PP

v.

COCOLIN INDUSTRIES SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[CRIMINAL APPEAL NO: 42-14-2007-II]
8 AUGUST 2007

CRIMINAL LAW: *Environmental Quality Act 1974 - Section 31(1) - Failure to comply with directive issued - Non-installation and operation of control equipment to reduce water pollution - Whether proper notice was served on the respondents - Whether evidence showed respondent received notice - Whether respondent had not complied with the terms stated in notice*

The prosecution herein appealed against the decision of the Sessions Judge who acquitted and discharged the respondent at the close of the prosecution's case. The respondent was charged under s. 31(1) of the Environmental Quality Act 1974 (EQA 1974) and punished under s. 31(3) of the same. The complaint against the respondent was that the Assistant Environment Control Officer (PW5) had inspected the respondent's premise and found that the effluent from the premise was channeled into two ponds. The two ponds were not functioning effectively to treat the effluent. In consequence of the inspection, PW1 confirmed that a notice dated 11 October 2001 was issued under s. 31 of EQA 1974 to instruct the respondent to install and operate controlled equipment to reduce water pollution from the premise within three months from said letter. PW5 had confirmed that the said notice was received by the respondent based on the fact that the respondent had written a letter referring to the date in exh. P1 on the respondent's own letterhead. PW5 further said that on 7 March 2002 he went to inspect the respondent's premise to check whether the notice was complied with. Upon inspection he did not find any change to the existing system, and the respondent had not installed controlled equipment to reduce the water pollution. In consequences of non-compliance, the said charge was preferred. The respondent's defence was two fold in that (i) no proper notice was served according to the law and (ii) the respondent by having two ponds for effluent treatment was in

compliance with the law as the respondent had such controlled equipment installed and operated. It was the appellant's contention that the Sessions Court Judge had erred in law and in fact when she, *inter alia*, held at one breath that the accused had not received the notice issued and yet in another breath opined that the accused had complied with the requirement of the notice.

Held (allowing appellant's appeal):

(1) The *sine qua non* to prosecute a charge under s. 31(1) EQA 1974 is that the prosecution must show that notice was served and the respondent had notification of the said notice. Strict compliance of the mode of service is essential to ensure that the accused is fully aware of what he is required to do. On the facts of the case herein, though there was no clear evidence to show the manner it was served, there was unchallenged evidence that the respondent had received such a notice, as evidenced by exh. P6. Thus, exh. P6 corroborated the evidence of PW5 who had explained the manner the notice was served. (para 7)

(2) There was clear evidence from PW5 that the respondent had not complied with the terms stated in the notice. Section 31(1) is a strict liability offence where the burden of proof is on the respondent to show that they have installed and operated controlled equipment or additional controlled equipment to reduce water pollution within three months from the date of the said notice. This could only be achieved on the facts of this case at the defence stage. (para 8)

[Setting aside judgment of Sessions Court Judge and directing Sessions Court to call for defence.]

Legislation referred to:
Environmental Quality Act 1974, ss. 2, 31(1), (3), 39(1)
Evidence Act 1950, ss. 4, 45, 46

For the appellant - Fazillah Begum Abdul Ghani
For the respondent - Jacob Wong; M/s Nawi, Wong & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the prosecution's appeal against the decision of the learned session judge who acquitted and discharged the respondent at the close of the prosecution's case.

[2] The respondent was charged under s. 31(1) of the Environmental Quality Act 1974, (EQA 1974) and punished under s. 31 (3) of the same. The charge reads as follows:

> That you, the owner of Cocolin Industries Sdn. Bhd., on 7 Mac 2002, at about 11.20 hrs, in the premise located at Lot 334, Rebak Road, Asajaya, in Samarahan Division, in the State of Sarawak, were found failed to comply with the Directive Notice, ref. AS (SWK)(B): 31/151/000/010 (55) dated 11 October 2001 issued by the Director of Department of Environment Sarawak, under Section 31(1) of the Environmental Quality Act, 1974, namely you:
>
> i. Not installing and operating any control equipment or additional control equipment to reduce water pollution
>
> within three months period from the date of Notice and you thereby committed an offence under Section 31(1) of the Environmental Quality Act, 1974 and punishable under Section 31(3) of the said Act.

