1942 *Present :* **Keuneman J.**

THE ATTORNEY-GENERAL *v.* GUNARATNE *et al.*

760—M. C. Colombo, 41,625.

Defence (Miscellaneous) Regulations 20A (1)—Newspaper article—Publication of rumour—Likely to cause alarm or despondency—Mens rea.

The accused was charged with publishing, in contravention of Regulation 20A of the Defence (Miscellaneous) Regulations, an article in a newspaper in the following terms :

"The fatal blow that Raja Rata would receive."

"A rumour has spread out through the Anuradhapura District that our Ceylon Government has fixed dynamite at the sluices of . . . . . tanks which contain water sufficient for the production of adequate foodstuffs for the whole of the North-Central Province. There is a feeling among the people that, in the event of there being any danger from the enemy, the dynamite would be caused to explode and that the water would be made to flow out. Then the water in all these tanks would, like a sea flowing over the land, carry the whole of Anuradhapura with the people into the ocean. At a time when people have to face a dreadful famine like this, their being overtaken by a trouble like this would be a fatal blow to their cultivation work."

Held, that the article was likely to cause alarm and despondency within the meaning of the section.

The publication of a rumour, though it is expressly stated to be a rumour, is penalised by the section.

Held, further, that *mens rea* was not an essential ingredient of the offence.

APPEAL by the Attorney-General from an acquittal by the Magistrate of Colombo.

J. Mervyn Fonseka, K.C., Solicitor-General (with him *R. R. Crossette-Thambiah*, C.C.), for appellant.—The material words of the Regulation under which the accused are charged are "publish", "report", "statement", "likely", "alarm", "despondency". Each of these words should be given its ordinary dictionary meaning. To "publish" is to make known to the public, to spread abroad, to divulge; a "report" is a rumour, common popular talk, that which is reported; a "statement" is that which is stated, an expression of opinion or belief in words, an assertion, an affirmation; "likely" is what is reasonably to be expected, probable; "alarm" is the emotion caused by anticipation of danger, fear, anxiety; "despondency" is dejection of mind and spirits. Given these meanings, the document which is the subject of the charge is clearly a report relating to matters connected with the war, which is likely to cause alarm or despondency.

[KEUNEMAN J.—But the Magistrate has found otherwise.]

It is submitted that the finding of the Magistrate on this point is incorrect. It is for your Lordship to test the document complained of according to its tenor, having regard to the time of publication and to the districts in which this newspaper circulates. The learned Magistrate further holds that the Regulation should be read as though the words "knowingly" or "intentionally" were inserted before the word "publishing".

The doctrine of *mens rea* exists in Ceylon only in so far as it is embodied in section 69 and 72 of the Penal Code—*Weerakoon v. Ranhamy*[1]. It is necessary to look at the statute, its scope and object—*A-G. v. Rodriguesz*[2]. Turning to the Defence (Miscellaneous) Regulations, see Regulations 10, 13, 17B, 19B, 20 (1) (b). See also *Betts vs. Armstead*[3], *Warrington v. Windhill*[4], *Buckingham v. Duck*[5].

As regards the 2nd accused, the Magistrate has disbelieved his defence.

[KEUNEMAN J.—Did he abet? When you write a letter to a newspaper do you not cast your bread upon the waters? It is left to the Editor to accept or reject the letter.]

I invite attention to the exhibit P 5 (*a*). It is clearly a request to commit the offence set out in this Regulation. The 2nd accused, having admitted authorship of the letter, can escape liability only *if he proves* that he comes within both clauses (*a*) and (*b*) of the proviso to the Regulation.

[KEUNEMAN J.—Was not his motive good ?]

Motive is immaterial. See *R. v. Hicklin*[6]. In that case a publication entitled, "The Confessional Unmasked", was written ostensibly with the best of motives but the author was punished as the publication was held to be obscene.

N. E. Weerasooria, K.C. (with him *H. W. Jayawardana*), for the accused, respondent.—The view taken by the Magistrate is the correct view. This article is one primarily dealing with food production and the scorched earth policy. One cannot say that it relates to matters connected with the war.

[KEUNEMAN J.—Do not the use of the words "danger from the enemy" refer to the war ?]

One does not know what that means and there is nothing to show that it refers to some alien enemy. The prosecution admits that this is not a correct interpretation of the original Sinhalese script. It may mean some danger from a hostile source and yet not be connected with the war. Moreover, there is nothing to show that this caused alarm or despondency. The words used are a mere exaggeration and the writer has adopted a familiar mode of expression in Sinhalese, namely, the use of exaggerated metaphors and similes. The reference to a sea flowing over the land is a particular example. One cannot say that the ordinary reader who is familiar with this form of expression would be alarmed or become despondent on reading this. The purport of the whole article has been to bring the matters referred to therein before the authorities.

