Present: Pereira J.

1913.

"TIMES OF CEYLON" *v.* MARCUS.

235—P. C. Colombo, 39,564.

Copyright telegram—Offence under s. 2 of Ordinance No. 19 of 1898—Prosecution need not establish that the accused knew that the news had appeared in another paper—Burden of proof is on accused to show that publication was not wilful—Mens rea.

In a prosecution under section 2 of Ordinance No. 19 of 1898, where the intelligence contained in a message by electric telegraph, duly published in accordance with the Ordinance in a newspaper, is proved to have been printed and published by the accused within the prohibited time, such publication can be excused only if it is shown that a message similar to that received by the newspaper and in like manner sent was the local source of such intelligence.

In section 2 of the Ordinance the word "wilfully" is not used in the sense of "knowingly."

Mens rea is not an ingredient of the offence defined in section 1. What the Ordinance means is that when a person receives intelligence that, humanly speaking, could only have reached Ceylon by means of the electric telegraph, it is his duty before printing and publishing the intelligence within the prohibited time to trace the primary local source of the intelligence, and to print and publish the intelligence, if he desire to do so, only if the source aforesaid happen to be a source other than a newspaper in which a copyright telegram containing the same intelligence appears.

THE accused in this case was charged under section 2 of Ordinance No. 19 of 1898 with having wilfully caused to be printed and published in *The Ceylonese* an item of telegraphic news which was published in the *Times of Ceylon* and was fined Rs. 100. He appealed.

H. A. Jayewardene (with him *A. St. V. Jayewardene*), for the accused, appellant.—There is nothing to show that the accused took over the news from the *Times of Ceylon*. The two paragraphs are not the same.

The accused says that he got the news from a gentleman at a hotel. [Pereira J.—Why don't you prove that the information was received by others as well ?]

There is nothing to show that the accused published the news "wilfully." The word "wilfully" means "knowingly." In a case of this kind the prosecution should prove that the accused knew at the time he published this news that he was contravening the

1913.

"Times of Ceylon" v. Marcus

Ordinance in publishing it—that he published it after knowing that the telegram had appeared in another paper. [Pereira J.—The word "wilfully" is used as opposed to "accidentally."]

Even if the word "knowingly" is not in the section, it ought to be read into it. It is not always that a statute states all the ingredients of an offence. There are some ingredients which are common to all offences, and they ought to be introduced into the section even if not expressly stated. See *Queen v. Tolson.*[1]

Mens rea is a necessary element in all offences.

The word "wilfully" should be read not only with "print and publish," but with "matter contrary to the provisions of the Ordinance." Counsel cited *Capper v. Wayman et al.*,[2] and asked that the point be reserved for the consideration of two or more Judges.

F. H. B. Koch, for the complainant respondent (not called upon).

Cur. adv. vult.

April 28, 1913. PEREIRA J.—

In this case the accused has been convicted, under section 2 of Ordinance No. 19 of 1898, of having wilfully caused to be printed and published certain matter contrary to the provisions of the Ordinance. Under the Ordinance, when once a message by electric telegraph from any place outside the Island, lawfully received by any person, has been published by him in a newspaper circulated in the Island, no other person may, without the consent in writing of the first-mentioned person, print or publish, or cause to be printed or published, until after the expiration of a certain period, such telegram or the substance thereof or an extract therefrom. The publication of the whole or any part of such telegram or of the substance thereof or (excepting the publication of any similar message in like manner sent) of the intelligence therein contained or any comment upon, or reference to, such intelligence, it is enacted, is to be deemed to be a publication of the telegram itself.

In the course of the argument in appeal it was mentioned that the publication in the accused's paper was not the same as that in the *Times of Ceylon*. That may be so. By mere comparison of the two publications it can hardly be said that the accused has taken over the particular telegram or the substance of or an extract from the particular telegram that appeared in the *Times of Ceylon;* but, manifestly, the intelligence contained in that telegram appears also in the paragraph complained of in the accused's paper and the publication of that intelligence can be excused only if it is shown that a message similar to that received by the *Times of Ceylon* and in like manner sent is the local source of that intelligence.

