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TAN SIAK HENG v. REX.

pp. Crim. Juris. (Murray-Aynsley, C.J.) April 24, 1950]

[Singapore — Magistrate's Appeal No. 183 of 1949]

Penal Code, s. 408 — Criminal breach of trust — dmissibility of evidence — Records produced by person ho did not compile them and recording facts of which had no personal knowledge — No proof of appro- iation of property.

This was an appeal against convictions on three arges of criminal breach of trust. The appellant was ployed by the Singapore Traction Co. Ltd. as a nductor on an omnibus. It was proved that he issued used ticket to a passenger who happened to be a tective. At the trial, the deputy accountant of the ngapore Traction Company produced certain records in attempt to show that the money received had not been id to the Company. The records were not compiled by e witness and he had no personal knowledge of the ets recorded.

Held, (1) that as the records were not compiled by e witness and as he had no personal knowledge of the corded facts, they should not have been admitted in idence; (2) that apart from the records, there was no idence of the failure to pay over the money, and the arges were not therefore proved.

AGISTRATE'S APPEAL.

Mark Morrison for the appellant.

A. V. Winslow for the Crown.

Murray-Aynsley, C. J. : — In this case the appel- nt was charged as follows :—

(1) That he, on or about 12.10.49 at Singapore, in e capacity of a bus conductor bearing No. 332 (old No. 5) employed by the Singapore Traction Co. Ltd., on nnibus No. STC 93 travelling between Telok Kurau and ulia Street being entrusted with property, to wit, the llection of fares from passengers, did commit criminal each of trust in respect of 10 cents, to wit, by failing deliver to the Company, the sum of 10 cents, paid to m by way of fare at or about 12.50 p.m. by Lim Geok on a passenger between Stamford Road and Chulia reet, for which he issued no ticket, and that he thereby mmitted an offence punishable under section 408 of the nal Code.

(2) That he, on or about 12.10.49 at Singapore, in e capacity of a bus conductor bearing No. 332 (old No. 5) employed by the Singapore Traction Co. Ltd., on nnibus No. STC 93 travelling between Telok Kurau and ulia Street being entrusted with property, to wit, the llection of fares from passengers, did commit criminal each of trust in respect of 10 cents, to wit, by failing deliver to the Company, the sum of 10 cents, paid to m by way of fare at or about 1.05 p.m. by Chan Kim ee a passenger between Bras Basah Road and Kallang ad, for which he issued no ticket, and that he thereby mmitted an offence punishable under section 408 of the nal Code.

(3) That he, on or about 13.10.49 at Singapore, in e capacity of a bus conductor, bearing No. 332 (old No. 5) employed by the Singapore Traction Co. Ltd., on nnibus STC No. 109 travelling between Telok Kurau d Chulia Street being entrusted with property, to wit, e collection of fares from passengers, did commit minal breach of trust in respect of 10 cents, to wit, failing to deliver to the Company, the sum of 10 cents paid to him by way of fare at or about 3.15 p.m. by Chan Kim Swee a passenger between Geylang, Lorong 25, and Joo Chiat Place for which he issued a used 20 cent ticket No. 3N 9632 and that he thereby committed an offence punishable under section 408 of the Penal Code.

The facts are as follows: The appellant was employed as a conductor on an omnibus. It was proved that he issued a used ticket to a passenger who happened to be a detective. An attempt was made to prove criminal breach of trust in respect of the sum of money tendered as a fare by calling the deputy accountant of the Company who produced certain records which had been compiled by others and recorded facts of which he had no personal knowledge. In the circumstances it appeared that the charge was not proved. The offence is failure to pay over money, not the issue of a used ticket. If the failure to pay over the money had been proved, the issue of the used ticket might have been very material evidence of a fraudulent intent, but, by itself it did not prove the commission of any offence.

The appeal was, therefore, allowed and the conviction quashed.

Appeal allowed.

IN THE MATTER OF MARIA HUBERDINA HERTOGH, AN INFANT; AMINA BINTE MOHAMED v. THE CONSUL-GENERAL FOR THE NETHERLANDS.

[Court of Appeal (Evans, Storr and Thorogood, JJ.) July 28, 1950]

[Singapore — Civil Appeal No. 7 of 1950]

Guardianship of Infants Ordinance (Cap. 50) — Rules of the Supreme Court, Order 52 rule 23 — Form of Originating Summons — Necessity to serve on infant and on persons interested.