Section 31 EQA 1974 reads as follows:

> **31. Power to require owner or occupier to install, operate, repair, etc.**
>
> (1) Where any environmentally hazardous substances, pollutants or wastes are being or are likely to be emitted, discharged or deposited from any vehicle, ship or premises irrespective of whether the vehicle, ship or premises are prescribed under section 18 or otherwise, or from any aircraft, the Director General may by notice in writing require the owner or occupier of the vehicle, ship or premises, or aircraft, to:
>
> (a) install and operate any control equipment or additional control equipment;
>
> (b) repair, alter or replace any equipment or control equipment;
>
> (c) erect or increase the height of any chimney;

A (d) measure, take a sample of, analyse, record and report any environmentally hazardous substances, pollutants, wastes, effluents or emissions containing pollutants;

(e) conduct a study on any environmental risk:

B (f) install, maintain and operate monitoring programme at the expense of the owner or occupier, or

(g) adopt any measure to reduce, mitigate, disperse, remove, eliminate, destroy or dispose of pollution,

C within such time and in such manner as may be specified in the notice.

(2) Notwithstanding any other provisions to the contrary, the Director General may by notice direct the owner or occupier of any vehicle, ship., or premises, or aircraft to emit, discharge or
D deposit environmentally hazardous substances, pollutants or wastes during such periods of day as he may specify and may generally direct the manner in which the owner or occupier shall carry out his trade, industry or process or operate any equipment, industrial plant or control equipment therein.

E

(3) Any person who contravenes the notice issued under subsection (1) or (2) shall be guilty of an offence and shall be liable to a fine not exceeding twenty-five thousand ringgit or to imprisonment for a period not exceeding two years or to both and to a further fine not exceeding one thousand ringgit a day
F for every day that the offence is continued after service on him of the notice specified in subsection (1) or (2).

[3] The complaint against the respondent is that (i) PW5 (Assistant Environment Control Officer) inspected the respondent's
G premise on 12 September 2001 and found that the effluent from the premise was channeled into two ponds. The two ponds were not functioning effectively to treat the effluent. In consequences of the inspection, PW1 confirmed that a notice dated 11 October 2001 was issued under s. 31 of EQA 1974 to instruct the
H respondent to install and operate controlled equipment to reduce water pollution from the premise within three months from the said letter. The said letter dated 11 October 2001 marked as exh. P1 reads as follows:

I

A.R. BERDAFTAR

Ruj. Tuan:

Ruj. Kami: AS(SWK)(B) 31/151/
000/010 (55)

Tarikh: 11 Oktober 2001

Pengarah Urusan,
Cocolin Industries Sdn. Bhd.
Lot 334, Jalan Rebak, Asajaya,
94600, KOTA SAMARAHAN

Tuan,

Notis Arahan Di Bawah Seksyen 31,
Akta Kualiti Alam Sekeliling 1974

Memasang dan Mengendalikan kelengkapan kawalan pencemaran air iaitu Sistem Pengolahan Effluen

Saya diarah merujuk kepada siasatan aduan/lawatan penguatkuasaan oleh pegawai-pegawai Jabatan ini ke premis tuan pada 12 September 2001 mengenai perkara di atas.

2. Hasil daripada pemeriksaan tersebut mendapati effluen yang terhasil daripada pemprosesan buah kelapa tidak diolah melalui sistem pengolahan effluen yang sempurna. Sistem pengolahan effluen yang sedia ada di premis tuan tidak berupaya untuk mengolah effluen yang terhasil bagi mematuhi Standard B, Jadual Ketiga, Peraturan-Peraturan Kualiti Alarn Sekeliling (Kumbahan Dan Effluen-Effluen Perindustrian), 1979.

