1948 *Present :* **Basnayake J.**

MUTHUSAMY, Appellant, *and* DAVID (S. I. Police), Respondent

S. C. 200—M. C. Matale, 9,944

*Money Lending Ordinance—Taking promissory notes in blank—Notes taken by Kanakapulle—Liability of employer—*Mens rea*—Chapter 67, section 13—Reasons for conviction not read out in Court—Irregularity—Conviction not vitiated—Criminal Procedure Code, Sections 304, 306 and 425.*

Under section 13 of the Money Lending Ordinance where a promissory note is taken in blank, the true lender is guilty of an offence although it may be the hand of his servant that actually takes the offending document and pays out the money. It is not necessary in such a case to show that he knew that the note was in blank.

The failure to comply in every particular with section 306 of the Criminal Procedure Code does not by itself vitiate a conviction.

[1] *(1924) 2 Times of Ceylon Law Reports, 192.*

APPEAL from a judgment of the Magistrate, Matale.

F. A. Hayley, K.C., with *W. D. Gunasekera*, for accused appellant.

R. A. Kannangara, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 15, 1948. BASNAYAKE J.—

The accused-appellant (hereinafter referred to as the appellant), one Muthusamy Pulle, a money-lender, was convicted of the following charges under the Money Lending Ordinance (hereinafter referred to as the Ordinance) and ordered to pay a fine of Rs. 250 in respect of each charge :—

"(1) That you did, within the jurisdiction of this Court, at Matale on 15th October, 1946, being a money-lender, take as security for a loan, a promissory note for Rs. 50 from one Jaleel in which the amount due is left blank and that you have thereby committed an offence punishable under section 13 of Chapter 67, Vol. II of L.E.C.

"(2) That you did on 9.7.47, at Matale, within the jurisdiction of this Court, take as security for a loan a promissory note for Rs. 30 from one Nagoor Pitche in which the amount due is left blank and that you have thereby committed an offence punishable under section 13 of Chapter 67 of Vol. II of L.E.C.

"(3) That you did on 17. 7. 47 at Matale, within the jurisdiction of this Court, take as security for a loan a promissory note for Rs. 25 from one Mohamed Hussain in which the amount is left blank and that you have thereby committed an offence punishable under section 13 of Chapter 67 of Vol. II of the L.E.C."

It appears that the appellant carries on his money-lending business at premises No. 51, Esplanade Road, Matale. On a search of his place of business Sub-Inspector David found 56 promissory notes in a box of which 15 were blank. The present charges relate to three of those blank promissory notes. Of the three borrowers, Jaleel, the person referred to in the first charge, does not appear to have been traced. Nagoor Pitche and Mohamed Hussain, the other two, have given evidence. The former borrowed thirty rupees on promissory note P1 which he executed in blank, while the latter borrowed twenty-five rupees on promissory note P2 which was also executed in blank. P1 was given to the appellant's kanakapulle at a time when the appellant was absent, but the money borrowed thereon was later paid by the appellant himself. P2 was given when the appellant was present, the money being paid immediately. Each borrower received a pass book which contained entries relating to the loans. The appellant produced his ledgers D3 and D4 which show the accounts of Nagoor Pitche, Mohamed Hussain and Jaleel in respect of the loans alleged in the charges.

The appellant admits that the promissory notes P1, P2 and P3 were taken as security for loans, but denies that he took them or that he was present when they were taken. He says that he has a kanakapulle to attend to his business and that the blank notes were taken by the kanakapulle. He also denies that he knew that blank notes were taken. He puts it down to the laziness or carelessness of his kanakapulle, who, he says, has acted contrary to his instructions in lending money on promissory notes not containing the particulars of the loan. It appears that although the appellant's kanakapulle had full authority to conduct the appellant's business, he was not competent to insert in English the necessary particulars in the promissory notes he took. This appears to have been done by a part-time visiting clerk after the notes were taken.

The learned Magistrate is satisfied that the blank notes were taken with the appellant's knowledge. He also holds that no *mens rea* is necessary to establish an offence under section 13 of the Money Lending Ordinance and that, even if the notes were taken by the kanakapulle without the appellant's knowledge, his acts bind the appellant as the kanakapulle was acting within the scope of his employment. He relies on the maxim " *Qui facit per alium facit per se* ".