This was an appeal against orders made by the Honourable the Chief Justice of Singapore, whereby it was ordered that Maria Huberdina Hertogh be delivered to the custody of the Social Welfare Department, Singapore, and subsequently to the custody of the Consul-General for the Netherlands. The application was originally made by an **ex parte** Originating Summons in which it was prayed that Che Amina binte Mohamed (the appellant in the appeal) be ordered to deliver up Maria Huberdina Hertogh into the custody of the Social Welfare Department, Singapore, or that such further or other order be made as to the custody or maintenance of the said infant. The affidavit filed in support of the Originating Summons did not show the age of the infant, the nature and amount of its property and the names and addresses of the infant's nearest relatives as required by Order 52 rule 23(2) of the Rules of the Supreme Court. Nor was the Originating Summons served on the infant or on Amina binte Mohamed, the person who had custody of her.

Held, that the pr non-service of necessar made thereon must the

Cases referred to :—

(1) *Mathieson*
(2) *In re D.* (
(3) *Craig v. K*
(4) *Hewitson*
(5) *Fry v. Mo*
(6) *In re Agar*
(7) *Besant v.*

CIVIL APPEAL.

Dr. C. H. With him) for the appell

K. Gould for th

Evans, J. : — T made in Chambers b and 19th May 1950. application of an Consul-General of th although made *ex* summons a form of from that by summo able, by reason of summons an appea brought there could tion on the originati binte Mohamed be Huberdina Hertogh Welfare Departmen or other order be ma ance of the said inf

This child was, belief of the Concel General, born on 2 the appellant, she v to her at a date father was then a the Japanese, and t mother. All the c disputed, and the da nowhere stated. It was occupied by th that the parents th has since brought Moslem. The app and settled in Kem where she has since time not stated, enq was at length foun said to have made

Held, that the proceedings were, by reason of the non-service of necessary parties, a nullity and the orders made thereon must therefore be set aside.

Cases referred to:—

(1) *Mathieson v. Napier and wife* 119 L.T.R. 18.
(2) *In re D.* (1943) Ch. 305.
(3) *Craig v. Kanssen* (1943) 1 K.B. 262.
(4) *Hewitson v. Fabre* 21 Q.B.D. 6.
(5) *Fry v. Moore* 23 Q.B.D. 395.
(6) *In re Agar-Ellis* 24 Ch. D. 317 at p. 326.
(7) *Besant v. Narayaniah* 30 T.L.R. 560.

CIVIL APPEAL.

Dr. C. H. Withers-Payne (*A. Muthuswamy* with him) for the appellant.

K. Gould for the respondent.

Evans, J. : —This is an appeal against two orders made in Chambers by the Chief Justice on 22nd April and 19th May 1950. These orders were made on an application of an unusual character made by the Consul-General of the Netherlands. This application, although made *ex parte* was made by originating summons a form of proceeding which is said to differ from that by summons, where such procedure is available, by reason of the fact that to an originating summons an appearance is generally required. As brought there could be no appearance. The application on the originating summons was that Che Amina binte Mohamed be ordered to deliver up Maria Huberdina Hertogh into the custody of the Social Welfare Department, Singapore, *or* that such further or other order be made as to the custody and maintenance of the said infant.

This child was, according to the information and belief of the Concellor of the Netherlands Consulate-General, born on 24th March 1937 and, according to the appellant, she was four years old when entrusted to her at a date nowhere specified in 1942. Her father was then a prisoner of war in the hands of the Japanese, and the girl was left in the care of her mother. All the circumstances of this transfer are disputed, and the date and place where it happened are nowhere stated. It took place in Java while that island was occupied by the Japanese. The appellant claims that the parents then abandoned the child, whom she has since brought up as her own daughter and as a Moslem. The appellant later left the island of Java and settled in Kemaman, Trengganu, a Moslem state, where she has since resided. After the war, at some time not stated, enquiries were made for the child who was at length found, in Kemaman. The parents are said to have made a formal request to the Netherlands Consulate to return the said infant to them. The request is not produced, the child is not in the custody of the Consulate, nor has the consulate any jurisdiction over it. Negotiations appear to have been opened in Kemaman through a Government Officer with the appellant, who seems to have been persuaded to leave her home and come to Singapore, either for the purpose of proceeding to Holland, or of continuing negotiations which could not, seemingly, have been very involved. When she was refused a passage with the child, and when the consulate, or the parents, insisted on separating the child from her, she refused to give the child up. It is now further alleged that the girl has attained puberty, and, as a Moslem, is *sui juris*. These proceedings were then instituted, and seem to have been instituted with altogether undue haste, for no better reason than to keep the infant within a purely casual jurisdiction, which has nothing to recommend it.

