Present : Grenier J.

Aug. 25, 1911

SHAIKALI *v.* LEISAHAMY.

500—*P. C. Colombo*, 29,001.

Trespass on the railway line—Offence under s. 32 of Ordinance No. 9 of 1902—" Trespass " defined—Mens rea.

A person who goes on the railway line without the permission of the railway authorities would be guilty of an offence under section 32 of Ordinance No. 9 of 1902.

The term " trespass " in section 32 has not the same meaning as criminal trespass.

" Where the law says a certain act must not be done, and you consciously do it, the law presumes intention or knowledge on your part, and you have committed an offence."

THE facts are set out in the judgment of Grenier J.

Van Langenberg, for the accused, appellant.—There must be something in the nature of *mens rea* before the accused could be convicted. Trespass under the Railway Ordinance is not the same thing as criminal trespass under the Penal Code ; yet there must be proof of *mens rea* before a person can be convicted under section 32. Counsel cited *Queen v. Tolston*[1] ; *Stroud's Judicial Dictionary*, " Trespass ".

The public has a right of access to the seashore. 2 *Walter Pereira's Laws of Ceylon, pp.* 179 *and* 180 ; *the Attorney-General v. Pitche.*[2] The crown could not shut out any one from the seashore.

The ayah went to rescue the child.

Walter Pereira, for the respondent.—Necessity is no longer a defence to a criminal charge, though it is an element to be taken into consideration on the question of sentence. *Dudley v. Stephen.*

The *mens rea* necessary for the commission of this offence is only the intention to go on the line ; that element is present in this case. No further intention is necessary. The railway line is Government property ; and trespass on it is an offence. Whether the Government can keep people out of the seashore is a question that has to be fought out in another arena.

[At the close of the argument counsel for the appellant obtained permission to submit an authority (*Langendorff v. Pennsylvania Railway Co.*[3]) referred to by Mr. Advocate Canekeratne.]

Cur. adv. vult.

[1] *23 Q. B. D. 618.* [2] *(1892) 1 S. C. R. 11.* [3] *48 Ohio 316.*

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In this case the appellant was convicted of an offence punishable under section 32 of Ordinance No. 9 of 1902. That section runs as follows :—

> Any person who shall trespass upon the railway, or upon any of the lands, stations, or other premises appertaining to the railway, shall be guilty of an offence, and liable to a fine not exceeding twenty rupees ; and if any such person shall refuse to leave the railway, or any land, station, or other premises appertaining thereto, on being requested to do so by any railway official or by any other person on behalf of a railway official, he shall be guilty of an offence, and be liable to a fine not exceeding fifty rupees, and may be immediately removed therefrom by such railway official or other person as aforesaid.

The word " trespass " has not been defined in the Ordinance, and I take it that it must be understood in the ordinary sense in which it is used. It clearly has not the same meaning as the words " criminal trespass " in the Penal Code. The word " trespass " when used in connection with land under the English law means an entry or intrusion upon another's ground without lawful authority, and doing some damage, however inconsiderable, to his realty. I do not think it was in this sense that the word " trespass " was used in the Ordinance in the absence of any definition in it. In *Tomlin's Law Dictionary, vol. II.*, I find the word " trespass " defined as follows :—

> Trespass in a limited and confined sense as relates to land signifies no more than an entry on another man's ground without a lawful authority and doing some damage to his real property. For the right of *meum* and *tuum* or property in lands being once established, it follows as a necessary consequence that this right must be exclusive ; that is, that the owner may retain to himself the sole use and occupation of his soils. Every entry therefore thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression. ..... For every man's land is in the eye of the law enclosed and set apart from his neighbours, and that either by visible or material fence as one field is divided from another by a hedge ; or by an ideal invisible boundary existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other ; for if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, namely, the treading down and bruising his herbage.

It will be seen that this definition of trespass more particularly applies to actions at common law in England, and I am inclined to think, looking to the whole scope of Ordinance No. 9 of 1902 and the object sought to be attained by section 32 in particular, that the intention of the Legislature was to prevent persons from entering upon or intruding upon any of the lands, stations, or other premises belonging to the railway without lawful authority, irrespective

of any damage, however inconsiderable, being caused. The provisions of section 32, therefore, as I read it, would apply to the case of any person who goes on the railway line without the permission of the railway authorities. It is a well-known fact that persons are to be seen almost daily trespassing on the railway line who are liable to prosecution under section 32, and the mere fact of the railway authorities not taking action against them must not be construed to mean that the right to prosecute them is not available. All the railways in this Island are the property of the Ceylon Government, and if our Statute law says that no person shall trespass upon the railway, and makes such trespass a punishable offence, it goes without saying that the law must be obeyed. And I do not see that the provisions of section 32, especially where it relates to trespass on the railway line itself, will work any hardship, when it is considered that by reason of passing trains the lives of careless trespassers are frequently placed in the most imminent danger. In my opinion section 32 was enacted as much in the interests of the public as of the railway authorities, and the provisions of it must be strictly complied with.

Now, let us see what the facts of this particular case are. According to the evidence of Mr. G. F. Beven, who was driving the 5.20 P.M. train from Maradana to Mount Lavinia, as he was approaching Wellawatta bridge he saw two small children on the line. One of the children evidently heard his whistle and ran away, leaving the other on the line. The child seemed unable to make up his mind to run, though Mr. Beven whistled again ; and Mr. Beven thereupon shut off steam, using his brake gently. At this juncture the appellant came from the left side of the line and took away the child. It is clear that were it not for Mr. Beven's prompt action a fatal accident might have taken place. In her defence the appellant stated that she took the children to the seashore, presumably after crossing the line, and that they strayed to the line under the Wellawatta bridge. The elder child on seeing the train coming ran to her, but the smaller child, who was on the far side of the line, made no movement, and the appellant crossed the line in front of the approaching train and picked the child up. On these facts it seems to me plain that, although the appellant acted with considerable courage in rushing forward at the risk of her own life to save the child's life, she has nevertheless, in law, committed the offence charged against her, but in circumstances which hardly called for any punishment or, indeed, for any serious prosecution. Her act was a transgression of the mere letter of the law, but all the same it was an offence, however, technical, under section 32. I must confess that I do not quite understand the defence that was raised for her in the Court below, and in appeal, that there was an absence of *mens rea* in her case. Where the law says a certain act must not be done, and you consciously do it, the law presumes intention or

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knowledge on your part, and you have committed an offence. I fail to see, therefore, how the question of *mens rea* arises. Another ground of defence was that the appellant committed no trespass, because she had a right to have access to the seashore. Upon this point the Magistrate thought that it was not open to him in these proceedings to concern himself about the policy of the railway authorities in shutting off access to the seashore. I do not see myself how the alleged common law rights of the appellant can be discussed or settled in this case, or used as a weapon of defence, nor can I see in what way the appellant was justified in committing an offence under section 32 in order to assert those rights. Those rights must form the subject of inquiry and adjudication in properly constituted civil proceedings ; but so long as our Statute law says that it is an offence to trespass on the railway line, the law must be obeyed, as I have said before. In this view the American case *Lagendorff v. Pennyslvania Railway Co.*,[1] cited by the appellant's counsel, does not apply. I would affirm the conviction, but in view of the exceptional circumstances, in this case, which are very creditable to the appellant, I would reduce the fine to a nominal one of one cent.

Conviction affirmed ; fine reduced.

[1] 48 Ohio. 316.