It is contended that in any event the appellant is not liable in respect of Jaleel's promissory note as he has not given evidence. In respect of the others it is submitted, on the authority of the cases of *Chisholm v. Doulton*[1] and *Williamson v. Norris*[2] that the appellant cannot be convicted without proof of *mens rea*. It is sufficient to refer to the case of *Chisholm v. Doulton* (*supra*) wherein Cave J. states the English-law doctrine of *mens rea* thus :—

> " It is a rule of the criminal law that one of the elements in every offence at common law is some condition of mind to which blame attaches. Sometimes it is negligence, sometimes malice, sometimes knowledge, but there is always some such condition of mind to which is applied the name of *mens rea*. Moreover, it has always been a principle of the common law that the condition of mind of a servant cannot in criminal matters be attributed to the master, and that the master cannot be held criminally responsible for the act of his servant. This universal rule of the common law applies also, as a general rule, to statutory offences. The Legislature may, indeed, and has in some cases enacted that a man may be convicted of an offence although he has not been shown to have a criminal condition of mind. But in these cases it lies upon those who assert that this has been done to make out their contention by convincing words in a statute, and this Court will not lightly assume that the Legislature intended that one person should be punished for the fault of another."

In *R. v. Tolson*[3] Stephen J. appears to have approached the question of *mens rea* from a different angle. His words are important enough to bear quotation *in extenso*. He says :—

> " Though this phrase (*non est reus, nisi mens sit rea*) is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds. It naturally suggests

[1] *(1889) 58 L.J. M.C. 133 at 135.* [2] *(1898) 68 L.J. Q.B. 31.*
[3] *(1889) 23 Q.B.D. 168 at 185.*

that, apart from all particular definitions of crimes, such a thing exists as a *mens rea*, or 'guilty mind,' which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. *Mens rea* means in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to describe a mere absence of mind as a *mens rea*, or guilty mind. The expression again is likely to and often does mislead. To an unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives, ... Like most legal Latin maxims, the maxim on *mens rea* appears to me to be too short and antithetical to be of such practical value. It is, indeed, more like the title of a treatise than a practical rule. I have tried to ascertain its origin, but have not succeeded in doing so. . . . . The earliest case of its use which I have found is in the 'Leges Henrici Primi,' v. 28, in which it is said: "*Si quis per coaccionem abjurare cogatur quod per multos annos quiete tenuerit, non in jurante sed in cogente perjuriam erit. Reum non facit nisi mens rea*" . . . . The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition."

Stephen J.'s view seems to be against the importation into a statute creating an offence any ingredient which is not expressed or implied in the statute itself. Even though it may be permissible in England to import the common-law doctrine of *mens rea* into statutory offences, in Ceylon such a course cannot be adopted, for the principles of English criminal law can apply only in cases in which they have been imported into our legislation expressly or by necessary implication. Our criminal law and procedure are governed by the Penal Code and the Criminal Procedure Code. So much of the English and Roman-Dutch criminal law as existed at the time of the enactment of the Penal Code is expressly abolished by section 3 which enacts: "So much of the Criminal Law heretofore administered in this Island as is known as 'the Criminal Law of the United Provinces', or as 'the Roman-Dutch Law' is hereby abolished." This view finds support in the case of *Kachcheri Mudaliyar v. Mohomadu*[1], a decision of three judges, which holds that the Penal Code has abolished not only the Roman-Dutch criminal law, but also the English criminal law, which, to a certain extent, had been imported into the jurisprudence of this country.

[1] *(1920) 21 N. L. R. 369.*

In regard to the doctrine of *mens rea*, it is settled law both here and in India[1] that the doctrine as understood in English criminal law as such has no place in the criminal law of either country. In dealing with the argument of the Solicitor-General for the Crown that the doctrine is not in force in Ceylon, Bertram C.J. observes in the case of *Weerakoon v. Ranhamy* [2] (4 judges) :—

> " I think he is correct in stating that for the doctrine of *mens rea* as it exists in our law, we must look exclusively to sections 69 and 72 of our own Penal Code."

In the instant case, neither section 69, nor section 72, nor any other provision of the Penal Code, excuses the act of the appellant. The only question that remains for decision is whether, upon a true interpretation of the Money Lending Ordinance, the appellant is excused if as he says the promissory notes P1, P2, and P3 were taken by his kanakapulle contrary to his instructions. To answer this question it is necessary first to examine section 13 of the Money Lending Ordinance which the appellant is alleged to have contravened. That section reads :

> " Any person who shall take as security for any loan a promissory note or other obligation in which the amount stated as due is to the knowledge of the lender fictitious, or in which the amount due is left blank, shall be guilty of an offence, and shall be liable on conviction to a fine not exceeding five hundred rupees, or in the event of a second or subsequent offence, either to a fine not exceeding one thousand rupees, or to simple imprisonment for a period not exceeding six months."