Application might have been made for a writ of *habeas corpus*, or under the former equity procedure. The appellant here largely relies on those exceptions developed in equity, which now generally apply, and which are stated by Swinfen Rady, L.J. in *Mathieson v. Napier and Wife*[1] :—

> "The case has been argued before us upon the footing that the father, notwithstanding the arrangement, has an absolute right to have the child returned to him. In my opinion that is not the law. After a father has actually surrendered the custody of his child to relatives who have agreed to bring it up, and has placed the child with them and handed over the custody of the child to such persons, if the court sees, after the child has been there some time, that to allow the father to revoke the arrangement and insist upon the return of the child to the parents would be injurious to the best interests of the child, then the court is not under any obligation to make an order for the return of the child. The proper order for the court to make is to leave the child where the parent originally placed it."

It would be difficult to draw any distinction between a necessity arising from the poverty of the parents, and a necessity arising from war.

This equity jurisdiction has been said to depend on the child being a ward of court, or entitled to property, and on the position of the Crown as supreme parent of the children of the realm, and it does not seem to have been until 1943, that this jurisdiction was declared by Bennett J., in the case of an alien Jewish refugee child, to arise from the child's need for protection *In re D.*[2], but it cannot be urged here that the child is in need of protection, and she certainly is not a refugee in this jurisdiction. It might however be questioned whether the rules of equity have any application to a Dutch child, of Javanese origin, at present resident in the State of Trengganu. Certain rules of Dutch law were proved by the Concellor, but they clearly do not cover all these considerations,

On the face of the proceedings there is some ambiguity as to the capacity in which the Consul-General acts. The claim is based purely on the parental rights of the father, but Counsel for the respondent states he does not act as agent for the father, but as consul. There is, in fact, no evidence of the father's ability to maintain the child, nor even of his continued existence. We are asked to take judicial notice of a consul's duties. While it may be usual for a consul to act for persons detained wrongfully, or against their will, there is no evidence whatever that the child is detained against her will, and she is clearly kept under some claim of right. While the evidence of proof may lie heavily on one detaining a child from its parent, the position with regard to the consul is not so clear.

It is not however in my opinion necessary to resolve these questions; for the respondent chose to proceed under the Guardianship of Infants Ordinance (Cap. 50) which is doubtless intended to cover the whole matter. While it might be difficult for respondent to bring his case exactly within any of the sections of the Ordinance, it may be conceded that he rightly brought his application under the Ordinance. The respondent's substantive application was for the removal of the infant from the jurisdiction, and for sending her to her father in Holland. The Originating Summons asks for a purely preliminary order, the substantive matter being introduced by a chamber summons in the originating summons after the order therein sought had been made. It is said that the Originating Summons remained alive by reason of the phrase in the first Order of 22nd April 1950 "until further order". The usual liberty to apply was not added, and in fact the Originating Summons asks for further order in the alternative to the order prayed and obtained. The procedure under the Ordinance is governed by Order 52 rule 23, and seems to have been largely ignored. That rule admits of proceedings on an originating summons, as here. Parties served therewith are entitled to enter an appearance, and the proceedings are delayed to enable them to do so (Order 51 rules 10 and 11). This Originating Summons was heard on the day it was issued. Rule 23 (2) requires that the evidence shall show three things: the age of the infant (a condition of the jurisdiction), the nature and amount of its property and the names and addresses of the infant's nearest relations.

None of these matters is shewn, or not fully, nor by good evidence. We need not, however, consider the effect of these omissions. Rule 23 (3) requires service on "the infant and on any other person appearing to be interested in or affected by the relief sought". We have no doubt that the appellant here is a person interested in and affected by the relief sought within that rule, and it would have seemed impossible for the respondent to argue otherwise; for the order of a preliminary nature, which is in fact the subject of his Originating Summons, is asked to be directed to her by name. In fact neither the infant nor the appellant was served.

It is unnecessary in our opinion to go into the distinctions between irregularities and nullities. Counsel referred to *Craig v. Kanssen*[3] in which Lord Greene M.R. said :—

> "In my opinion, it is beyond question that failure to serve process where service of process is required goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it has never been adopted in this country. It cannot be maintained that an order which has been made in these circumstances is to be treated as a mere irregularity and not as something which is affected by a fundamental vice."

That case followed *Hewitson v. Fabre*[4], one of the only other reported cases as to a nullity arising on a point of service. The Master of the Rolls quoted from the judgment in *Fry v. Moore*[5] where an order for substituted service was obtained when personal service could not have been effected, and the defect was considered a mere irregularity. That seems a much finer point. In all those cases service of some document was effected, or at least attempted, but here there is a complete omission, the only true remedy for which would be to recommence. The omission therefore seems, of necessity, to render the proceedings a nullity, and that being so no question of waiver can properly arise.

