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ATTORNEY-GENERAL, CAPE — APPELLANT

AND

CLIFFORD NOEL BESTALL — RESPONDENT

NESTADT, JA

CASE NO. 496/86
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

ATTORNEY-GENERAL, CAPE APPELLANT

AND

CLIFFORD NOEL BESTALL RESPONDENT

CORAM: CORBETT, NESTADT, KUMLEBEN JJA
et VILJOEN, NICHOLAS AJJA

DATE HEARD: 24 MARCH 1988

DATE DELIVERED: 17 MEI 1988

J U D G M E N T

NESTADT JA:

Respondent was convicted by a magis-

trate on two counts of having, in July 1983, unlawfully

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taken photographs of certain prisons in contravention of sec 44(1)(e)(i) of the Prisons Act 8 of 1959. Both counts were taken together for the purpose of sentence which was a fine of R300 or one hundred days imprisonment. On appeal to the Cape Provincial Division the convictions and sentence were set aside. The judgment of that court is reported (see S vs Bestall 1986(3) S A 761(C)). We are now concerned with a further appeal, this time by the attorney-general. The decision of the court a quo having been based on a question of law, sec 311(1) of the Criminal Procedure Act 51 of 1977 makes such an appeal competent.

Sec 44(1)(e)(i) provides:

"44(1)/.....

"44(1) Any person who -

(e) without the authority in writing of the Commissioner -

(i) makes a sketch or takes a photograph of any prison, portion of a prison or any burial referred to in section 35(4)(b); - - -

shall be guilty of an offence and liable on conviction to a fine not exceeding two thousand rand or, in default of payment, to imprisonment for a period not exceeding two years or to such imprisonment without the option of a fine or to both such fine and such imprisonment."

In terms of the definition section (sec 1), the Commissioner is the Commissioner of Prisons. It will be relevant, in due course, to consider also the definition of "prison". The burial referred to in sec 35(4)(b) is that of a prisoner executed in terms of a death sentence.

The circumstances in which the photographs, in the form of a television film, were admittedly taken by respondent are fully set out in the judgment a quo (at 762 H - 765 B). Insofar as they are material to the issues that arise in this appeal, they may be briefly stated. Respondent is a free-lance professional cameraman living in Cape Town. He filmed the prisons in question, viz Robben Island and Pollsmoor, on the instructions of a television news agency called ITN. He knew that to lawfully do so, the permission of, as he put it, "the requisite authorities" was needed. He assumed that it had been granted (at the instance of his principal). He was mistaken. It had neither been granted nor even sought.

Respondent's defence was thus an absence of mens rea; though he intended to take photographs of the prisons and knew that it was unlawful to do so without authority, he, believing that it had been granted, was unaware that he was acting unlawfully.

The magistrate accepted that this was respondent's state of mind. He nevertheless convicted him. He did so on the basis that whilst mens rea was required for a contravention of the statute, it took the form, not of dolus, but merely of culpa. On the facts it was held that respondent's assumption that he was authorised to take the photographs was not a reasonable

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one; he had therefore acted negligently; in the result the State (which bore the onus) had established that respondent possessed the necessary mens rea.

The court a quo, in upholding the appeal to it, did not consider whether respondent was negligent in assuming that the requisite authority had in fact been obtained. This was because, in its view, sec 44(1)(e)(i) required mens rea in the form, not of culpa, but of dolus. This entailed at the very least the taking of a photograph with knowledge (i) that what was being photographed was a prison and (ii) that the requisite authority had not been obtained (see at 768 A - C). Respondent lacked this latter state of mind and therefore the necessary mens rea.

The question of law raised by the appeal to us is whether the court a quo was correct in its construction of sec 44(1)(e)(i). In particular having regard to the basis on which it granted leave to appeal, the issue is the narrow one of what form mens rea, in relation to respondent's assumption that he was duly authorised to photograph the prisons, takes; is it dolus or culpa? If it be the latter, then the matter would have to be remitted to the court a quo for it to consider the correctness of the magistrate's finding that respondent was negligent. If it be the former then, naturally, the appeal must fail.

Inherent in what has been stated, was the acceptance by appellant that, provided respondent

was not negligent, his ignorance of the unlawfulness of what he did constitutes a defence. And, consistent with this, Mr van der Merwe on behalf of appellant, has, to his credit, despite certain suggestions from the Bench querying this basic premise, confined his argument to an attack on the court a quo's finding that dolus was, in this regard, required.

Upon reflection, I am of the opinion that, leaving aside the form of mens rea, appellant's approach is the correct one and that any initial mistrust of it was unwarranted. The idea that the section perhaps imposed strict liability was based primarily on a line of cases exemplified by S vs Louterwater Landgoed (Edms) Bpk en Andere 1972(2) S A 809(C) in which BAKER AJ, at 818 C - E, said:

"Dit/ .....