Now under this section a person who takes as security for any loan a promissory note in which the amount due is left blank is guilty of an offence. The words *take as security for any loan* are significant, in that those words in my view fix the liability on the true lender though it may be the hand of his servant that actually takes the offending document and pays out the money of his master. It is clear that the legislature intended to make the prohibition against taking promissory notes in blank absolute. It is significant that although in the case of fictitious promissory notes it must be proved that the lender knew that the amount stated as due was fictitious there is no such requirement in regard to promissory notes in which the amount due is left blank.

It is not denied that, in contravention of the statute, promissory notes, in which the amount due on each was left blank, were taken as security for the loans given to Nagoor Pitche and Mohamed Hussain. But the appellant claims that it was his servant and not he that contravened the statute, and that he cannot be held liable for the acts of his servant. That claim is, in my opinion, not entitled to succeed in the instant case at any rate, for it is not denied that the kanakapulle paid out the appellant's money and took the notes as security for the loans made not by the kanakapulle for himself but by him for his master, the appellant. The question also arises as to whether, having regard to the nature and object of the statute, the appellant can in law escape liability

[1] *Mayne's Criminal Law of India, 4th Edn., p. 9.*
[2] *(1921) 23 N. L. R. 33 at 42.*

by imputing the blame for the contravention of the statute to his servant the kanakapulle. The case law of England provides numerous instances in which, on a true interpretation of a statute, the master has been held liable for the breach of it committed by his servant entrusted with the carrying on of his master's business.

In the case of *Roberts v. Woodward* [1] the master was held liable for the act of his servant in supplying drink to a constable on duty. In the words of Baron Pollock, the liability arises " not by virtue of an express statutory enactment that he should be liable, but because to permit him under such circumstances to avail himself of a plea that he was ignorant of his servant's acts would be contrary to the whole spirit of legislation on the subject."

In the case of *Farley v. Higginbotham* [2], an employer was held liable for the act of his servant upon the well-known principle that where the gist of the offence is not in reality criminal then the master may be held liable. Wright J. observes in that case : " It seems to me that these Food Adulteration Acts could not be worked if persons who keep shops were not to be held liable for acts done by their servants in carrying on the ordinary course of the business."

In the case of *Mullins v. Collins* [3], a licensed victualler was held liable for the act of his servant who sold liquor in the ordinary way to a constable who was in uniform and on duty, without inquiring whether he had the authority of his superior officer. Quain J. approaches the question thus :—

> " We must look at the nature of the act done. How does a licensed victualler carry on his business ? He frequently supplies the liquor, not personally, but through his servants. Then does the supply of liquor without the knowledge of the licensed person, by his servant, to a constable on duty amount to an offence under section 16 ?. Here the servant sold the liquor in the ordinary way to the constable, who was in uniform and on duty, and she did not inquire whether he had the authority of his superior officer. If we held that, on these facts, the licensed victualler was not liable for the act of his servant, we should render the enactment wholly inoperative."

In the case of *Dyer v. Munday* [4] Rigby L.J. holds, following the case of *Bayley v. Manchester, Sheffield & Lincolnshire Ry. Co.* [5] that a person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done ; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done ; provided that what was done was done, not from any caprice of the servant, but in the course of the employment ; and adds : " I can find no authority for distinguishing in the application of this rule between tortious and criminal acts of the servant."

This principle was affirmed in the case of *Commissioners of Police v. Cartman* [6] wherein it was held that the fact that the master *bona fide* gave

[1] *(1890) 25 Q. B. D. 412 at 415.*
[2] *42 Sol. Jo. 309.*
[3] *(1873–74) 9 L. R. Q. B. 292.*
[4] *(1895) 1 Q. B. 742.*
[5] *(1871–72) 7 L. R. C. P. 415 at 420.*
[6] *(1896) 1 Q. B. D. 655.*

instructions to his servant, a barman, that no drunken persons should be served, and that he intended those instructions to be acted upon, affords no answer to a charge against the master. Lord Russell of Killowen C.J. observes : " In considering this question, we must see what is the object of the Act, and how far that object would be effected or defeated if the construction contended for by the respondent were given to this section."

It appears from the case of *Allen v. Whitehead*[1] that even in a case where knowledge is an ingredient of an offence, knowledge in the servant may in certain circumstances be imputed to the master. In determining whether in any particular statute the principal is made liable if the act is in fact done by his servants, regard must be had, as stated by Atkin J. in *Mousell Bros. Ltd. v. London & North-Western Ry. Co.*[2] " to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed."