With regard to the second point, it is submitted that *mens rea* is an essential element of this offence. The element of *mens rea* is one that enters into the ingredients of every offence. The presence or absence of words such as "knowingly" or "intentionally" may give an indication as to whether *mens rea* is a necessary ingredient but its absence alone is no ground for drawing an inference that *mens rea* is not an essential

[1] *(1923) 23 N. L. R. 33 at p. 46 : Full Bench.*
[2] *(1916) 19 N. L. R. 65 at p. 68.*
[3] *L. R. 1888 z (20 Q. B. D. 771.)*
[4] *(1918) 88 L. J. K. B. 280.*
[5] *(1918) 88 L. J. 375.*
[6] *(1868) L. R. 3 Q. B. D. 360.*

ingredient of the offence. The evidence of the first accused clearly brings him within the purview of sections 69 and 72 of the Penal Code—*Weerakoon v. Ranhamy* [1]; *Gunasekera v. Dias Bandaranaike* [2].

[KEUNEMAN J.—Could one say that there has been a mistake of fact in this case ?]

Yes, the accused says that he did not know that this article contravened the Regulation and his evidence has been accepted by the Magistrate. The rule regarding the absence of *mens rea* is applicable only to social and Municipal legislation and not to legislation of this kind—*Casie Chetty v. Ahamadu* [3]; *Perumal v. Arumugam* [4]. There is no doubt that the accused was ignorant of the use to which this article had been put—vide *Evans v. Dell* [5].

[KEUNEMAN J.—If the answer to the question is one involved in doubt should not one infer that *mens rea* is not an ingredient of this offence ?]

If there is a doubt then the interpretation must be in favour of the accused—*Said Ahmad v. Emperor* [6]. The legislature must be deemed to have failed to express itself and the interpretation must be in favour of the subject and against the legislature—*R. v. Chapman* [7]; *Nicholson v. Fields* [8].

Though the words "knowingly" and "intentionally" are absent, the existence of the proviso indicates that the presence of a mental element is an ingredient of the offence and when its absence is pleaded as a defence it is incumbent upon the prosecution to prove the presence of *mens rea*.

Cur. adv. vult.

October 23, 1942. KEUNEMAN J.—

This is an appeal by the Attorney-General against an acquittal. The first accused was charged with publishing in contravention of Regulation 20A of the Defence (Miscellaneous) Regulations an article entitled "The fatal blow that 'Raja-Rata' would receive", in the issue of the Sinhalese Newspaper, "Sinhala Bauddhaya", dated March 7, 1942, which article, relating to matters connected with the war, was likely to cause alarm or despondency. The second accused was charged with abetment. The offences were punishable under Regulation 20 (A) (1) of the said Regulations.

The article in question, after dealing with the food question in the North-Central Province, contained the following paragraph, which forms the basis of the prosecution:

"A rumour has spread throughout the Anuradhapura District that our Ceylon Government has fixed dynamite at the sluices of Nachchaduwa, Tissawewa, Nuwarawewa, Kalawewa and other tanks, which contain water sufficient for the production of adequate food-stuffs for the whole of the North-Central Province. There is a feeling among the people that, in the event of there being any danger from the enemy, the dynamite would be caused to explode and that the water would be made to flow out. Then, the water in all these tanks would,

[1] *(1921) 23 N. L. R. 33.*
[2] *(1936) 39 N. L. R. 17*
[3] *(1915) 18 N. L. R. 184.*
[4] *(1939) 40 N. L. R. 532.*
[5] *(1937) 1 A. E. R. 349.*
[6] *(1927) 28 Cr. L. J. 554 at 556.*
[7] *(1931) 2 K. B. 606 at 609.*
[8] *31 L. J. Ex. 233.*

like a sea flowing over the land, carry the whole Anuradhapura District with the people, into the ocean. At a time when the people have to face a dreadful famine like this, their being overtaken by a trouble of this nature would be a fatal blow to their cultivation work, &c."

I may add that as regards the phrase, "in the event of there being any danger from the enemy", may also be translated as "in the event of danger from a harmful source" or "from a hostile source".

It has been proved and admitted in the case that the letter in question was sent for publication to the newspaper by the second accused, who is a student Buddhist priest. The covering letter P 5 (*a*) by the second accused has been produced, which contains a request for publication.

It has also been proved and admitted that the first accused is the Printer and Publisher of the paper, "Sinhala Bauddhaya". The first accused is also the Secretary of the Mahabodhi Society and Manager of its printing press. In accordance with the practice of this Society, the letter in question was sent first to, and opened by, the first accused, registered in his register, and addressed to the Editor. The letter bears an endorsement to the Editor in the handwriting of the first accused. The first accused, however, stated in evidence that he did not read this letter and was unaware of its contents till long after publication in the newspaper. He stated that he had no time to read all the letters received, and only read those letters signed by persons who were known to him.