Several excuses are made for this omission. It is said that the Judge can dispense with service under Order 52 rule 23 (3) and, therefore, any procedure taken is valid without service; secondly that the appellant has waived the lack of service, and has been heard; and thirdly, as regards the infant, that her consent is immaterial.

Counsel's first argument would seem to leave no difference between dispensing with service by the Judge, and by the applicant. If the applicant dispenses with service then service is dispensed with, if there be any appearance of the court's acquiescence, whether the Judge's attention has, or has not, been drawn to the matter, and whether or not, he has considered it. A party has some choice as to his procedure and chooses at his own risk, nor is it for the Judge to advise him on his procedure. There is clearly no order dispensing with service.

If the defect be a nullity, no question of waiver can arise, but it would also seem that the proceedings have not been apt to raise the issues involved. If it be said that the appellant is given a chance to amplify her case, that result would seem unvoidable, nor may it be objectionable, when the party has not had all the notice to which the law entitles her. Moreover behind the non-service of the appellant, lies the non-service of the infant, who still remains unserved. It is said that it does not lie in the appellant's mouth to take this point, but we think the court must regard it. The appellant complains that the infant has never been heard at all, and all that is said in reply is, that she was once in chambers.

On his third point Counsel for respondent cites *In re Agar-Ellis*[6] where Brett M.R. referred to a rule that boys under fourteen and girls under sixteen cannot consent or withhold consent. The whole passage puts the rule in its context. His Lordship said :—

"It is the universal law of England that if any one person alleges that another is under illegal control by anybody, that person, whoever it may be, may apply for a habeas corpus, and thereupon the person under whose supposed control, or in whose custody, the person is alleged to be illegally and without his consent, is brought before the Court. But the question before the Court upon habeas corpus is whether the person is in illegal custody without that person's consent. Now up to a certain age children cannot consent or withhold consent. They can object or they can submit. But they cannot consent. Because the Court cannot inquire into every particular case, the law has now fixed upon certain ages — as to boys the age of fourteen, and as to girls the age of sixteen — up to which, as a general rule, the Court will not inquire upon a habeas corpus, as between the father and the child, as to the consent of the child to the place, wherever it may be. But above the age of fourteen in the case of a boy, and above the age of sixteen in the case of a girl, the Court will inquire whether the child consents to be where it is; and if the Court finds that the infant, no longer a child, but capable of consenting or not consenting, is consenting to the place where it is, then the very ground of an application for a habeas corpus falls away. I say, if it is the father who applies for the habeas corpus the habeas corpus is not granted."

This cannot be held to excuse non-service. A local court would in any case hesitate to accept ages of children in England as a certain guide here. The Court frequently distinguished that case, where the child was in the father's custody, from those in which she was not. The proceeding here is not upon a *habeas corpus,* nor by the father, but above all these considerations is the fact that this case, and the rule referred to, are long anterior to the rule requiring service, while the passage itself recognises that the child can object. This rule of procedure makes no limitation as to the age, though that might be a ground for dispensing with service. Moreover in the case already cited of *Mathieson v. Napier and Wife*[1] Eve J., whose judgment appears at the same place as the judgment on appeal before quoted, examined at length a child of ten and based his decision mainly upon the child's wishes in opposition to her father's rights. Again in *Besant v. Narayaniah*[7] where the father proceeded in his own courts, which would normally be those of the domicile of his infant sons seventeen and fourteen years of age, but who were then in England for their education, the Privy Council held that the sons should be heard. Lord Haldane in that case expressed opinions, clearer indeed than the decision, which the former opinion seems to sum up, when at the conclusion of the argument, he said (page 561) :—

"that as at present advised his view was that the proceedings in the Court below were altogether misconceived and brought in a wrong form, and for that reason ought to fail, without prejudice to any further proceedings which the father might take in proper form.

Mr. KENWORTHY BROWN asked whether the difficulty was that the boys were not represented in the Court in India.

THE LORD CHANCELLOR. — It is more than that. The boys not being represented, the issues were not properly framed, and the mind of the Court was not properly directed to the true question, but it was not the fault of the Court."

The same remark is not inapplicable to this case, going no further into the character of the defects.