I have cited English precedents to the point of almost overburdening this judgment in order to show that even in England the principles stated by Cave J. in *Chisholm v. Doulton* (*supra*) are not regarded as applying to all statutory offences. In this connexion I should not fail to refer to the maxim *qui facit per alium facit per se*, which the learned Acting Magistrate has cited. I agree with him that it is applicable in criminal as well as in civil cases.[3]

I shall now briefly refer to the main provisions of the Money Lending Ordinance. It is an Ordinance to provide for the better regulation of money-lending transactions. It prescribes the duties to be observed by a person carrying on a money-lending business. He must keep accounts (section 8) ; he must give copies of accounts, documents relating to the loan, and receipts, on being requested to do so by the borrower (section 9), and also permit him to compare such copies with the original. Section 10 requires that every promissory note given as security for the loan of money shall have the prescribed particulars separately and distinctly set forth thereon.

The provisions I have referred to, along with the section which is under consideration in the instant case, are all designed for the protection of the borrower. They can all be rendered useless if a money-lender is able to escape liability by employing a servant to carry out his duties. Money-lending is a business that can be carried on through an agent. Where business is transacted through a servant the real lender is not the servant but the master. It is not claimed, as I have said before, that in the instant case the loan was made by the kanakapulle or that he took the note as security on his own behalf. The loans are accounted for in the appellant's books, which he admits he examines. If the appellant's contention were to prevail, neither he nor his kanakapulle would be liable, for clearly the lender is not the kanakapulle but the appellant. The appellant's contention would render the obligation imposed by section 10 ineffective and make section 13 of the Ordinance wholly inoperative, and defeat one of the main objects of the Money Lending Ordinance.

[1] *(1929) 45 T. L. R. 655 at 656.* [2] *(1917) 2 K. B. 836 at 845.*
[3] *Stroud's Mens Rea, p. 136.*

On a true construction of section 13 of the Ordinance in the light of the principles laid down in the cases I have cited above, I am unable to escape the conclusion that the appellant is liable to be punished for the acts alleged in the charges against him.

Learned Crown Counsel has drawn my attention to the fact that in this case the learned Magistrate's reasons were not read out in open Court. It appears from the letter of the Acting Magistrate who tried the appellant that although the conviction and sentence in this case were recorded and signed in open Court, the reasons were not. They were handed by him to the permanent Magistrate on the day after the verdict. Section 306 (1) of the Criminal Procedure Code requires that " the judgment shall be written by the Magistrate who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in cases where appeal lies shall contain the point or points for determination, the decision thereon, and the reasons for the decision."

Learned Crown Counsel referred me to the case of *Henricus v. Wijesooriya*[1] where de Silva J. held that the failure to read out the reasons for the Magistrate's finding is an irregularity which is not curable under section 425 of the Criminal Procedure Code. The learned judge appears to have departed from some of the earlier decisions of this Court which hold that the failure to read the reasons in open court is curable under section 425.

The provisions of the Criminal Procedure Code which have an immediate bearing on the question are sections 304 and 306. They read—

" 304. The judgment in every trial under this Code shall be pronounced in open court either immediately after the verdict is recorded or at some subsequent time of which due notice shall be given to the parties or their pleaders, and the accused shall if in custody be brought up or if not in custody shall be required to attend to hear judgment delivered except when his personal attendance during the trial has been dispensed with and the sentence is one of fine only."

" 306. The following provisions shall apply to the judgments of courts other than the Supreme Court :—

(1) The judgment shall be written by the District Judge or Magistrate who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in cases where appeal lies shall contain the point or points for determination, the decision thereon, and the reasons for the decision.

(2) It shall specify the offences if any of which and the section of the law under which the accused is convicted and the punishment to which he is sentenced.

(3) If it be a judgment of acquittal it shall state the offence of which the accused is acquitted.

(4) When a judgment has been so signed it cannot be altered or reviewed by the court which gives such judgment ;

Provided that a clerical error may be rectified at any time and that any other error may be rectified at any time before the court rises for the day.

[1] *(1946) 47 N. L. R. 378.*

(5) The judgment shall be explained to the accused affected thereby and a copy thereof shall be given to him without delay if he applies for it.

(6) The original shall be filed with the record of proceedings."

Section 304 requires that the judgment shall be pronounced in open court either immediately after the verdict is recorded or at some subsequent time of which due notice shall be given to the parties or their pleaders. Now what is the sense in which the word "judgment" is used ? It is clearly not the verdict. Is it the pronouncement of the sentence ? It has been so held in a number of cases [1].