3. Maka dengan kuasa yang diberikan kepada Ketua Pengarah Kualiti Alarn Sekeliling di bawah Seksyen 31(l)(a), Akta Kualiti Alam Sekeliling 1974 dan diperwakilkan kepada saya di bawah Seksyen 49(l), Akta yang sama, saya dengan ini memberikan **Notis Secara Bertulis** menghendaki tuan sebagai pemunya/penduduk premis di atas dalam tempoh **3 bulan** dari tarikh notis ini untuk:

3.1. Memasang dan mengendalikan apa-apa kelengkapan kawalan atau kelengkapan kawalan tambahan untuk mengurangkan pencemaran air.

A 4. Pihak tuan diperingatkan bahawa sebarang kelewatan atau kegagalan untuk mematuhi notis arahan ini akan menyebabkan tindakan perundangan akan dikenakan terhadap tuan tanpa notis yang membabitkan denda maksimum sebanyak RM 25,000.00 atau 2 tahun penjara atau kedua-duanya sekali.

B Sekian, harap maklum.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

C t./t

(DR. AB RAHMAN AWANG)
Pengarah
Jabatan Alam Sekitar
Negeri Sarawak

D s.k.

1. Ketua Pengarah Alam Sekeliling
   Pusat Pentadbiran Putra Jaya

E 2. Fail Notis Arahan

3. Fail Punca.

[4] PW5 confirmed that the said notice was received by the respondent based on the fact that the respondent had written a F letter referring to the date in exh. P1 on the respondent's own letterhead. PW5 was not able to confirm whether exh. P1 was sent by A.R Registered Post. That part of PW5's evidence in the notes of proceedings reads as follows:

G I know that Cocolin Industries Sdn. Bhd. had received the notice because the said factory wrote us a letter. I can recognize the letter. [Referring to a letter]. This is the reply letter from Cocolin Industries Sdn. Bhd. signed by Tang Tech Po, who is also known as Eric Tang.

H Normally the notice was served by A.R. registered post. Normally the A.R. cards are kept by the office boy in the file. I am not sure whether there was any A.R. card in relation to the posting of the service of the notice. I have checked the file and asked the office boy, Masri Serah, about the A.R. card and the card was not in the file. The card is lost. There is no other evidence that I the factory had received the notice other than the reply letter from the factory.

The reply letter was referring to the said notice because it refers to the reference number to the notice and the date of the notice. The reference number stated in the reply letter is AS(SWK)(B)31/151/000/010(57)and (SWK)(b)31/151/000/010(55). The signature next to the second reference number is Eric Tang.

Court:

To this afternoon at 2.30 o'clock.

Signed: Yew Jen Kie

Court resumed at 2.30 p.m.

Continuation of trial. Parties as before.

PW5 reminded that he is still under oath. XN continues:

Court:

Letter from Cocolin Industries Sdn. Bhd.: ID6

PW5:

[Referring to exh. P1]. The reference number and the date in PI is the same as the reference number stated in the reply letter, ID6. Ref No. is AS(SWK)(B)31/151/000/010(55) dated 11th October, 2001.

Miss Gwendolyne:

May I tender ID6.

Mr Wong:

I do not know whether the witness had received this letter personally or it was received by the office.

PW5:

My official initial in the DOE is PPKKR which stands for Penolong Pegawai Kawalan Kamaruzaman Ramzi.

[Reverting to ID6]. I recognize the handwriting on the right hand side of ID6. The minute (1) and (2) at the top was written by Dr. Abdul Rahman Awang. The bottom minute was written by the Head of Enforcement Unit, Mr Mohd Sunni Mohd Daud. It was minuted to me. It says, "PPKKR, Untuk susulan." It means it was my duty to follow up. I am the investigation officer of this case.

Mr Wong:

No objection to the tendering of ID6.

Court:

ID6 converted to P6.

PW5 further said that on 7 March 2002 he went to inspect the respondent's premise to check whether the notice was complied with. Upon inspection he did not find any change to the existing system, and that the respondent had not installed controlled equipment to reduce the water pollution. In consequences of non-compliance the charge was preferred. The respondent's defence appears to be two fold in that (i) no proper notice was served according to law, (ii) the respondent by having the two ponds for effluent treatment is in compliance with the law as the respondent had such controlled equipment been installed and operated.

