[2010–12 Gib LR 150]

ATTORNEY-GENERAL v. ENTRECANALES Y TRAVORA (GIBRALTAR) LIMITED

COURT OF APPEAL (Aldous, Kennedy and Tuckey, JJ.A.): March 15th, 2011

Criminal Procedure—appeals—case stated—appeal limited to questions in case stated—inappropriate for court to determine other matters it considers important, e.g. whether enabling legislation ultra vires—if important matters unstated, court may include them by requiring amendment to case stated

Employment—safety—risk assessment of premises—required by Management of Health and Safety at Work Regulations 1996, regs. 7(1)(a) and 24(1)(a) not ultra vires Factories Act 1958, s.58—by requiring protection for employees and such classes of person, protection of others in area surrounding "factory" not precluded

The respondent company was charged in the magistrates' court with failing to conduct a risk assessment contrary to the Management of Health and Safety at Work Regulations 1996, regs. 7(1)(b) and 24(1)(a).

The respondent was contracted by the owner and developer of a site to undertake the building work. During the development, debris began to fall from one of the buildings and the developer requested the respondent act to protect users of the site. The respondent erected a plastic fence around the site that proved unstable and provided no protection against falling

objects. It was reported that a child had subsequently ridden her bicycle into the fence as the area surrounding the site was open to the public. The Factories Inspector had visited the site and discovered that the respondent had failed to conduct a risk assessment in respect of the work being undertaken as required by the Management of Health and Safety at Work Regulations 1996, reg. 7(1)(b). The respondent then erected scaffolding with wooden planks to protect against falling debris.

The respondent was charged under the 1996 Regulations, regs. 7(1)(b) and 24(1)(a), found guilty, and fined by the Stipendiary Magistrate. It appealed by way of case stated to the Supreme Court (Dudley, C.J.). The case stated asked (a) whether the site was a factory, as defined in s.5 of the Factories Act 1956; (b) whether there was evidence that it was a factory; (c) whether there was evidence that the respondent was conducting an undertaking within the meaning of reg. 7(1)(b); and (d) whether there was evidence of an unsuitable or insufficient assessment of risk. However, the Supreme Court, without requiring amendment to the statement of case, decided that the real issue was whether the regulations were *ultra vires* the Factories Act. It quashed the conviction, holding that the regulations were *ultra vires* in extending protection beyond employees or such classes of persons to others, including passers-by.

The Crown appealed, submitting that (a) the Supreme Court had erred in quashing the respondent's conviction, as although regulations were required by s.58 if necessary for the protection of employees and such classes of person, protection need not be limited to them alone; (b) the site was clearly a "factory" for the purposes of s.5, as it was a place in which the respondent worked under its agreement with the owner and developer; and (c) the respondent, as a contractor, was conducting an undertaking for the purposes of reg. 7(1)(b), had taken responsibility for the safety equipment on the site and had erected the fences and scaffolding.

The respondent submitted in reply that (a) the Supreme Court had correctly quashed the conviction, as the regulations were not limited to the protection of its employees and such classes of person, as required by s.58; (b) the development site was not a "factory" for the purposes of s.5; and (c) the respondent, as a contractor for the owner and developer, was not conducting its own undertaking for the purposes of reg. 7(1)(b).

Held, allowing the appeal:

(1) The Supreme Court had erred in quashing the respondent's conviction which would be reinstated, as the Management of Health and Safety at Work Regulations 1996, regs. 7(1)(b) and 24(1)(a) were not *ultra vires* the Factories Act 1956, s.58. The regulations, as required by s.58, were reasonably practicable and necessary to protect the health, safety, and welfare of "employees or such classes of person" (a definition that excluded the public at large). However, the scope of the protection offered was not limited to those persons explicitly mentioned in s.58, and it was open to the Minister, as in the present case, to make regulations that also

protected others that might come into the area surrounding the factory and be put at risk (paras. 14–20).

