents formed part of the original assembly at Masjid Negara, then there is no evidence to support this allegation. The truth is that at the time of the arrests, all three assemblies had been thoroughly mixed up and there was no means of telling them apart. The only evidence on identification then is the fact of arrest at Masjid Negara.

It is contended by the appellant that it is not necessary to identify positively any of the respondents as everyone at Masjid Negara at the material time constituted themselves an unlawful assembly. This may be so if the prosecution had proceeded with the original charge under section 143 of the Penal Code or under any of the other related offences of being found at an unlawful assembly under the Penal Code. The charge here is taking part in an unlawful assembly for which no licence was issued under the Police Act. There is a distinction between "taking part" under the Police Act and "being a member of or is found at an unlawful assembly" under the Penal Code. The dictionary meaning of "take part" is "to participate in (some action), to assist, co-operate." Taking part calls for a more active part than mere presence. Thus if the evidence showed that the respondents were the persons who carried the banners, distributed the pamphlets, used the loud-hailers to address the crowd or even shouting their approval at the speeches, then they can be said to be "taking part" in an unlawful assembly. But all these require positive

identification of the respondents to the part played by each of them. It is my considered view that it was not the intention of the legislature that all persons who are merely found at an assembly for which no licence had been issued under section 27 of the Police Act shall be guilty of an offence. If so, it would have said so and employed the words of section 144 of the Penal Code which provides "any person who attends, takes part in or is found at any unlawful assembly." It seems to me, therefore, that where the prosecution might succeed in a charge under the Penal Code by proof of mere presence supported by fact of arrest at an unlawful assembly it must go beyond that for a charge under section 27 of the Police Act by showing not only that the accused was present at the unlawful assembly but also that he did take part in that unlawful assembly. I accordingly hold that the learned magistrate was right in finding that the prosecution had failed to prove beyond a reasonable doubt that the 60 respondents did take part in the assembly.

There remains, whether at the close of the case for the prosecution, there was sufficient evidence for the learned magistrate to alter or add the charge under section 158 of the Criminal Procedure Code. I have given this matter anxious consideration and find that there is none. I hold that the learned magistrate was right in making the order of acquittal and discharge and I would therefore dismiss this appeal.

Appeal dismissed.

Solicitors: *Sri Ram, Chan & Chia; Karam Singh Veriah; Mah, Kok & Din; Lim Soh Wah & Co.; Atma Singh Veriah.*

TAN SIM SEE & ANOR. v. SEE CHEE PING

[O.C.J. (Arulanandom J.) September 15, 1975]
[Penang — Civil Suit No. 263 of 1975]

Practice and Procedure — Defendant's application to set aside writ by reason that it was defective — Infant suing by next friend — Consent of next friend filed after filing of writ — Irregularity curable — R.S.C. 1957 O.16 r.20 and O.70.

In this case, the plaintiff, an infant by her next friend, filed a writ against the defendant on August 18, 1973 claiming damages for injury suffered by the defendant's negligent driving.

The consent of the next friend was filed in court on August 24, 1973 and the defendant entered appearance on September 26, 1973.

On March 18, 1975, the defendant sought to have the writ set aside for want of prosecution or by reason that the writ was defective.

Held: (1) the defendant's claim to strike the writ out for want of prosecution was completely devoid of merit;

(2) an affidavit was filed with the writ by the father of the infant indicating that he had agreed to be appointed next friend for the purposes of the writ. Hence, if there was an irregularity in form, it could be cured under Order 70;

(3) the object of the Rules of the Supreme Court in making provisions for the striking out of writs is to save the time of the court in processing and proceeding with actions which are frivolous, vexatious and show no cause of action or in other words writs without any merit whatsoever. The purpose of the rules is not to enable defendants to come to court and waste the court's time by complaining the 'i's are not dotted or the 't's crossed in the hope of making a few paltry pennies in costs;

(4) courts should seriously consider when such unsuccessful applications to strike out writs are concerned, whether the solicitors responsible should be personally liable to pay costs;

(5) in the circumstances the application must be dismissed with costs.

Cases referred to:-

(1) *Attorney-General at & by the relation of Pesurohjaya Ibu Kota, Kuala Lumpur* v. *Wan Kam Fong & Ors.* [1967] 2 M.L.J. 72.

(2) *H. Stacey* v. *Diamond Metal Products Co. Ltd. & Anor.* [1935] M.L.J. 249.

CIVIL SUIT.

Triptipal Singh for the plaintiffs.

Abu Haniffa for the defendant.

Arulanandom J.: In this case, the plaintiff, an infant by her next friend Tan Ah Lat, filed a Writ in the High Court against the defendant on August 18, 1973 claiming damages for injuries suffered by the plaintiff as a result of an accident caused by the negligent driving of a motor car by the defendant on April 30, 1973 at about 2.00 p.m. along Penanti-Permatang Pauh Road.

The consent of the next friend was filed in court on August 24, 1973. The defendant entered appearance on September 26, 1973.

Since then no steps were taken by either party until March 8, 1975 when the plaintiff applied to have the Writ of Summons amended to have the next friend added as second plaintiff. On March 18, the defendant filed a Summons-in-Chambers to have the writ set aside on grounds stated in the affidavit of the solicitor in charge of the defendant's case dated February 4, 1975. The defendant prayed that the writ be set aside for want of prosecution or by reason that the writ was defective.

As for the complaint that there was want of prosecution on a perusal of the affidavit of Triptipal Singh, the solicitor for the plaintiffs, it is quite evident that owing to the circumstances of the case *viz.*, the plaintiff infant continuing to receive medical treatment and the delay on the part of the Medical Authorities in producing a final Medical Report on the plaintiff, the solicitors had by mutual agreement agreed to waive stipulations in the Rules of the Supreme Court as to the time of filing Statement of Claim, etc. In view of the said affidavit which was not denied in substance by the defendant's affidavit in reply of May 8, 1975, the court considered the defendant's claim to strike the writ out for want of prosecution as completely devoid of merit. The defendant filed his appearance in September 1973 and only gave notice of intention to proceed in February 1975. If there was no exchange of correspondence or indulgence shown by either side, the matter would have been prosecuted, but if there was delay the defendant himself was guilty of laches.

Secondly, the defendant claims the writ is defective. As to the grounds in paragraph 6 of the affidavit of Abu Haniffa dated February 4, 1975 *viz.* "(a) It does not state how the accident happened and the exact