In the case of *Kershaw v. Rodrigo* [2] it was observed by Ennis J. : "From section 306 it would seem that the judgment is something other than the reasons for the decision for the reasons have to be recorded in the judgment and only in cases where there is an appeal, while section 304 indicates that the judgment is not necessarily contained in the verdict."

The judgment of a Magistrate's Court in a case where an appeal lies should according to section 306—

(*a*) contain the point or points for determination, and the decision thereon together with the reasons for the decision,

(*b*) specify the offence and the section of the law under which the accused is convicted, and the punishment to which he is sentenced, and

(*c*) be written by the Magistrate who heard the case and dated and signed by him in open Court at the time of pronouncing it.

To my mind the judgment contemplated in section 304 is, in the case of a conviction, a judgment which fulfils all these requirements.

In the case of a trial in a Magistrate's Court there is another provision which needs consideration, viz., section 190. That section reads—

"190. If the Magistrate after taking the evidence for the prosecution and defence and such further evidence (if any) as he may of his own motion cause to be produced finds the accused not guilty, he shall forthwith record a verdict of acquittal. If he finds the accused guilty he shall forthwith record a verdict of guilty and pass sentence upon him according to law and shall record such sentence."

In the instant case the learned Acting Magistrate complied with the requirements of that section, for when after hearing the prosecution and defence he found the appellant guilty he made the following record : "I find the accused guilty. I sentence him to pay a fine of Rs. 250 in default 2 months S.I. on each count, i.e., Rs. 750 in all or 6 months S.I. Reasons to-morrow. Time till 5.1.48 to pay fine on double security."

The record made by the learned Magistrate on 22.12.47 contains the verdict and the sentence and appears to have been pronounced and signed by him in open Court though not dated. The reasons were not pronounced, nor dated, nor signed in open Court, but merely filed of record.

[1] *The Queen v. Kiriya (1894) 3 S. C. R. 100.*
Forrest v. Leefe (1910) 13 N. L. R. 119.

[2] *(1916) 3 C. W. R. 44.*

The question then is whether the non-compliance with section 306 of the Code in the respects I have indicated is fatal to the conviction or is curable under section 425. That section enacts that no judgment shall be reversed or altered on appeal on account of any omission or irregularity in the judgment unless such omission or irregularity has occasioned a failure of justice. What is the judgment in the instant case ? Is it the record of the verdict and sentence, or the reasons ? I am inclined to think it is the former as it contains all the essentials of a finding at the conclusion of a criminal trial before a Magistrate as prescribed by section 190. It is defective in that it is not dated and does not specify the charge and does not contain the reasons.

I have carefully examined the petition of appeal and it is not alleged therein that the appellant was prejudiced by the irregularity, nor did the learned counsel for the appellant at the outset of his appeal take the point or submit that the appellant was prejudiced. Nor is there anything to indicate that the appellant has been prejudiced or that the irregularity has occasioned a failure of justice.

The cases of *Clara v. Pedrick* [1], *Forrest v Leefe* [2], *Chairman, Municipal Council, Kandy v. Mohmad Ali et al.* [3], and *Buultjens v. Samitchi Appu* [4] all hold that the failure to comply in every particular with section 306 does not by itself vitiate a conviction. I am in respectful agreement with those decisions.

On reference to the Indian Criminal Procedure Code I find that sections 366 and 367 of that Code correspond to section 304 and 306 of our Code. Under the Indian Code too it has been held [5] that the omission to write a judgment before pronouncing the sentence, to date and sign the judgment [6] in open Court, and to record reasons [7] for the decision, are irregularities curable under section 537 of the Indian Code.

The appeal is dismissed.

Appeal dismissed.

[1] *(1900) 1 Browne 211.*
[2] *(1910) 13 N. L. R. 119.*
[3] *(1923) 25 N. L. R. 85.*
[4] *S. C. Minutes of 23rd October, 1945/S. C. 646–647/M. C. Trincomalee, 11,304.*
[5] *Mohamed Hayat Mulla v. Emperor, (1930) A. I. R. Rangoon 77.*
[6] *Ram Sukh & others v. Emperor, A. I. R. 1925, Allahabad 299.*
[7] *Sham Lal Khettry v. Emperor, A. I. R. 1932, Calcutta 655.*
Damu Senapathi v. Sridhar Rajwar, (1893) I. L. R. 21, Calcutta 121.