[5] The appellant has filed a lengthy and a prolix petition of appeal which *inter alia* reads as follows: that the learned sessions court judge had erred in law and in fact when she (a) failed to appreciate the rule and principle of hearsay evidence when she held "by not calling the office boy who allegedly posted the notice and had custody of the A.R. card, the evidence of PW5 about the office boy having sent the notice and the missing of the A.R. card is hearsay evidence which the court rejects". (b) held that 'the prosecution must prove that the notice had been served on the accused and produce the proof of notice, which the prosecution had failed to do so". Whilst there are sufficient evidence to prove the notice had been received by the accused when they responded to the notice by replying to it by referring to the reference number to the notice that is AS(SWK)(B) 31/151/000/010(55) and AS(SWK)(B) 31/151/000/010(75) and the date of the notice that is 11 October 2001. (c) failed to appreciate the principle laid in the illustration in s. 45 of the Evidence Act 1950 (EA 1950) and the explanation in s. 46 of the EA 1950. (d) held that the request of installing a control equipment in the notice according to s. 2 EQA 1974 had been complied with. (e) held at one breath that the accused did not receive the notice and yet in another breath opined that the accused had complied with the requirement of the notice. (f) discussed at length contending her disagreement that the prosecution had failed to prove the first element but her finding is that the prosecution had proved the first ingredient. (g) failed to appreciate the evidence that the accused did receive the notice. (h) did not appreciate the fact that the signature was that of accused on both documents when PW3 said: "before we left, Kamarulzarnan (PW5) issued a form to Mr Eric Tang, PW5 in his evidence said after the inspection, I handed an inspection form to

Mr Eric Tang to sign it. I can recognize it again". (i) failed to appreciate the explanation of PW5 that the A.R. Card was lost. (j) held that the notice had been complied with by the defence whereas the notice needed the accused to "memasang dan mengendalikan apa-apa kelengkapan kawalan atau kelengkapan kawalan tambaban untuk mengurangkan pencemaran air" failed to do based on the inspection carried on 7 March 2002 which is the same as the inspection conducted on 12 September 2001. (k) did not appreciate the fact that PW5 had been working with DOE for nine years and to enforce the EQA 1974 and his evidence is based on expertise as an assistant environmental control officer. (l) did not consider s. 2 EQA 1974 that whatever wastewater treatment system that had been installed by the accused does not comply with the provision of EQA 1974. (m) refused to accept the fact that exhibits especially P2, P3, P4 and P7 clearly showed the wastewater treatment system at the accused premises remained unchanged from the day the notice was issued until the inspection was conducted and therefore an offence had been committed.

[6] The respondent to each of the appellant's petition of appeal *inter alia* submits as follows:

(a) the learned sessions judge had not erred in law and in fact as she had considered fully the evidence given by PW5 relating to the A.R. card. The evidence of PW5 is hearsay as what he told the court is just what he heard from the office boy. Thus by not calling the office boy to testify as to the actual position of the A.R. card is vital. PW5 had no actual knowledge of the whereabout of the A.R. card. He only told the court that normally the notice is sent by A.R. Registered post and normally the card is kept by office boy. (b) the prosecution had not proved that notice had been sent and received by the accused. The learned sessions judge is correct in her judgment that the prosecution had failed to prove service of the notice. The fact that a letter P6 purportedly been signed and sent by one Eric Tang who is also known as Tang Teck Po does not prove conclusively that the accused company had received the notice Pl. In this respect, the prosecution had not proved that the accused company had in fact received the notice Pl. The learned sessions court judge had not erred in law and in fact when she held that the prosecution had not proved that notice had been duly served on the accused in pursuant to s. 39(1)(c) of EQA. (c) the fact that PW5 did not see Tang Teck Po wrote and signed on exhibit P6 and more so he is not a