(2) The court considered that the Supreme Court had erred in judicially reviewing the Regulations rather than answering the questions put to it in the case stated. In an appeal by case stated, the court should answer only the questions put to it. If it considered that an important issue had not been stated, it should require amendment to the draft case before settling its final form rather than addressing matters that had not been stated (para. 5–6).

(3) It was clear that the development site was a "factory," for the purposes of the 1956 Act, s.5, as it was a place in which the respondent worked under its agreement with the owner and developer. "Factory" encompassed premises open to others, including public sites (para. 21).

(4) Moreover, the respondent, as a contractor, was conducting an "undertaking" for the purposes of reg. 7(1)(b) and had taken responsibility for the safety equipment on the site and the erection of fences and scaffolding, despite not being the site owner or developer (para. 23).

Legislation construed:

Factories Act 1956, s.2: The relevant terms of this section are set out at para. 7.
s.5: The relevant terms of this section are set out at para. 8.
s.58: The relevant terms of this section are set out at para. 9.

Management of Health and Safety at Work Regulations 1996, reg. 7: The relevant terms of this regulation are set out at para. 10.
reg. 24(1)(b): "It is an offence for a person . . . to contravene any requirement or prohibition imposed under the relevant statutory provisions."

R.R. Rhoda, Q.C., *Attorney-General*, for the Crown;
S.P. Triay for the respondent.

1 **ALDOUS, J.A.,** delivering the judgment of the court: In his ruling of October 14th, 2010, the Chief Justice quashed the conviction of Entrecanales y Tavora (Gibraltar) Ltd. ("the company"/"the respondent"). He held that the regulations which the Stipendiary Magistrate had decided had not been complied with were *ultra vires* the enabling Act.

2 The appeal to the Chief Justice was by way of a case stated by the Stipendiary Magistrate, Karen Prescott. The case outlined the facts and issues before her in this way:

> "(a) The defendants were summoned to this court, information having been laid that while carrying out works at the Montagu Crescent Estate, they did fail to discharge a duty by virtue of reg. 7(1)(b) of the Management of Health and Safety at Work Regulations

1996, by failing to make a suitable and sufficient assessment of the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking, contrary to reg. 24(1)(a) of the Management of Health and Safety at Work Regulations 1996.

(b) On or about September 2008, there was a problem with falling debris from one of the buildings in Montagu Crescent. Mr. A. Segui for and on behalf of Montagu Management Committee wrote to Mr. M. Figueras at 6 Convent Place informing him of the need to protect users of the podium from falling debris. As a result of this letter and at the request of the developer, the defendants erected an orange plastic fence around the building. This fence was not fit for purpose in that it did not provide adequate protection because it was unstable, prone to falling over regularly and provided no cover from falling objects.

(c) On September 28th, it was brought to Mr. Segui's notice that a child had been involved in an accident and had suffered injuries when she had become entangled in the fence whilst riding her bicycle. The Factories Inspector, Mr. R. Perera, visited and inspected the site.

(d) On November 6th, 2008, Mr. Perera telephoned the defendant and requested the risk assessment method statement. There was none in existence and the defendant was unaware that such an assessment was necessary. Given that the defendant employed in excess of five people, it was incumbent on him to assess the risk and record the same in a written statement. Thereafter, the defendant removed the fences and some two to three weeks after that erected a scaffolding covered by wooden planks in order to protect against falling debris.

(e) The developer of Montagu Crescent is Gibraltar Homes Ltd.; the defendant is the contractor who built the estate. There is an unresolved dispute between the developers, the defendants and the estate as to who bears the responsibility for safety measures and repairs at the site in question."

3 The case stated went on to set out the parties' contentions in two appendices. It then set out the findings in this form:

"(a) Regulations 7(1)(b) and 24(1)(b) of the Management of Health and Safety at Work Regulations are the relevant statutory provisions in relation to this offence.