In *Craig v. Kanssen*[3] the defendant was seeking to set aside the order obtained on the irregular proceedings. The plaintiff argued strenuously that the summons there was misconceived, and that the defendant should have appealed in accordance with the decision of Croom-Johnson J. Greene M.R. said "I say nothing on the question whether or not an appeal from the order, ... would be competent." The point had not, in fact, been disputed, but, in the event, it did not require resolving. Here the point is raised on appeal, but is obviously not the only point of substance the appellant sought to raise, either on her own behalf or for the infant. Even if it be admitted that the proper or better course is to take a summons to set aside the order, yet any irregularity involved could, apparently, be amply compensated for in costs. In this case, it does not seem to us, that the appellant should be debarred from raising the matter on appeal.

In our opinion therefore the proceedings here are, by reason of the non-service of necessary parties, a nullity, and the orders made thereon should be set aside. The appellant is entitled to her costs here and below.

Storr, J. : — I have had the advantage of reading the judgment of the learned President (Evans, J.) with which I agree and have nothing to add.

Thorogood, J. : —I have had the advantage of reading the learned President's judgment with which I agree. I would however add the following comments regarding these proceedings.

The respondent in this matter instituted proceedings under the Guardianship of Infants Ordinance (Cap. 50). There were other possible courses open to him but he chose this course and is bound by the rules applicable thereto.

An application under Cap. 50 may be made in accordance with the Rules of the Supreme Court and the applicant/respondent took out what purported to be an Originating Summons under Order 52 rule 23 (1) (b) of the Rules. Except in the matters set out in Order 5 rule 11, it is necessary under Order 51 rule 7 to indorse on the Originating Summons a memorandum requiring the defendant or other respondent to enter an appearance within eight days from the day of service or in special circumstances within such time as the Court or a Judge directs. The application in these proceedings is not one of those set out in Order 51 rule 11.

On the document purporting to be an Originating Summons no one is named as respondent or defendant and there is no memorandum as mentioned above. The document, for what it was worth, was served on no one despite the statutory requirement that it must be served on the infant and anyone appearing to be interested or affected. There is no record that a Court or a Judge gave any direction as to time or dispensing with service on any person or that any application for such a direction was made as provided for by Order 52 rule 23 (3). Order 51 rule 12 applies where an Originating Summons has not been served by the day fixed for attendance. No action in accordance therewith appears to have been taken.

The provisions of Order 3 rule 4 would apply to the Originating Summons had the Consul-General sued in a representative capacity but no action was taken under that rule as, so we were informed, the applicant acted in these proceedings as the Consul-General of the Netherlands and not as an agent for the father. As the learned President has said, the claim in this matter is, however, based purely on the parental rights of the father.

It would appear that the document purporting to be an Originating Summons was prepared in a hurry and without adequate care for which the only reason given was that the intended respondent had indicated that she proposed to return with the infant to her home in Kemaman, Trengganu. She had been induced to come from Kemaman and to bring the infant with her to discuss proposals that she and the infant should proceed to Holland. It was found impossible to carry out such proposals and the intended respondent was at liberty to return home with the child. As far as I am aware there was, and is, nothing to prevent proper proceedings being instituted in the Federation of Malaya. However these proceedings were initiated in order to keep the infant within a jurisdiction in which she but casually found herself. The learned President has already commented upon that action.

It was suggested that the respondent had waived the lack of service on herself, but there has been no waiver or any suggestion thereof by the infant. The infant has not been served and has had no opportunity of being represented. It would appear that the issues were not properly framed and that by reason of the hasty and irregular manner in which these proceedings were initiated and continued, the mind of the learned Chief Justice was not properly directed to all the matters which should have been considered. I agree that the proceedings are, by reason of the non-service of necessary parties, a nullity and the orders made thereon should be set aside with costs both here and below to appellant.

Order accordingly.

K. S. ANWARI v. LEE LING NEO

[App. Civ. Juris. (Evans, J.) April 4, 1950]

[Singapore — District Court Appeal No. 2 of 1950]

Control of Rent Ordinance, 1947, s. 14(1) — Validity of notice to quit — Subletting in breach of agreement — Refusal of application for adjournment — Right of appeal against ex parte order — District Court Rules, O. 25 r. 22.

In this case the appellant appealed against an order made for possession of certain premises at No. 37 Lorong M, Telok Kurau. The summons was issued on the 6th of August, 1949, returnable for the 22nd August, 1949, and after several adjournments, it was fixed for hearing on the 8th of December, 1949. On that day counsel appeared for defendant-appellant and applied for an adjournment, and a medical certificate regarding the appellant's health was produced. The application was refused and counsel for the defendant-appellant withdrew. The learned District Judge then heard the plaintiff and