> "Dit is uitgemaakte reg dat selfs in die geval van daardie wetteregtelike misdrywe waarby mens rea 'n vereiste is, as die betrokke Wet 'n uitsondering, vrystelling of verskoningsgrond skep, word die beskuldigde nie vrygespreek nie bloot omrede die feit dat hy glo dat hy deur die uitsondering beskerm word; hy moet bewys dat hy inderdaad deur die uitsondering beskerm is: d.w.s. mens rea is nie relevant nie."

"Uitsondering, vrystelling of verskoningsgrond" were used in reference to sec 315(2)(b) of Act 56 of 1955 to which sec 90 of the present Criminal Procedure Act, 51 of 1977 corresponds. It provides:

> "In criminal proceedings any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the law creating the offence, may be proved by

> the accused but need not be specified or negatived in the charge and, if so specified or negatived, need not be proved by the prosecution."

It is at least questionable whether the principle stated by BAKER AJ is sound. The ratio of the Louterwater type of case would seem to be that where one has what I will call a sec 90 situation, the exemption (to use a composite term) is not an element of the offence and mens rea in relation to it is not required. But I am not sure that this is not unjustifiably elevating what may be a purely procedural provision, designed to facilitate proof by the prosecution, to one affecting the substantive law. The following remarks of CORBETT J, in S vs Tshwape and Another 1964(4) S A 327(C) at 332 H are in point:

"As/.....

> "As I see it, the fact that sec. 315(2)(b) relieves the State of the task of negativing the issue of a permit and places the onus in this regard upon the accused, does not alter the fact that the absence of such a permit is one of the requisites of a contravention of the prohibition ... The procedural question as to where in this connection the onus of proof lies does not, in my opinion, affect this conclusion."

On this reasoning, unless the statutory provision in question creates strict liability, a contravention thereof by an accused can only be blameworthy if (depending upon which form of mens rea applies) he knows, or ought reasonably to know, his conduct to be unlawful. He must have the necessary guilty state of mind in respect of the element of unlawfulness, in addition to the other elements

of/ .....

of the offence. If because of a mistake as to the law or facts he does not, there cannot be a conviction. This consequence follows from S vs De Blom 1977(3) S A 513(A). It also accords with the general rule that mens rea extends to all the elements of a crime.

There is an alternative basis for coming to the same conclusion. It is one advanced by Prof André Rabie in a helpful article on sec 90 in 1985 THRHR 81. His view, which appears to differ from that of CORBETT J in S vs Tshwape, set out above, is that the effect of sec 90 is that an exemption does not form part of the crime in question and that a mistake as to its existence is not one in respect of an element of the offence created by the statute. However, on the basis that exemptions in

terms/ .....

terms of sec 90 amount, in effect, to statutory grounds of justification, he submits the following (at 85):

> "Since an exception (in terms of section 90 of the Criminal Procedure Act) amounts in effect to a statutory ground of justification, comparable to any common-law ground of justification, a mistaken belief that the exception applies should be regarded as a mistake in respect of the lawfulness of the conduct in question, and should be treated on the same basis as mistakes with regard to common-law grounds of justification. An accused who mistakenly believes that his conduct is covered by a statutory ground of justification accordingly believes that his conduct is lawful. De Blom (1977 3 SA 513'A)) constitutes decisive authority for the principle that an accused who is unaware of the fact that his conduct is unlawful, cannot be held liable for a crime in respect of which intention is required. The view that reliance upon an exempting provision will only avail an accused who proves

> that he in fact falls within the terms of an exemption is tantamount to a denial of the element of fault and constitutes a preoccupation only with the element of unlawfulness."

It would seem, therefore, that, even if the Commissioner's authority referred to in sec 44(1)(e)(i) constitutes an exemption in terms of sec 90, respondent's assumption that it existed would, leaving aside the issue of whether it need be reasonable, be a defence. It is, however, unnecessary to express a definite view in this regard. This is because I do not, in any event, think that on a proper construction of sec 44(1)(e)(i), the portion reading "without the authority in writing of the Commissioner" is an "exception, exemption, proviso, excuse or qualification"

within the meaning of sec 90. As appears from what SCHREINER JA said in R vs Kula and Others 1954(1) S A 157(A) at 159 F - H, the application of the section is not always easy. What has to be decided is whether the negative element or excusing factor forms a material part of the offence itself or whether it is merely an exclusion (to be established by the accused) from the general prohibition contained in the provision. In each case it is a question of construction of the relevant legislation. Factors used as an aid in this regard, in addition to the form in which the prohibition is cast, include the grammatical shape of the provision, its context, its apparent scope and object and the practical consequences

of the competing constructions. In addition, according to the so-called "truncation test", assistance may be derived from considering whether, if the alleged exemption be excised, what remains looks like something that the Legislature might well have intended to make an offence (see R vs Kula, supra, at 161 A - B).