person who is said to be acquainted with the hand writing of Tang Teck Po within the explanation of section 47 of EA 1950. In the premises, the learned sessions judge is right to reject the opinion of PW5 regarding the signature next to the handwritten reference number on P6. (d) the fact that there were two effluent treatment ponds which PW5 agreed that it is a form of device to reduce and limit water pollution. Therefore, the learned sessions judge had not erred in law and in fact that the accused had complied with the requirement of the law. (e) by reading the judgment of the learned sessions judge, her finding is that the prosecution had not proved the first ingredient of the offence. However, when she said "For all the reasons aforesaid, it is my finding that the prosecution had proved the first ingredient". I believe she must have meant it to be that the prosecution had not proved the first ingredient. The word "not" could have been missed out because all along, she had been mentioning of the failure of the prosecution to prove the first ingredient of the offence.

[7] I have read the submission of the appellant and the respondent in detail. I do not wish to deal with each and every issue raised by appellant in point, as the matter is still at the prosecution stage. For the prosecution to establish a *prima facie* case, it is sufficient if there is evidence to show that the respondent had received the said notice exh. P1 and that the respondent had failed to comply with the terms of the notice. Thus, the *sine qua non* to prosecute a charge under s. 31(1) EQA 1974 is that the prosecution must show that notice was served and the respondent had notification of the said notice. The manner in which such notice may be served is set out in s. 39(1) of EQA 1974; it reads as follows:

39. Service of notices.

(1) Every notice, order, summons or document required or authorized by this Act or any regulations made thereunder to be served on any person may be served:

(a) by delivering the same to such person or by delivering the same to some adult member or servant of his family;

(b) by leaving the same at the usual or last known place of abode or business of such person in a cover addressed to such person; or

(c) by forwarding the same by registered post in a prepaid cover addressed to such person at his usual or last known place of abode or business.

In my view, for purpose of criminal prosecution, strict compliance of the mode of service is essential to ensure that the accused is fully aware of what he is required to do. This is a significant concept of natural justice and procedural fairness. If the court, for any reason, takes the view that proper notice had not been served and the accused was not aware of the said notice, even though the prosecution is able to demonstrate that they have complied with the provision of s. 39(1) EQA 1974, the court is entitled to rule that the prosecution has not established one of the vital ingredients of the offence. This is so because compliance of s. 39(1) of EQA 1974 only raises a rebuttable presumption in law that the notice has been served. A presumption is an inference of fact, drawn from other known or proved facts. It is a rule of law under which the courts are authorised to draw a particular inference from a particular fact, unless and until the truth of such inference is disproved by other evidence. The Evidence Act 1950 (EA 1950) does not define the meaning of presumption. The law in respect of presumption is encapsulated in s. 4 of EA 1950, which reads as follows:

(1) Whenever it is provided by this Act that the court may presume a fact, it may either regard the fact as proved unless and until it is disproved, or may call for proof of it.

(2) Whenever it is directed by this Act that the court shall presume a fact, it shall regard the fact as proved unless and until it is disproved.

(3) When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

However, on the facts of this case, though there is no clear evidence to show the manner it was served, there is unchallenged evidence that the respondent had such a notice. This is evidenced by exh. P6. Thus, I take the view that exh. P6 corroborates the evidence of PW5 who had explained the manner the notice was served.

[8] In respect of whether the respondent has complied with the notice, there is clear evidence from PW5 that the respondent has not complied with the terms stated in the notice. Section 31(1) is a strict liability offence where the burden of proof is on the respondent to show that they have installed and operated controlled equipment or additional controlled equipment to reduce water pollution within three months from the date of the said notice. This can only be achieved on the facts of this case at the defence stage.

[9] For reasons stated above, I allow the appellant's appeal, and set aside the judgment of the learned sessions court judge dated 28 November 2006 and direct the Sessions Court to call for the defence. For this purpose, the matter shall be fixed for mention today before the Sessions Court to fix the hearing date for the defence case and deal with the issue relating to bail.

I hereby order so.