As regards the first accused, the learned Magistrate held that the prosecution had failed to establish that he knowingly (or intentionally) published the article in question, and, further, that the article was not likely to cause alarm or despondency. As regards the latter point, the Magistrate mentions that with regard to the placing of dynamite at the sluices of the tanks mentioned in the letter, all that is said refers to a rumour. But the particularity with which four at least of the tanks are mentioned, and I think the general tone of the letter, suggest to the reader that there is truth in the rumour. Further, I think it is no defence to publish a rumour. The word "report" in Regulation 20 (A) may properly include a rumour. I think it has been a general experience, as expressed in another issue of this very newspaper, that "rumours are more dangerous than bombs", and there can be no question but that publication of a rumour in a newspaper will give it a currency which it would not otherwise have. I am of opinion that the Regulation penalises the publication of a rumour, even though it is expressly stated to be a rumour.

The pith of the article lies in the publication of the rumour that certain specified tanks and other tanks have had their sluices dynamited. Two distinct dangers are indicated. First, the danger of explosions, as a result of, or in anticipation of, action of an inimical nature. Next, the danger from flooding. This danger has been described in picturesque and exaggerated language, but though it is probable, as the Magistrate says, that the very exaggeration would rouse derision in the better informed classes, it would tend to create the greater alarm among more ignorant persons.

I think the time at which this letter was published must be taken into account. It is a matter of general knowledge that it was a period of tense expectancy and anticipation of enemy attack. This and similar rumours called for emphatic denial by the authorities (see D 5).

I hold that the article in question was likely to cause alarm or despondency, more particularly among those who resided in the neighbourhood of the tanks indicated, and also in the District of Anuradhapura. There is evidence that the "Sinhala Bauddhaya" has a circulation in this District. The spread of a state of alarm or despondency was a probable, and not merely a possible, result of the publication. I think the Magistrate is wrong in thinking that language of this kind "would rather raise a smile than cause alarm". Nor can I regard the article as a general discussion of the "scorched earth policy". This is the publication of facts, said to be based on rumour, with regard to the placing of dynamite at the sluices of certain tanks, and the dangers arising from the possible explosion of the dynamite, and the consequent flooding that would ensue. There is a world of difference between this and the general discussion of the "scorched earth policy".

I shall now turn to the other matter on which the order of acquittal rests. I may say that even if knowledge was a necessary ingredient of the offence, it may be difficult to say on the facts proved in the case that the publication was without the knowledge of the first accused. There can be no question but that the first accused was aware of the existence of the letter, and had passed it on to the Editor in the ordinary course. Would the fact that the first accused did not make himself acquainted with the contents of the letter be a defence to the charge of publication with knowledge? I do not propose to answer this question, for I do not think the Magistrate was entitled to read the word "knowingly" into the Regulation. The word does not occur in the Regulation itself, which runs as follows:—

> "20A (1) Subject as hereinafter provided any person publishing any report or statement relating to matters connected with the war which is likely to cause alarm or despondency shall be liable . . . . to imprisonment . . . . or to a fine . . . . or to both . . . .
>
> Provided that a person shall not be convicted of an offence against this Regulation if he proves—
>
> (a) that he had reasonable cause to believe that the report or statement was true; and
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> (b) that the publication thereof was not malicious and ought fairly to be excused."

It is significant that in the case of previous Regulations various mental states are clearly indicated as essential to the constitution of the offences created. To give a few instances under Regulation 10, interference with telegraphic communications is made an offence if done "knowingly". So, under Regulation 13, knowledge is specifically made the basis of the offence in relation to means of secret communication. In the case of other offences, absence of permission by a competent authority is one of the ingredients of the offence. Under Regulation 17B a certain

"intent" is necessary and so in Regulation 19B and 20 (1) (b). In the Regulation with which we are concerned, viz., 20A, no mental state is made an ingredient of the offence, but instead we find a proviso, which exempts the accused person from conviction, *if he proves* two things, contained in provisos (*a*) and (*b*). I think it is not possible to resist the conclusion that the words "knowingly" or "intentionally" were deliberately omitted, and the burden definitely placed on the accused to prove the matters mentioned in the proviso in order to escape conviction. The burden on the Crown was to prove three things—

(*a*) the publishing by the accused of the report or statement;
(b) that the report or statement related to matters connected with the war; and
(c) that the report or statement was likely to cause alarm or despondency.

See in this connection *Betts v. Armstead* (*supra*).

> "That word is not to be found in the section and it is clear from the words of other sections of the Act that the word 'knowingly' was intentionally omitted from section 6. It is provided by section 5 that want of knowledge shall be a defence in the case of the offences specified in sections 3 and 4, and it is therefore obvious that the Legislature, when it desired to make ignorance a good answer, has expressed that intention in the clearest terms."

