

1955

*Present: de Silva J.*

M. M. R. DE SILVA *et al.*, Appellants, and THE REGISTRAR OF COMPANIES, Respondent

*S. C. 382-384—M. C., Colombo, 45,393A*

*Company Law—Annual general meeting—Failure to hold it—Charge against directors for failure to furnish annual return to Registrar of Companies—Inference of guilt—"Knowingly and wilfully"—Burden of proof—Companies Ordinance No. 51 of 1938, ss. 106 (1), 108 (1) and (4), 110, 316.*

The directors of a company were charged under section 108 (4) read with section 106 of the Companies Ordinance with having failed to forward to the Registrar of Companies the annual return for a certain year as required by section 108 (1). The accused pleaded that no general meeting was held during the relevant year and that it was, therefore, impossible to furnish the return. They did not, however, establish that the failure to hold the general meeting was not due to any default on their part.

*Held*, that the failure to hold the general meeting was due to the default of the accused themselves and that they were not entitled, therefore, to rely on their own default as an answer to the charge.

*Held further*, that the burden was on the accused, as directors, to establish that no blame could be attached to them for failing to carry out the statutory duties cast on them.

**A** PPEALS from a judgment of the Magistrate's Court, Colombo.

*H. W. Jayewardene, Q.C.*, with *K. Sivasubramaniam*, for the 1st accused appellant.

*G. D. Welcome*, for the 2nd accused appellant.

*W. P. N. de Silva*, for the 6th accused appellant.

*A. E. Keuneman*, Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*

June 20, 1955. DE SILVA J.—

The three appellants along with three others who were all described as Directors of "The Golden Dawn Night Club", being a Company having a share capital, were charged under section 108 (4) read with section 346 of the Companies Ordinance No. 51 of 1938 (hereinafter referred to as the Ordinance) with having failed to forward to the Registrar of Companies the annual return for the year 1952 as required by section 108 (1) of that Ordinance. The charge against the 4th and 5th accused was withdrawn at a very early stage of the proceedings. The learned Magistrate acquitted the 3rd accused as the latter established to the satisfaction of the Court that he had resigned from the Board of Directors of the Company in October 1952. The three appellants were convicted of the charge and the learned Magistrate imposed a default fine of Rs. 25 for every day from 1.2.1953 on each of the 1st and 6th accused while the 2nd accused was ordered to pay a default fine of Rs. 5 a day from the same date.

Section 110 (1) of the Ordinance enacts that a general meeting of every Company shall be held once, at the least, in every calendar year and a failure to do so is made punishable under section 110 (2). Every Director or Manager who is knowingly a party to such default is guilty of an offence. Section 106 (1) provides that an annual return be forwarded to the Registrar of Companies, containing, *inter alia*, the particulars set out in that section. According to section 108 (1) the annual return must be completed within twenty-eight days after the first or only general meeting in the year and the company must forthwith forward to the Registrar of Companies an authenticated copy of such return. The annual return should also include a copy of the balance sheet together with the copy of the Auditor's report on it. Sub-section 4 of this section enacts that on failure to comply with the provisions of this section or either of the two preceding sections "the Company and every officer of the Company who is in default shall be guilty of an offence and shall be liable to a default fine". Section 346 (1) deals with the nature of the default fine that is to be imposed while sub-section 2 of that section states that the expression "officer who is in default" means "any director, manager, secretary or other officer of the Company, who knowingly and wilfully authorizes or permits the default, refusal or contravention mentioned in the enactment".

That no annual return for the year 1952 was sent is conceded by the appellants. The annual return has to be completed within twenty-eight

days after the general meeting in that year. It is also admitted that no general meeting was held during the year 1952. The last date on which the general meeting could have been held during that year was the 31st of December 1952. Therefore the last day for completing the annual return was the 28th of January 1953. The learned Magistrate allowed three days for the purpose of forwarding the return to the Registrar of Companies. Accordingly he held that the default had taken place on 1.2.1953. His finding on this point cannot be questioned.

At the trial the appellants sought to prove that they had ceased to be directors prior to the date of default. The learned Magistrate, however, rejected that contention giving reasons which, if I may say so, are very convincing.

