1966 *Present :* **G. P. A. Silva, J.**

PHOTO CINEX LTD., Appellant, *and* G. D. RAJAH (Labour Officer), Respondent

S. C. 586/66—M. C. Colombo, 11218/A

Workmen employed in an industry—Termination of the services of some of them—One month's notice of discontinuance—Failure of employer to give such notice—Circumstances when it is not an offence—Difference in effect between "retrenchment" and closure of a section or sections of the business—"Industry"—Statutory offence—Requirement of proof beyond reasonable doubt—Industrial Disputes Act (as amended), ss. 31F, 31G, 40 (1) (s), 43 (1), 48.

One month's notice in writing in terms of section 31F of the Industrial Disputes Act need not be given when an employer who carries on an industry terminates the services of workmen to effect a phased closure of business of a section or sections of the establishment and not to effect retrenchment by the reduction of staff while continuing the entire business.

In any criminal prosecution, whether the offence charged is one under the Penal Code or under any other statute, the case against the accused must be proved beyond reasonable doubt.

APPEAL from a judgment of the Magistrate's Court, Colombo.

George E. Chitty, Q.C., with *R. A. Kannangara* and *A. M. Coomaraswamy*, for the Accused-Appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 2, 1966. G. P. A. SILVA, J.—

The accused-appellant Company was charged and convicted in the Magistrate's Court of Colombo on three counts with having on 15th September 1962, in contravention of Section 31 F (*a*) of the Industrial Disputes Act (Chapter 131) as amended, failed to give one month's notice in writing, to the three workmen mentioned in the three counts and to the Trade Union of which they were members, of the Company's intention to effect retrenchment in respect of the said three workmen and having thereby committed an offence under Section 40 (1) (*s*) of the said Act punishable under Section 43 (1) of the said Act. The principal question that arises for decision in the appeal is whether the appellant effected any retrenchment in terminating the services of the three employees referred to in the charges. Very briefly stated, the position of the appellant is that what was sought to be done by it in terminating the services of these three employees, among others, was to effect a phased closure of business of a certain section or sections of the establishment and not to effect

retrenchment by the reduction of staff while continuing the entire business. The contention for the Crown however is that the said termination of services of the three workers constituted retrenchment within the meaning of the definition contained in section 48 of the Industrial Disputes Act. Mr. Pullenayegum for the respondent has very properly conceded that the provision as to retrenchment would not apply if what was intended to be done by the Company was a closure of business in the departments in which the discontinued persons were employed. He has however endeavoured to show that what was in fact accomplished by the appellant was a termination of services of the workmen concerned on the ground that they were in excess of the number required by the appellant to carry on the industry, as contemplated by the Act and that such termination brought the appellant within the penal provisions of section 43 (1) read with section 40 (1) (*s*) and 31 F.

The three employees in respect of whose termination of services the charges were based are Jilson Fernando, a radio technician ; Percy Peiris, a worker in the Refrigerator section and W. E. Fernando, a tinker. The evidence of Jilson Fernando was that he was served with a notice of termination of services by the Works Manager by a cyclostyled letter in which it was stated *inter alia* that the management were taking immediate steps to reorganise the departments in view of the cost of running the workshop and that it would be therefore necessary to retrench staff. Along with this witness nine other employees were served with notices on the same day making a total of ten. Of these, Percy Peiris was working in the refrigerator department; C. D. Perera, W. E. Fernando and W. C. Fernando in the tinkers' department, while Van Cuylenberg functioned as an Assistant Storekeeper. The witness was the only one served with a notice in his section, along with the tinkers D. A. W. Perera, W. E. Fernando and W. C. Fernando. One tinker Leelaratne continued to work in his section and the storekeeper and others were working in the stores section at the time of the trial. All those in the refrigerator section were completely dismissed at the end of December 1962. The evidence of Percy Peiris was that at the time he was served with a notice similar to the one served on Jilson Fernando, he was employed in the refrigerator section. There were others working in the refrigerator section after he was discontinued but no one was working in that section at the time of the trial. The evidence of W. E. Fernando was that he worked as a tinker for about 10 years till his services were terminated on the 15th September 1962. One tinker Weeraratne continued to work till about 4 months prior to the trial while some temporary tinkers continued to work. There was also some evidence from other employees whose services were similarly terminated to support the evidence given by the three persons in respect of whose discontinuance from service the charges in the plaint were based. The evidence of the prosecution, which was contradicted by the defence, was that the termination of services of these employees was due to their enrolment as members of the Ceylon Mercantile Union a week or so prior to the notices of termination served on them.