In the present case the apparent object of sec 44 as a whole is to shroud prisons and prisoners with anonymity; to draw a veil between them and the public. Presumably, the purpose of this is to promote the security of prisons, avoid the publication of false information about conditions in them, prevent escapes and minimise the humiliation of prisoners. It may be

conceded/ .....

conceded that, in these circumstances, the mere taking of a photograph of a prison was something which the Legislature possibly wished to penalise so that, applying the truncation test, the authority of the Commissioner is to be regarded as an exculpatory factor and, accordingly, an exemption. On the other hand, the form which sec 44(1)(e)(i) takes tends, in my view, to favour the conclusion that the absence of the Commissioner's authority is a material part of the offence; it is woven into the language of the prohibition. Moreover, it would be a simple matter for the State to negative the existence of authority; it has to be an authority given by the Commissioner in writing. Indeed, in the present case, it was alleged in each charge that a photograph of a

prison had been taken without the necessary authority and the State had no difficulty in establishing this. An affidavit to this effect by the Commissioner was handed in by consent. The decision is a borderline one but, on balance, I take the view (with which counsel for appellant agrees) that the authority required by sec 44(1)(e)(i) is not an exemption within the meaning of sec 90.

To sum up so far, I am of the opinion that respondent's assumption that he was authorised to photograph the prisons was capable of constituting a defence of contravening sec 44(1)(e)(i).

After/ .....

After this somewhat lengthy diversion, I return to a consideration of appellant's argument that culpa rather than dolus constituted the necessary form of mens rea. The main submission was that this was so in relation to all the elements of the offence created by sec 44(1)(e)(i). Alternatively it was contended that even if the taking of a photograph of a prison had to be intentional, it sufficed if an accused was negligent in assuming that he had the necessary authority. I deal immediately with the latter proposition. The possibility of a type of hybrid form of mens rea (as LAWSA Vol 6 para 112 p 108 calls it) has been judicially recognised (see S vs Ngwenya 1979(2) S A 96(A) at 100 C - E).

But/ .....

But it does not avail appellant because, as will appear, I do not think that mens rea in the form of culpa applies to any of the ingredients of the offence.

The type of problem raised by the main argument has engaged the attention of our courts on many occasions over the years. Most recently it arose, as far as this Division is concerned, in Attorney-General, Natal vs Ndlovu 1988(1) S A 905(A). It stems from the fact that the Legislature frequently omits to indicate what form of mens rea is required (or indeed, equally often, to stipulate whether mens rea is an ingredient of the offence at all). Its intention has then to be discovered by interpreting the statute

in question. This is often a matter of difficulty. As far as the issue under discussion is concerned, i e the degree of blameworthiness, it was stated in R vs Arenstein 1964(1) S A 361(A) at 366 C that there is no general rule favouring dolus or culpa; negligence may constitute sufficient proof of mens rea if there was a duty on the accused to be circumspect. On the other hand, it has been said that the form of mens rea that the Legislature had in mind will usually be taken to be dolus (S vs Ngwenya, supra, at 100 A) I am not sure that the two approaches (as to which see, too, LAWSA Vol 6 para 112, p 105 - 106; Snyman:

Strafreg/ .....

Strafreg 2nd ed 268) are in conflict with each other. In any event, it is unnecessary to choose between them. Even assuming that the scales are initially evenly balanced, it seems to me, for the reasons which follow, that, in the end, there are considerations in favour of a finding that sec 44(1)(e)(i) requires intentional wrongdoing which outweigh those that negligence suffices.

There are a number of well-established criteria which are taken into account in determining what degree of mens rea was intended by the Legislature. They are similar to those which govern the enquiry whether mens rea is required at all. The main ones are:

(i) the language and context of the prohibition;

(ii) the ease with which the provision can be evaded if only dolus constitutes the necessary mens rea; (iii) the reasonableness or otherwise of holding that culpa suffices and (iv) the degree of circumspection which the statute demands. Relevant in the latter regards are (a) the object and scope of the statute and (b) the nature of the penalty imposed. (See, generally, LAWSA Vol 6 para 112 pp 105 - 108.)

It cannot be gainsaid that certain of these criteria point to culpa being the intended form of mens rea in sec 44(1)(e)(i). There is firstly its context. As counsel for appellant was understandably quick to indicate, sub secs (c) and (d) of sec 44(1) respectively

(in/ .....

