1950 *Present :* **Nagalingam J.**

CUMARASAMY, Appellant, *and* R. A. DE MEL, *et al.*, Respondents

S. C. 979—M. C. Colombo, 6,503 A

Companies Ordinance, No. 51 of 1938—Section 111, sub-sections 1 and 9—Statutory meeting—Duty of Directors to hold such meeting—" Knowingly and wilfully "—Burden of proof.

Where a Company has failed to hold, within the prescribed period, the statutory meeting required by section 111 (1) of the Companies Ordinance, the Directors of the Company are *prima facie* guilty of the default or can be said to have knowingly and wilfully permitted the default, within the meaning of section 111 (9).

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

T. S. Fernando, Crown Counsel, with *A. Mahendrarajah*, Crown Counsel, for the complainant appellant.

No appearance for the accused respondents.

Cur. adv. vult.

November 29, 1950. NAGALINGAM J.—

This is an appeal by the complainant with leave of the Attorney-General obtained from a verdict of acquittal entered against the respondents by the learned Magistrate of Colombo in regard to a charge preferred against them under section 111 (9) of the Companies Ordinance, No. 51 of 1938. This is not the type of case that comes up before a Magistrate's Court and it is therefore not surprising that the order of the learned Magistrate is challenged on the ground that errors both of fact and law have been committed by the learned Magistrate.

The charge against the respondents is correctly framed in terms of section 111 of the Companies Ordinance. I propose to draw attention to the terms of the charge as it is not quite clear whether the Magistrate has correctly appreciated the essentials of the offence with which the accused were charged. Section 111 (1) requires that a Company should within a period of not less than one month nor more than three months from the date on which the Company is entitled to commence business hold the statutory meeting. Sub-section 9 proceeds to enact that in the event of any default in complying with the provisions of this section every director of the Company who is guilty of the default, to focus attention on one limb at the moment, shall be guilty of an offence.

The view taken by the Magistrate that where the Company is in default it is the Company that should be prosecuted may be a sound piece of logical reasoning but it is not supported by the provisions of the section which looks at the problem from a larger and a practical standpoint—the sub-section, it will be noted, does not enact that the Company should be made liable. Between the date of the incorporation of a Company and the date of the holding of the statutory meeting, the shareholders are not brought together nor are they apprised in regard to the various matters affecting the Company such as what part of the capital has been subscribed, whether the shares taken have been fully or partly paid or the nature of the consideration for the shares allotted, and in fact the shareholders are in entire ignorance of what has been done in respect of these matters. To punish the Company as such at this stage would be to punish even shareholders for whose protection the requirement that the statutory meeting should be held has been enacted and who themselves are powerless to have the meeting held, for prior to the statutory meeting being held the directors must forward a report to every member (sub-section 2) and also a copy of it to the Registrar (sub-section 5). Unless, therefore, the directors forward this report themselves first, no statutory meeting can be held and the shareholders would be punished for a default which they can in no way prevent.

Under Article 64 of Table A in the First Schedule to the Companies Ordinance (the Company has adopted the article substantially) provision is made for the appointment of the first directors and the appointment. it is of importance to note, is made not by the shareholders who have taken up shares in the Company but by the subscribers to the Memorandum of Association. The reason for the subscribers to the Memorandum deciding upon the first directors is that the shareholders have no opportunity before the statutory meeting is held of electing directors.

There can therefore be no reason to punish the shareholders before the holding of the statutory meeting, and it is in consideration of these factors that the Legislature in its wisdom prescribes that where there is default on the part of the Company the Company is not to be subjected to a penalty but the persons who bring obout the default.

If the Company is not liable, then one has to determine who the person or persons are who are made liable for the default. Sub-section 9 imposes a penalty on every Director of the Company who is guilty of the default or who knowingly and wilfully permits a default. The question, then, is whether it can be said that where the Company has failed to hold the statutory meeting within the period prescribed the Directors of the Company are guilty of the default or can be said knowingly and wilfully to have permitted the default.

This leads to a consideration as to what are the functions of the directors in relation to a Company. In the case of *Edmunds v. Foster* [1] Lord Coleridge C. J. had to consider an analogous provision of the English Companies Act of 1862 which required that a Company should, once at least in every year, forward a list of the shareholders of the Company, the share capital and other particulars, and in default it provided *inter alia* that every director who shall knowingly or wilfully permit such default shall be subject to a penalty. The learned Chief Justice made this observation:

> " I assume that there was evidence that the appellant continued to be a Director. Now, in my judgment there is *prima facie* evidence that he knowingly and wilfully permitted the default upon the part of the Company, for a Director is one ' who directs ' the proceedings of the Company. No step can be taken and no omission can occur in its management without his having the power to raise an objection. He is therefore *prima facie responsible for any default on the part of the Company*, and the burden of proof is upon him to show that the failure to do what was required of the Company happened without any blame attaching to him."

Lord Coleridge's dictum that a director is one " who directs " the proceedings of the Company has received statutory recognition by the Legislature enacting in Article 67 of Table A that the business of the Company shall be managed by the directors and that they may exercise all such powers of the Company as are not required by the Ordinance or the Articles to be exercised by the Company in general meeting. This particular Article of Tale A has been adopted by the Company in question.