It was also contended on behalf of the appellants that they cannot be convicted of failing to send an annual return as contemplated by section 108 (1) because it was impossible to forward such a return as no annual general meeting was held during the year 1952. This argument is based on the ground that section 108 (1) provides that the annual return is to be completed within 28 days of the holding of the general meeting. The Counsel for the appellants, therefore, submitted that it was impossible to furnish the return as no general meeting was held. In support of this contention Mr. Jayawardene relied on *Dorte v. South African Super-Aeration, Ltd.*<sup>1</sup> In that case the Company was charged before the Aldermen of the City of London for failing to send the annual return. The Company pleaded that it was impossible to furnish the return as no general meeting was held during the relevant year. The Aldermen held that the duty cast on the Company to furnish an annual return was impossible of performance as no general meeting was held and dismissed the summons. In appeal a Bench of three judges one of whom was Lord Alverstone C.J. without calling on the Counsel for the Company affirmed the decision of the Aldermen and dismissed the appeal. As the arguments and the judgment in that case have not been reported it is not possible to say what the grounds of that decision were. In a subsequent case *Park v. Lawton and another*<sup>2</sup> a contrary view was taken. Lord Alverstone C.J. was also one of the judges who decided that case. In that case two directors of a Company were charged before the Justices of Hertfordshire for failing to send an annual return. They were acquitted by the Justices on the ground that as no annual general meeting was held it was impossible to furnish the annual return. In appeal the acquittal was set aside and the accused was convicted. In that case Lord Alverstone C.J. said "the cases of *Gibson v. Burton*<sup>3</sup> and *Edmonds v. Foster*<sup>4</sup> are clear authorities that a person charged with an offence under section 26 is not entitled by way of defence to plead the impossibility of complying with Section 26 by reason of no general meeting having been held, at any rate if the person charged was also a party to the default in holding the meeting; in other words, a person charged with an offence cannot rely on his own default as an answer to the charge". In the present case too the appellants are seeking to avail themselves of their own default to establish their innocence. It is true that in *Park v. Lawton* the accused had been convicted already

<sup>1</sup> 20 *Times Law Reports* 425.

<sup>2</sup> (1911) 1 *K. B. D.* 588.

<sup>3</sup> (1874-1875) 10 *Q. B. D.* 329.

<sup>4</sup> (1875) 44 *L. J. M. C.* 41.

for failing to hold the annual general meeting. In the present case although the appellants were not charged for failing to hold the general meeting it is clear on the evidence led that the failure to hold the general meeting in 1952 was due to the default of the appellants themselves. I am unable to agree with the submission made by Mr. Jayawardene that the Registrar of Companies is not entitled to maintain the present charge because the appellants were not charged with failing to hold a general meeting. It is not sufficient in answer to the present charge for the appellants to say that they were unable to comply with the provisions of section 108 (1) because no general meeting was held. They have to proceed further and establish to the satisfaction of the Court that the failure to hold the general meeting was not due to any default on their part. It is true that the appellants were confronted with certain difficulties in the matter of holding a general meeting but one cannot say that those difficulties were insurmountable. Those difficulties however must be taken into consideration in passing sentence.

Mr. Jayawardene also argued that there was no evidence that the appellants had "knowingly" and "wilfully" permitted the default. The appellants were directors of the Company during the whole of the relevant period. The directors were responsible for the conduct of the business of the Company. The holding of a general meeting and the furnishing of the annual report are important matters which have to be attended to by a Company. The directors being the persons who are entrusted with the transaction of all business relating to the Company must be held *prima facie* responsible for any default on the part of the Company. The burden is on the directors to establish that no blame could be attached to them for failing to carry out the statutory duties cast on them. In this case the appellants have failed to discharge that burden. Therefore the convictions must be affirmed.

The fines imposed on the appellants are far too severe. The registered office of the Company was at No. 161 Turret Road, Colombo. The business of the Company was also transacted there. These premises had been taken on lease by the Company. Mr. Jayawardene submitted that the most valuable asset of the Company was this lease. On a writ issued by the District Judge, Colombo, the Company was ejected from these premises on 20.12.1952. The first accused appellant has stated that he had decided to hold the annual general meeting before the end of December, 1952, and that he failed to hold that meeting as the Company was ejected from these premises. His evidence on this point appears to be true. Even in the previous years the annual general meeting was held at the end of December. It is also quite possible, as stated by the 1st accused, that when the Company was thrown out of the premises some of the papers relating to its business were either lost or got misplaced. In these circumstances it is sufficient if only a nominal fine is imposed on the appellants. I set aside the default fines imposed on them by the Magistrate and substitute therefor a default fine of 25 cents a day from 1.2.1953 on each of them. Subject to this variation the appeals are dismissed.

*Convictions affirmed.  
Sentence varied.*