(b) Regulations 7(1)(b) and 24(1)(a) of the Management of Health and Safety at Work Regulations have not been complied with by the defendant in that the defendant failed to assess and record the risks as required by law; in addition the safety measures employed

by the defendant were not appropriate. It is immaterial whether the child who suffered the accident should have been riding her bicycle in the area. Causation in relation to the accident was not a matter upon which the court had to rule.

(c) Once the defendant accepted the task of carrying out safety measures, he was responsible for the same and expected to do so in the appropriate way as required by law, it was immaterial that he was doing so as a favour to the developers."

4 The case stated went on to set out four issues of law for consideration on appeal, they were in this form:

"(a) Whether Montagu Crescent Estate was a factory, as defined in s.5 of the Factories Act 1956.

(b) Whether there was any evidence to support the finding that Montagu Crescent was a factory.

(c) Whether there was any evidence to support the finding that the [company] was conducting its undertaking within the meaning of reg. 7(1)(b) of the Management of Health and Safety at Work Regulations.

(d) Whether there was any evidence to support the finding that the assessment was unsuitable or insufficient."

5 The Chief Justice did not decide those questions of law. He heard submissions made on behalf of the company to the effect that the relevant regulations were *ultra vires* the enabling section of the Act. That was, in his view, the real issue that should have been decided. He did not send the matter back for the case to be amended and proceeded to decide that issue without any amendment. He concluded that the relevant regulation was *ultra vires* the enabling provision of the Act. That conclusion of the Chief Justice is challenged by the Crown on appeal.

6 The procedure that was adopted was unusual and in our view was inappropriate. In normal cases, the first draft of the case stated would be produced by the parties for consideration by the judge who should settle its form. Having settled the form of the case stated, the appeal court should confine itself to the issues that are raised for decisions. In cases where those issues are not complete or are in any way inappropriate there should be an appropriate amendment. There was no such amendment, only an appeal against the conclusion reached by the Stipendiary Magistrate. This court must therefore consider whether the ruling of the Chief Justice was correct. However, we heard argument on two of the questions in the case stated.

7 The enabling Act is the Factories Act 1956, s.2 of which provides:

"Save as in this Act otherwise expressly provided, the provisions of this Act shall apply only to factories, as defined by this Act, but shall, except where the contrary intention appears, apply to all such factories."

8 Section 5 interprets "factory." So far as relevant, it states:

"5.(1) Subject to provisions of this Act the expression 'factory' means any premises in which, or within the close or tutelage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely—

(a) the making of any article or of part of any article; or

(b) the altering, repairing, ornamenting, finishing, cleaning or washing, or the breaking up or demolition of any article; or

(c) the adapting for sale of any article,

being premises in which, or within the close or tutelage or precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control . . .

. . .

(3) Any workplace in which, with the permission of or under agreement with the owner or occupier, one or more persons carry on any work which could constitute the workplace if the persons working therein were in the employment of the owner or occupier, shall be deemed to be a factory for the purposes of this Act, and, in the case of any such workplace, the provisions of this Act shall apply as if the owner or occupier of the workplace were the occupier of the factory and the persons working therein were persons employed in the factory.

. . .

(5) Premises shall not be excluded from the definition of a factory by reason only that they are open air premises."

9 The power to make regulations for health, safety and welfare is contained in s.58. That section so far as relevant is as follows.

"(1) Where the Minister is satisfied—

(a) that any manufacture, machinery, plant, equipment, appliances, process or description of labour used in factories is of such a nature as to cause risk of bodily injury, or be offensive, to the persons employed, or any class of those persons; or

(b) that any measures are necessary to secure the health, safety or welfare of such persons;

he may, subject to the provisions of this Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case.

(2) Regulations so made may, without prejudice to the generality of the powers conferred by subsection (1)—

(a) prohibit the employment of, or modify or limit the hours of employment of, all persons or any class of persons in connection with any manufacture, machinery, plant, equipment, appliance, process or description of manual labour; or

. . .