As the Magistrate however has accepted the version of the defence on this matter, the appellant is entitled to the benefit of that finding and the arguments adduced by the appellant's counsel before this court have to be considered on the basis of the absence of any bad faith on the part of the appellant.

Before considering these arguments it is necessary to have a clear appreciation as to what the offence is which the legislature contemplates. Section 40 (1) (*s*) of the Act provides that a person who, being an employer, contravenes the provisions of section 31 F shall be guilty of an offence. Section 31 F (*a*) requires an employer who intends to effect retrenchment in respect of any workman employed in an industry carried on by that employer to give to that workman at least one month's notice in writing of such intention, and, if that workman is a member of a trade union, to that trade union, and 31 F (*b*) requires that a copy of such notice should be sent to the Commissioner. It is common ground that the notice as required by the Act was not given by the appellant.

The first criticism that has been made by counsel for the appellant of the judgment of the learned Magistrate is that he has misdirected himself in regard to the meaning of closure of business when he observed as follows: " If it was retrenchment then one month's notice of discontinuance will have to be given to the worker and the union..... If on the other hand it was a bona fide closure of the entire business then no such notice would be necessary." The word retrenchment in the Act means the termination by an employer of the services of a workman or workmen on the ground that such workman or workmen is or are in excess of the number of workmen required by such employer to carry on his industry. The last few words connote that the question of retrenchment can only arise if the industry is carried on and not if it is closed. Having regard to the meaning of the word ' industry ' in section 48 of the Act, the closure of any branch or section of the business by discontinuing the services of a few employees engaged in that section would not expose the employer to a prosecution on the ground of retrenchment without giving notice of the intention to retrench in contravention of section 31F of the Act. It seems to me that there is substance in the criticism of the finding in this regard. The considerations which would arise in arriving at a decision as to whether there was a closure of the entire business or only a section of it are very different both in character and degree. That the total closure of the entire business has not been in the serious contemplation of the firm at the time the three employees concerned were discontinued is not in doubt; for, apart from the self-evident fact that the business of Photo Cinex Limited is still in existence, even the evidence of the Managing Director indicates that a decision to effect a total closure was taken only after the Labour Department intervened after the termination of services of few employees. The question whether there was a phased closure of one or more sections of the business in contemplation is one which has to be decided after a very detailed and careful analysis of the evidence. It seems to me that the

learned Magistrate has misdirected himself on this question by leaning too heavily on the notices served on the employees which set out the intention of the appellant as being to reorganise the business and to retrench the staff. The decision of this question depends on a number of factors in this case and an over-emphasis of the wording of the notices themselves can be misleading. It has been admitted by the Managing Director during the conference with the Labour Department that he was unaware of the provisions of the Industrial Disputes Act regarding retrenchment. There is no reason to disbelieve this admission particularly because it is most unlikely that the word retrenchment would have been used in the notices of termination had he been aware of the new provision, which made retrenchment as understood in the Act, an offence under section 40 (1) (*s*) read with section 31 F. The use of the word retrenchment in the notices must therefore be considered from a different angle bearing in mind the sense in which a layman would use the word. If the business of Photo Cinex Ltd. consisted of one activity only the question would not present much difficulty and the Magistrate's view would be fully justified. As however the business consisted of various activities and various sections the use of the word retrenchment in the notices is not at all inconsistent with the closure of some of the sections in relation to the entire business. Considering the varied lines of business that the appellant carried on and the virtual stoppage of imports in respect of some of them such as sewing machines and refrigerators, the decision to close down some of them is a most reasonable one. While, in relation to the entire business, the discontinuance of a few employees would ordinarily constitute retrenchment such discontinuance can well be construed as a closure of a section of the business. As the words of the notices are thus equivocal one has to examine the other facts and circumstances in order to arrive at a decision whether there was retrenchment or a closure.