The whole question of *mens rea* has been fully discussed in the Divisional Bench case of *Weerakoon v. Ranhamy* (*supra*). In this case it was held by the majority of the Court that the doctrine of the English criminal law, known as the doctrine of *mens rea,* only exists in Ceylon in so far as it is embodied in the express terms of sections 69 and 72 of the Penal Code.

> "Our Code is intended to be an exhaustive Code . . . . We cannot, therefore, import into this Chapter any principle of English law, except in so far as it is expressed or implied in those words. In other words, the formula can neither be extended nor limited by reference to the principles of the English law. It must be taken as complete in itself." (per Bertram C.J. p. 44.)

In the case of Regulation 20A, there is evidence that the draftsman had in mind a principle in the English law, which Bertram C.J. refers to as follows (p. 43);

> "When the definition or statement of the offence contains the word 'knowingly', or some corresponding expression, it is for the prosecution to establish the guilty knowledge. Where it does not, it is for the accused to prove the absence of *mens rea.* As it is often put, the absence of the word 'knowingly' merely shifts the onus."

But it is clear that the draftsman of the Regulation has not put into his draft the full implications of that principle. On the contrary, the draftsman has specifically mentioned only two matters which, *if proved by the accused,* would provide a ground of defence. I think the defence must be restricted to those two matters.

It has been further contended in this case that the accused can justify his action under the terms of section 72 of the Penal Code. There can be no doubt the accused can avail himself of section 72, but does the section apply? Is the accused a person "who, by reason of a mistake of fact and not by reason of a mistake of law, believes himself to be justified in doing it". Has there been any mistake of fact made by the first accused? I agree with the dictum of Bertram C.J., in *Weerakoon v. Ranhamy (supra)* that "ignorance is not the same as mistake. Mistake, to my mind, implies a positive and conscious conception which is, in fact, a misconception". There is no evidence of any such misconception in this case, nor is there evidence that, as a result of the misconception, the accused "believed himself to be justified in doing it".

On these grounds, I hold that the acquittal of the first accused was wrong. I set aside that order, find the first accused guilty and enter a conviction of the first accused for the offence with which he was charged.

As regards the second accused, the Magistrate held he had reasonable cause to believe that the report was true, and that the publication was not malicious, and ought fairly to be excused. The second accused, who is a student priest of the age of 17, stated in evidence that some man from Trincomalee came to the temple and asked him to copy out what he had written down, and that the article in question was what he copied at the man's bidding, and sent to the "Sinhala Bauddhaya".

The Magistrate described this evidence as "childish" and holds it to be untrue. The name of the visitor was not given by the second accused. But the Magistrate thought, more particularly owing to the youth of the second accused, it would not be straining the law in his favour to accept the view that when he heard the talk of his elders he had reasonable cause to believe that what they said was true. The Magistrate thought he was entitled "to use some common sense, and not to base his decision strictly upon the actual evidence given before him". I am not myself aware of any justification for making "common sense" a substitute for evidence. This is not a case where the Magistrate was considering the question of reasonable doubt as to the commission of the offence, but a case where the accused had to *prove* that he came within the proviso. Though the second accused mentions hearing of the rumour, he nowhere says that the rumour was conveyed to him by any of his "elders" or by any member of the priesthood having authority over him. There is no evidence whatever to show that the second accused had any material upon which he could come to the reasonable conclusion that dynamite had been placed at the sluices of any tanks. In fact, the second accused in cross-examination stated: "I don't know whether it is true or not that dynamite had been fixed in tanks".

It is clear, therefore, that the second accused has failed to prove that he had reasonable cause to believe that the report or statement was true. The defence of the second accused therefore fails, for it was incumbent upon him to *prove* both the elements of defence in provisos (*a*) and (*b*).

I hold that the evidence establishes that the second accused was guilty of the offence of abetment with which he was charged. I set aside the order for his acquittal and enter a conviction of the second accused for the offence with which he was charged.

There remains to be considered the question of sentence in the case of each of these accused. The second accused, the writer of the letter, is only 17 years of age. I think it is clear that his action was not malicious, but was intended mainly as a help to the food-production scheme, and to draw the attention of the authorities to certain dangers. He ends his letter as follows:—

> "Let us bring this matter to the notice of the noble English Government in order to save the people of Ceylon from this dreadful trouble."

There were, however, misstatements and considerable exaggeration in the letter. As regards the first accused, the Magistrate has held that he was not aware of the contents of the letter, which he undoubtedly published. This finding was not disputed. I also think it is clear that he was not actuated by malice, but there was at the least carelessness, either by him or by those to whom he delegated his authority of passing letters.

In all the circumstances, I impose on the first accused a fine of Rs. 100, in default 3 weeks' simple imprisonment, and on the second accused a fine of Rs. 20, in default one week's simple imprisonment.

Set aside.