(in broad terms) make it an offence to "wilfully" ride, drive or lead any animal or vehicle through a group of prisoners and in any manner to "wilfully" interfere with any prisoner. The use of "wilfully" in these sub-sections is to be contrasted with its absence in sub-sec (e)(i) (and the rest of sub-sec (e)). It is prima facie a strong indication that a different and lesser degree of mens rea is required for the offence created by the latter provision (S vs Oberholzer 1971(4) S A 602(A) at 611 H; S vs Willemse 1975(1) S A 84(C) at 91 F). I am not impressed by the suggestion of Mr Kuny, representing respondent, for the difference in wording. It was that the acts of riding etc and interfering referred to in

sub-secs/.....

sub-secs(c) and (d) could be committed either deliberately or unintentionally; it was in order to ensure that the latter not be punishable that "wilfully" was introduced; but in the nature of things taking a photograph inherently requires conscious volition; it was therefore unnecessary to make the prohibition in this regard subject to wilfulness. Whilst counsel may be right as regards the actual taking of a photograph, it is not difficult to imagine (as will be seen) a case where a prison falls unknowingly, and therefore accidentally, within the picture.

Secondly, there are factors which favour the view that a high degree of circumspection to ensure compliance with the prohibition created by sec 44(1)(e)(i)

is demanded by the lawgiver. This suggests that mens rea, in its less stringent form of culpa, was intended (S vs Arenstein, supra, at 366 F). The one is the undoubtedly severe penalties which are provided for a contravention of sec 44(1) generally. The other is the object of sub-sec (e). It follows from what has been indicated earlier that it is not merely the prevention per se of escapes (as the court a quo found) but also, indirectly, the promotion of the security of prisons.

What has been stated, however, does not give the whole picture. There are other considerations which must be taken into account and which, in my view,

militate/ .....

militate against a conclusion that mens rea in the form of culpa suffices for a contravention of sec 44(1)(e)(i). They are the following:

(i) As appears from the judgment of RABIE ACJ in Attorney-General, Natal vs Ndlovu, supra, the fact that the statute in question demands a high degree of circumspection is only one of the factors to be taken into account; it does not necessarily show that negligence, as opposed to dolus, is the form of mens rea (see at 915 D - 916 A).

(ii) I cannot agree with Mr van der Merwe that to insist on dolus would result in the whole object

of the prohibition being frustrated; that it could easily be evaded; and that it would be difficult for the State to prove the necessary state of mind. I think this is an exaggeration of the position. Evidence as to the circumstances in which the photograph was taken (whether surreptitiously or otherwise), the occupation of the accused, his education, his motives, his explanation for taking the photograph, his knowledge of and familiarity with local conditions and topography would be some of the factors which might, in a given case, facilitate the necessary proof by the State of dolus. And,

of/ .....

of course, it must be borne in mind that dolus eventualis could be relied on.

(iii) At 766 I - 767 B of the judgment a quo, attention is drawn to some of the ways in which sec 44(1)(e)(i) could be unintentionally contravened. Clearly a multitude of situations is covered. They result, in part, from the wide definition of "prison" (quoted at 766B - D) and, in part, from the activity sought to be regulated (taking photographs) being so commonplace. Prima facie therefore, in the absence of a clear indication to the contrary, an interpretation is called for which restricts the ambit of the section.

In other words, so it seems to me, rather than the section requiring a high degree of circumspection from members of the public, a high degree of circumspection is called for in applying the Act. This must have been Parliament's intention. It can best be achieved by requiring dolus. To require culpa, would obviously spread the net of the prohibition more widely. Those falling within it would then be exposed to the risk of a conviction were it proved that they had acted unreasonably. This is a consequence which is, if possible, to be avoided. In principle, a wide-ranging prohibition applicable

to/ .....

to all citizens indicates *dolus* alone as the required form of *mens rea*, if the application of the standard of *culpa* will result in great hardship to the various groups of persons who may contravene the section in question through mere carelessness or thoughtlessness. (*LAWSA*, *op cit*, 108). This is the position here.

The cumulative effect of the considerations referred to in the previous paragraph leads me to the conclusion that the court *a quo* correctly interpreted sec 44(1)(e)(i) as requiring *mens rea* in the form of *dolus* and not *culpa*. It follows that respondent's ignorance of the unlawfulness of what he did constituted a good defence.

On/ .....

On behalf of respondent it was submitted that, in the event of the appeal failing, he was entitled to his costs thereof. Sec 311(2) of Act 51 of 1977 makes provision for such an order. I see no reason why it should not be made in this case (as it was in Attorney-General, Natal vs Ndlovu, supra, at 918 I). It would be unfair that the correctness of the law point relied on by appellant should be tested (partly) at the expense of respondent.

The appeal is dismissed with costs.

Such costs are to include the fees of two counsel.

NESTADT, JA

CORBETT, JA)
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KUMLEBEN, JA) CONCUR
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VILJOEN, AJA)
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NICHOLAS, AJA)