In reaching his decision the learned Magistrate appears also to have been influenced by the fact that there was no special resolution to wind up the Company. Having regard to the parlous state of the business owing to the complete stoppage or serious curtailment of the imports in which the appellant was dealing, the report and advice tendered by the Auditors, the telephone consultation of the Managing Director with another director who was in England during the crisis are factors which strongly point to a decision to close down at least some sections of the business. Counsel for the appellant, on the other hand, has contended that there was no resolution by the Company to retrench and that the prosecution could not therefore sustain the charge of effecting retrenchment. In view of all the other circumstances and the action in fact taken to discontinue some of the employees I do not think that it is reasonable to base a decision either way on the absence of a resolution for closure or for retrenchment.

The crucial point in the case therefore is whether the contention that the appellant's intention was to effect a phased closure of certain sections of the business can be sustained. The learned Magistrate has been on the

whole impressed by the evidence of the Managing Director. When, however, the Managing Director stated *inter alia* that the intention of the Company was to effect a phased closure, the Magistrate appears to have had an unfavourable reaction to the reference to a phased closure as it was mentioned for the first time during the Conference with the Labour Department. When a proposition of this nature is seriously put forward by counsel it is the duty of the court to examine its soundness initially on the assumption of *bona fides* and not to reject it as being a resourceful invention by the appellant to meet the exigencies of the case. Mr. Chitty has strenuously pressed this aspect before me and I wish to examine fully whether there is substance or not in his contention.

A correct approach for the consideration of this submission requires a proper appreciation of the background in which the appellant Company resorted to the termination of services of some of the workers. On this aspect, the most eloquent testimony is furnished by the documentary evidence in the case. I have already made my observations earlier in regard to the use of the word retrenchment in the notices of termination of services. As early as 19.9.62, four days after the notices were served, the position taken up at the trial by the appellant in regard to the phased closure was disclosed. The document D1, which consists of the notes at this conference supplies abundant evidence of the financial position of the firm, which I have already referred to earlier. By reason of the total ban on certain imports, some departments practically ceased business. In certain other departments the sales fell from an average of a million rupees a year to an import quota of Rs. 50,000. The servicing department was running at a loss. The sales of the neon sign department fell by about one lakh of rupees for this year. The salaries of Directors were drastically cut and others went on no-pay and some of them in addition advanced funds from their private savings in order to continue the business. Financial insolvency was not the only problem. Certain employees who became aware of the management's decision endeavoured to cause agitation and harassment to those who co-operated with the firm. There were talks of throwing handbombs and causing damage. The genuineness of the management's fears is supported by a complaint made to the police on the night of 7. 9. 62. On this day some workers of the staff were sent for and restrained by keeping them temporarily employed at the main office in order to prevent clashes. As early as February, 1962, the appellant addressed a communication to the Minister of Commerce, Trade, Food and Shipping, D2, which shows that no allocations were being made for the importation of certain articles which formed part of the business of the appellant and informing him that the appellant will be compelled to dispense with the staff already employed for the sale of their articles. On 12th October 1962, the auditors of the firm sent to the latter at their request a comprehensive report setting out the precarious financial position of the firm and advising them to close the establishment. As, however, they were reluctant to do so, the Auditors advised them, *inter alia*, to close down unprofitable departments. On September 28th, 1962,

the Company by D8 in fact informed the employees of their original intention to effect a phased closure and also communicated to them their final decision to close down and served them with three months notice of termination of services. I am not prepared to hold that all this documentary evidence has been the result of a conspiracy between the appellant on the one hand and the Ministry of Commerce, the Police and the Firm of Chartered Accountants who functioned as the Auditors of the appellant in order to prepare a defence to meet a possible charge of contravening section 31F of the Industrial Disputes Act. In my judgment, the presence of this combination of factors which I have recounted, as indicated by the documentary evidence in the case, would have created a situation in which it was highly probable, if not compelling, for the appellant to form an intention to effect a phased closure of at least certain departments of the business.