[1] *23 Q. B. D. 168.*

[2] *(1902) 6 N. L. R. 58.*

Now, it was argued that the accused did not wilfully cause to be printed and published the intelligence mentioned above, and I understood the contention to mean that the word "wilfully" was used in the Ordinance in the sense of "knowingly," that is to say, in order to constitute the offence under section 2 of the Ordinance, it should be shown that the accused party knew at the time he caused to be printed and published the intelligence in question that the same intelligence had appeared in a newspaper in the form of a telegram from outside the Island. If that is the meaning of the section, the burden of proving knowledge on the part of the accused must obviously rest on the prosecutoin, and it would be a matter of extreme difficulty to discharge the burden. But the word used in the Ordinance is "wilfully," and, so far as I am aware, that word has never been interpreted to signify "knowingly." Indeed, counsel for the appellant was not able to cite a single case in which the word has been so interpreted. There are cases in which the word "wilfully" has, with due regard to the object of the statute in which it occurs, been given a special meaning. In *Smith v. Barnham*,[1] for instance, it was held that, in the particular enactment then under consideration, it had the meaning of "wantonly" or "causelessly"; but, generally speaking, it means, as observed by Bramwell L.J. in the case of *Lewis v. The Great Western Railway*,[2] something to which the will is a party, that is to say, something opposed to "accidental" or "negligent." It may so happen that the editor or the manager of a newspaper may pass a communication on to the printing department of his establishment accidentally, that is to say, in circumstances, easily conceivable, in which, without even being guilty of negligence, the contents of the communication are not noticed by him. In such a case he would not be acting wilfully, and in order that the prosecution may not be embarrassed by such a defence, the Ordinance has provision throwing the burden of proving and establishing such a defence on the accused. The Legislature has wisely enacted by section 5 that proof that any person is owner, or is acting, or appears to be acting, as editor or manager, of any newspaper in which there is any publication contrary to the provisions of the Ordinance, shall be *primâ facie* evidence that such person has wilfully caused such unlawful publication. So that the burden of proof in the case of a defence that the printing and publication were not wilful but merely accidental or negligent is entriely on the person charged when it is proved that he is the editor, manager, &c., of the newspaper in which the prohibited intelligence has appeared.

It was further argued by the counsel for the appellant that the word "wilfully" must be read in connection not only with the words "print and publish," but with what follows, namely, "matter contrary to the provisions of the Ordinance." This brings me to the question—What is matter contrary to the provisions of the

[1] *1 Ex. D. 419.*

[2] *3 Q. B. D. 195.*

1913.

PEREIRA J.

"Times of Ceylon" v. Marcus

Ordinance? It is (confining myself to matter relevant to the questions involved in this particular case) the printing or the publishing of intelligence mentioned in an electric telegram that has already been published in a newspaper. Counsel argued that the Ordinance must be understood to mean that it prohibited here the printing or the publishing by any person knowingly of such intelligence, although it does not expressly say so, and he cited cases laying down the general principles of law on which *mens rea* was deemed to be an essential ingredient in every offence. No doubt, as observed by Stephen J. in the case of *The Queen v. Tolson*,[1] it is the practice of the Legislature to leave unexpressed some mental elements of crime; but at the same time it has been held that the word "knowingly" is not to be read into a merely statutory offence, "unless it is clear that the Legislature intended some such qualification" (see *Betts v. Armstead*[2]); and while in *Sherras v. De Rutzon*[3] there was a re-assertion of the doctrine that *mens rea* is an essential ingredient in every offence, Wright J., having mentioned two cases in which bigamy and abduction had been held to be exceptions to this rule, proceeded to observe as follows: "Apart from isolated and extreme cases of this kind, the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of Lush J. in *Davies v. Harvey*,[4] are not criminal in any real sense, but are acts which, in the public interests, are prohibited under a penalty." The act prohibited by section 1 of Ordinance No. 19 of 1898 is clearly such an act, the object of the Ordinance being to protect and encourage newspaper enterprise, and thereby, in effect, to benefit the public; and it was not therefore intended that *mens rea* should be one of the ingredients of the act. It may be supposed by some that this construction of the Ordinance may work hardship. I say no. What the Ordinance means is that when a person receives intelligence which, humanly speaking, could only have reached Ceylon from outside by means of the electric telegraph, it is his duty, before printing and publishing the intelligence within the time mentioned in the prohibition, to (I will not say read and examine every newspaper published in the Island, but) trace, through the medium of his informant or otherwise, the primary local source of such intelligence, and if it happen to be a source other than, and independent of, a newspaper in which a copyright telegram containing the same intelligence appears, then alone to print and publish the intelligence within the time referred to above if he desires to do so.

No appeal was made to me for a reduction of the sentence, nor is there any such appeal in the petition filed.

For the reasons given above I affirm the conviction and sentence.

Affirmed.

[1] *23 Q. B. D. 168, 187.*
[2] *20 Q. B. D. 771.*
[3] *(1895) 1 Q. B. 918.*
[4] *9 Q. B. 433.*