(d) impose duties on owners, employed persons and other persons, as well as on occupiers;

. . .

(f) give effect to the law of the European Economic Communities having as its intention the regulation of places of work for the purpose of ensuring the safety, health and welfare of employed persons;

(g) prescribe anything which may be prescribed under this Act."

10 The relevant regulations are the Management of Health and Safety at Work Regulations 1996. Regulation 7 is as follows:

"(1) Every employer shall make a suitable and sufficient assessment of—

(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions.

(2) Where the employer employs five or more employees, he shall record—

(a) the significant findings of the assessment; and

(b) any group of his employees identified by it as being especially at risk."

11 The judge accepted the submission made on behalf of the company that the offence created by reg. 24, when read with reg. 7(1)(b), is *ultra vires* the enabling provisions in the Factories Act, namely ss. 58 and 81, which provide for the payment of penalties for offences. He concluded:

> "Section 58(2) identifies specifics and is stated to be 'without prejudice to the generality of powers conferred by sub-section (1).' It must follow, therefore, that the sub-paragraphs in sub-s. (2) have to be read in the context of and subject to sub-s. (1); particularly as s.58(1) allows for the making of regulations 'subject to the provisions of [the] Act' and no other provision in the Act is relied upon as supporting reg. 7(1)(b). In turn, the ambit of s.58(1) is limited to the making of regulations in relation to factories and to persons employed 'or any class of those persons.' It is not in issue that the site where the incident took place did not, on the evidence before the Stipendiary Magistrate, fall within the statutory definition of a factory and although it may fall within the definition of place of work, the Factories Act (Extension of Application) Order 1996, which extends certain provisions of the Factories Act to places of work, it does not extend such an application to s.58. Moreover, it is clear that a child on a bicycle is not a person employed, whilst 'a class of those persons' must relate to persons working in the factory, albeit not in an employer/employee contractual relationship . . . I reach the conclusion that reg. 7(1)(b) is *ultra vires* the Factories Act and therefore cannot, when read with reg. 24, create a criminal offence. It is a decision I reach with much regret given that the obligations and sanctions created by these provisions are eminently sensible."

12 Before this court, the Attorney-General, who appeared for the Crown, explained that if the Chief Justice was right then primary legislation would probably be needed to ensure that the law in Gibraltar was consistent with European Union law. He accepted that English statute law was different, but submitted that the Minister was entitled to make regulations when satisfied that there was a risk to employees in the terms that he had done. Those regulations need not be confined to employees provided that they appeared to the Minister to meet the necessity of the case. He also relied on s.58(2)(f) and Council Directive 89/391/EEC.

13 Mr. Simon Triay, for the respondent, supported the conclusion reached by the Chief Justice. He submitted that s.58(1) of the Factories Act, which enabled the Minister to make regulations, is, by its terms, limited to the protection of persons employed or any class of those persons and does not extend to the protection of third parties. He drew attention to the fact that both paragraphs of s.58(1) were directed at risks to persons employed or any class of those persons. He submitted that the regulations that could be made had to meet the necessity of the case and that meant

that they had to be limited to protecting employees or any class of such persons. As the protection given in reg. 7(1)(b) went beyond employees or such class of persons, it was *ultra vires* the Act.

14 Before coming to construe the relevant section and the Regulations, it is important to note that the proceedings were not directly concerned with the safety of the child cyclist. The respondent was charged with failing to discharge its duty by virtue of reg. 7(1)(b) in that no risk assessment was made of "the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking." It was accepted that no such risk assessment was made and the Stipendiary Magistrate held that that constituted a failure of the duty imposed by the Regulations.