The law, therefore, casts the duty upon the Directors to manage the business of the Company and one of the first items of business that a Company has to transact and perform is to hold the statutory meeting. The statutory meeting, as evident from the terms of the section itself, can only be held by and at the instance of the directors. If there is a default on the part of the Company in not holding the statutory meeting, it would be a default brought about by the Directors themselves, and *prima facie* the directors would be guilty of the default. I say *prima facie* because, if, for instance, a director could show he was out of the

[1] *(1875) 45 L.J. M.C. 41.*

Island he would then have rebutted the inference that he was guilty of the default. One therefore can appreciate the Legislature enacting that where there is a default on the part of the Company it is not the Company but the directors who are liable to punishment.

Furthermore, as was said by Lord Coleridge, there cannot be a default on the part of the Company without that default being permitted knowingly and wilfully by the directors for, as observed, no step can be taken and *no omission* can occur in its management without the directors having the power to raise an objection. In this case, applying the same principle, it would follow that the Company's failure to hold the statutory meeting could not have arisen unless it was permitted by the directors, and they being the persons who had the management and conduct of the business of the Company, *prima facie* the permitting of such failure must necessarily have been " knowingly and wilfully ".

The order of the learned Magistrate, therefore, that the charge should have been laid against the Pembroke Academy Limited and not the directors of the Company cannot be supported.

I now pass on to consider certain other matters. The charge specifies three alternatives as constituting the offence. It declares that the directors are liable to punishment in that (*a*) they are guilty of the default consisting in the failure of the Company to hold the statutory meeting, or (*b*) they knowingly and wilfully authorized the default, or (*c*) they knowingly and wilfully permitted the default. In regard to (*b*) and (*c*) above, which involve knowledge and deliberation, the learned Magistrate observes that the prosecution should prove that the accused had " knowledge of the requirements under the Ordinance ". This is a wholly untenable proposition. Apart from the ordinary maxim that every man is presumed to know the law, it would be expected of a person who acts as a director of a Company that he has taken the trouble at least to acquaint himself with the law or at any rate to take advice as regards his duties and functions as a director. Knowledge of the provisions of the law is not a matter for proof by the prosecution, and ignorance of the law would be no excuse on the part of an accused person for the default.

The learned Magistrate also observes that there is no evidence which conclusively establishes that no statutory meeting has been held by the Company. In a prosecution such as this, the prosecutor cannot be expected to and need not do more than place before the Court a *prima facie* case against the accused. The question whether a statuory meeting was held or not is a matter which is especially within the knowledge of the directors themselves. The prosecutor has shown that no statutory report was delivered to the Registrar of Companies as required by section 111 (5), which is a necessary prerequisite to the holding of a statutory meeting. It must follow that if no such report has been delivered, then a statutory meeting could never have been held. Besides, there is the evidence of Mr. Tudor Perera, the Company's auditor, who swore he signed no statutory report. He also stated that he was one of the parties who should sign such a report along with two directors. The Magistrate expressed the view that the statement of Mr. Perera was incorrect.

Unless a statutory report contains a certificate of an auditor in regard to the statements therein contained relating to the shares allotted by the Company, to the cash received in respect of such shares and to receipts of the payments of capital (sub-section 4) it would not be a statutory report as required by law. It would therefore be correct to say that unless the auditor himself places his signature certifying to the correctness of these matters in the report, the statutory report cannot come into being. In this sense it is correct that the auditor himself should sign the statutory report. The evidence, therefore, of the auditor that, he not having signed any such report, no report could in fact have come into existence and therefore no statutory meeting could have been held, is perfectly correct. This testimony, there can be little doubt, is *prima facie* evidence that no statutory meeting had in fact been held. Besides, there is evidence that what purported to be a statutory report (P 14) signed by two of the directors and the auditor was delivered to the Registrar long after the period within which the statutory meeting should have been held and that it bears the date 7th November, 1949. This, again, is another piece of evidence which *prima facie* is proof that no statutory meeting had been held within the period prescribed by law.

I now come to another point referred to by the learned Magistrate in regard to the question whether the certificate to commence business, P 7, had reached the respondents or the Company so as to render it obligatory on them to hold the statutory meeting. The evidence of the prosecutor is that the certificate to commence business was applied for by Ranjit Wijemanne, Managing Director, and it was issued to him, but added that it was taken delivery of by one Pieris. It does not follow that where a messenger or a clerk is sent to obtain the certificate and it is proved that the messenger or clerk was duly delivered the document any further proof is necessary that it reached the Company, because delivery to an agent is delivery to the principal, so that it is difficult to understand the reasoning underlying the view that there must be further proof that the document reached the Company. When it is shown that the document was received by an agent of the Company, the fact of the delivery of the document to the Company is thereby established and proved.

Directly the certificate was issued, then by virtue of sub-section (3) of section 93, the Company became entitled to commence business and it is immaterial to inquire whether it did or did not commence business, for the date fixed by section 111 (1) for the holding of the statutory meeting is not with reference to the date of actual commencement of business but in relation to the date when the Company *became* entitled to commence business. It follows that where, after the issue of the certificate to the Company, and within the period allowed by law, no statutory meeting is *prima facie* shown to have been held, the Company would be in default and the directors who have the control and management of the Company would themselves *prima facie* be guilty either of the default or of having knowingly and wilfully permitted the default.

From the foregoing observations, it would be manifest that a *prima facie* case has been made out against the accused persons, and the learned Magistrate should have called upon the respondents for their defence.

I therefore set aside the order of the learned Magistrate and remit the case for further proceedings to be taken according to law.

Order of acquittal set aside.