While the documentary evidence is more eloquent than the oral evidence the latter too points more in the direction of an intention to effect a phased closure than to retrench. The evidence of some of the discontinued employees showed that certain articles which formed the stock in trade of the section in which they worked ceased to be imported, and that all the employees in those sections were discontinued in December 1962. There are however certain other items of evidence which show that some employees were continued in the sections in which others were served with notice and that temporary hands were employed in certain sections where others were discontinued. But this evidence is contradictory in parts. While Jilson Fernando's testified that all the people in the refrigerator section had been completely dismissed at the end of December 1962, Tennakoon's evidence was that about two persons were working in the refrigerator section. There were other similar contradictions in the evidence of the different witnesses. The evidence that some workers were continued in employment or that temporary hands were recruited in the sections in which the three employees Jilson Fernando, Percy Peiris and W. E. Fernando were discontinued is certainly a factor which, taken by itself, would support a view in favour of retrenchment rather than closure. But in a business activity conducted on a large scale even the closure of a section may not enable the management to discontinue all the hands at once simultaneously with the decision to effect a closure as the service requirements of a large clientele would necessitate the continuance of a skeleton staff even though the particular department may in fact be closed. Even if the evidence regarding the employment of a skeleton staff in certain sections is accepted, despite the contradictions which I have referred to, that is not conclusive for the purpose of proving that the business in those sections was carried on after the discontinuance of the three employees in question. In the absence of such proof, the prosecution in this case cannot succeed. For, the carrying on of the industry is an essential prerequisite of retrenchment and, in the absence of retrenchment, there is no obligation on an employer to give notice under section 31 F. One has also to bear in mind in this connection that a considerable time

has elapsed between the termination of services of the employees and the trial of this case. The continuance in service of some workers at the time the witnesses gave evidence may well have been due to changed conditions of the import business at the time of the trial even though the honest intention of the appellant in September 1962 may have been to effect a phased closure.

In any criminal prosecution, whether the offence charged is one under the Penal Code or under a statute, it is necessary to establish the case against the accused beyond reasonable doubt. The items of documentary evidence which I have enumerated above, which the learned Magistrate has not considered in their proper perspective, far from establishing the case against the accused beyond reasonable doubt, preponderate towards the position taken up by the accused that what was intended was a phased closure of business in certain sections of the industry and not retrenchment. So far as the oral evidence is concerned, a few items support the documentary evidence and thus strengthen the case for the defence. The other items which, on the surface, favour the allegation of retrenchment, do not, on closer examination, proceed beyond a case of circumstantial evidence which, while it is consistent with the prosecution case, is not inconsistent with the position taken up by the defence. For these reasons the contention of counsel for the appellant is entitled to succeed. In view of this decision that I have reached, it is unnecessary for me to consider the further submission made by counsel for the appellant to the effect that the charges in the plaint are bad for duplicity. Nor does the question of the validity of the legislative provision in section 31F which, in his submission, conflicts with the consecutive provision in section 31G, arise for decision as, in my view, the proved facts support the appellant even assuming that the provision is valid. In both these matters, however, I may say that I was inclined to accept the argument of Mr. Pullenayegum that there was no duplicity nor a real conflict between the two provisions one of which dealt with the notice of the intention of the employer to retrench while the other dealt with the discontinuance of a worker in giving effect to such intention.

While I am on the point of the validity of this provision, there is one observation which I wish to make, without in any way encroaching on the province of the legislature. This case illustrates the undesirability of legislative provisions which impose too severe burdens on the employer. The evidence shows that the appellant endeavoured in the first instance to meet an inescapable financial situation by a phased closure of the industry without causing distress from unemployment to the members of the staff. When the appellant was baulked by the Labour Department purporting to act—bona fide, of course—in terms of this provision and was threatened with prosecution, the answer of the appellant, which was more drastic but within the law, was to issue three months notice to all the employees with a view to closing down the business, though this course has been temporarily staved off by a reference of the matter to an Industrial Court. If there was some provision in this enactment

for an area of flexibility of action for an employer during times of grave financial stress, the appellant Company may not have taken the extreme step of deciding on the total closure of the business despite the stark prospect of throwing over a hundred workers out of employment. Should the decision to close down be implemented at any stage, the remedy adopted by the appellant would be infinitely worse than the mischief which this provision was intended to prevent.

I set aside the convictions and sentences and acquit the appellant of all the charges. The fine already paid into court should be refunded to the appellant.

Appeal allowed.