15 Against that background we return to s.58 of the Act. The parties accepted that the section required the Minister to be satisfied as to one of two matters in sub-s. (1)(a) or (b). Paragraph (a) requires the Minister to be satisfied that any manufacture or machinery or the like used in factories is of such a nature as to cause risk of bodily injury or be offensive to persons employed or any class of those persons. Paragraph (b) is wider in scope. It requires the Minister to be satisfied "that any measures are necessary to secure the health, safety or welfare of such persons." The words "such persons" in para. (b) must, in our view, refer back to the words in para. (a) "persons employed, or any class of those persons."

16 There is nothing before us which would suggest the Minister was not satisfied that measures were necessary and that is supported by the existence of the Regulations. Thus he was entitled, "subject to the provisions of this Act," to make such regulations as appeared to him to be reasonably practical and "to meet the necessity of the case." Practicability is not in issue.

17 We accept that the Minister must be satisfied that there are risks to employees or a class of those persons before regulations can be made, but there is no limitation on the breadth of the regulations that the Minister can then make, providing they appear to him to be reasonably practicable and to meet the necessity of the case. Section 58(2)(a) provides for the prohibition of the employment of all persons or any class of persons in connection with any manufacture, process or description of manual labour. Similarly, s.58(2)(d) allows regulations to be made which will impose duties on owners, employed persons and other persons as well as on occupiers.

18 A typical example where measures would be necessary to secure the health of an employee is the digging of a trench within a factory. It would be appropriate for the Minister to decide that to meet the necessity of the case the risk assessment would have to deal not only with the risk to

employees but also to others who might fall into the trench and then need to be rescued by employees.

19 Regulation 7 requires every employer to make a suitable and sufficient assessment of the risks to the health and safety of employees to which they are exposed while they are at work and also the risks to the health and safety of persons not in his employment, arising out of or in connection with the conduct by him of his undertaking. The regulation goes on to require that the risk assessment be for the purpose of identifying the measures that the employer needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions

20 The Minister appears to have been satisfied that risk assessments were necessary to secure the safety of employees and in our view a minister acting reasonably could conclude that to secure their safety it was necessary that the risk assessment should consider employees and persons in the vicinity. Take the facts of this case. To protect employees a risk assessment would be required as to injury from falling debris. That debris could fall on passers-by and persons helping employees or going to their rescue. In our view, it could properly appear to the Minister that where there was falling debris the necessity of the case required a regulation providing for a risk assessment as to risks to employees and others. In our view, the Chief Justice was wrong to hold that reg. 7(1)(b) was *ultra vires* the Act.

21 Mr. Triay also submitted that the Factories Act was passed for the protection of persons employed in factories and nowhere else. He submitted that the first question of law posed in the case stated should be answered in the negative. The title of the Act is: "an Act to make provision for the health, safety and welfare of persons employed in factories and other places, and for matters incidental thereto and connected therewith." Further, s.5(3), as already referred to, is in broad terms. It extends the expression "factory" to a workplace if persons working there are in the employment of the owner or occupier. Section 5(6) provides that the fact that the premises are open to others does not exclude them from being a factory. In our view the Stipendiary Magistrate was entitled to conclude that the area of the work fell within the expression of a "factory." The development was a workplace and was therefore deemed to be a factory by s.5(3).

22 Both Mr. Triay and the Attorney-General sought comfort from Council Directive 89/391/EEC of June 12th, 1989. We did not get any help from the Directive. Even if it be limited to the safety of employees, it does not follow that the law of Gibraltar should not provide for risk assessments relating to persons who were in and around the workplace.

23 We come next to the submission that the conviction should have been quashed on the basis that there was no evidence to support the conclusion that the respondent was conducting an undertaking within the meaning of that term in reg. 7(1)(b) of the Management of Health and Safety at Work Regulations. That was the second question posed in the case. Mr. Triay submitted that the undertaking was not that of the respondent; at best it was that of the owner of Montagu Crescent. We reject that submission. The respondent was the person who undertook to provide the safety equipment around Montagu Crescent. The respondent was the undertaking that carried out the erection of the fence and subsequently the scaffolding.

24 We allow the appeal and restore the conviction.

Appeal allowed.