Crim.A. 156/63

ATTORNEY-GENERAL

v.

ZVI OESTREICHER

In the Supreme Court sitting as a Court of Criminal Appeal.
[October 1, 1963]
Before Agranat D.P., Sussman J. and Halevi J.

Administrative law - state of emergency - power to make secondary legislation on essential activities - derogation of powers of legislature.

The respondent was charged with an offence against the Commodities and Services (Control) (Transport of Bread) Order, 1960, for transporting bread in open dirty boxes on the roof of an automobile. He admitted the facts but denied liability on the ground that the Order was *ultra vires* the Minister of Health who had issued it, according to the terms of the enabling Law, which confined the power to make Orders regarding specified essential matters and in a period only during which a state of emergency prevailed. At first instance this plea was rejected and he was convicted and sentenced, but on appeal to the District Court, the plea was accepted and conviction and sentence were overturned. The Attorney-General appealed.

Held (1) An activity essential for ensuring orderly daily life in peacetime can well have the same character during a state of emergency.

(2) Since, in view of the existing state of emergency in the country, the legislature found it necessary to derogate from its own powers and set up other law-making machinery to ensure that essential activities be effectively and speedily regulated, the measures taken are valid and for that reason alone are unchallengeable.

(3) An activity may be essential not only economically but also from a medical or hygienic viewpoint.

(4) *Obiter,* it is desirable that the legislature itself regulate in the normal way those matters which have no direct connection to the dangers stemming from a state of emergency.

Israel cases referred to:

(1) H.C. 222/61 - *Chemo-Ta'as Haifa v. Minister of Commerce and Industry* (1962) 16 P.D. 297.
(2) H.C. 300/60 - *Zvi Gottlieb v. Minister of Commerce and Industry* (1960) 14 P.D. 2182.
(3) H.C. 60/60 - *Shmuel Reisky v. Director-General of the Minister of Health* (1960) 14 P.D. 1373.

G. *Bach.* Deputy State Attorney. for the appellant.
Y. Weins for the respondent.

AGRANAT D.P. The respondent was convicted in the Magistrate's Court, Tel Aviv of an offence under section 39(a)(1) of the Commodities and Services (Control) Law, 1957 (hereinafter called "the Law"), in that he transported bread on the roof of an automobile in violation of paragraph 3 of the Commodities and Services (Control) (Transport of Bread) Order, 1960 (hereinafter called "the Order"), which provides as follows:

> "A person shall not transport bread save in a closed, dry, and clean case in which sufficient ventilation openings have been installed."

The particulars of the offence, as described in the information, are that on 29 September 1961 in a street in Ramat Gan, the respondent transported "on the roof of automobile No. 00622 open, dirty boxes in which there were *hallahs."*

At the trial in the Magistrate's Court, counsel for the respondent admitted the truth of these particulars but denied his client's guilt, basing himself on the legal argument that in prescribing the said paragraph 3, the Minister of Health who issued the Order exceeded the authority granted him in the Control Law. In his reasoned judgment, the learned Magistrate dismissed this argument and therefore convicted the respondent of the said offence and fined him IL. 50 or ten days imprisonment in lieu thereof. The respondent appealed from

this result to the District Court and there his counsel repeated the argument of *ultra vires* which had been dismissed by the Magistrate. This time the argument was accepted, and the conviction and sentence were overturned. Now it is incumbent upon us to consider the appeal from this judgment filed by the Attorney-General after receiving leave for the purpose.

It is my opinion that the appeal before us should be allowed.

Before I consider the reasoning which guided the learned judges of the District Court, I should cite the provisions of the Control Law concerning the power of the Minister of Health to enact the said Order which relate to our case.

(1) Section 5(a) of the Law provides that "A Minister may regulate by order - (1) the production, safekeeping, storage, transport, transfer from place to place or from hand to hand, distribution, sale, acquisition, consumption, treatment and use of a particular commodity, including the slaughter of cattle". (See also section 15 as to the auxiliary powers granted the Minister for the purpose of implementing the powers mentioned in the Second Chapter of the Law.)

(2) The term "Minister" is defined in section 1 as "any member of the Government, in so far as the Government has transferred to him the power to implement this Law", and section 47(a) states that "the Government may confer on any of its members the power to implement this Law and to make regulations as to any matter relating to its implementation." Pursuant to the last section, the Government granted the Minister of Health the power to implement the provisions of the Second Chapter of the Law which also included the aforementioned section 5(a)(1) (see the notice of the Government of 4 February 1958, published in *Yalkut HaPirsumim,* No. 584 of 13 February 1958, p. 566). It should be noted that this power was also granted *(inter alia)* to the Minister of Agriculture and the Minister of Commerce and Industry (ibid.).

(3) Section 3 restricts the exercise by a Minister of "his powers under this Law" to instances in which "he has reasonable grounds, for believing that it is necessary so to do for the maintenance of an *essential activity* or the prevention of profiteering". Section 1 defines the term "essential activity" as "any activity which a Minister regards as essential

to the defence of the State, public security, *the maintenance of regular supplies* or regular services, the increase of exports, the intensification of production, the absorption of immigrants, or the rehabilitation of discharged soldiers or war invalids". In interpreting the provisions of the said section 3, this Court has said, *per* Berinson J., that the question which may arise in connection with this section "is only factual in two senses: first, whether the conditions listed therein actually exist, and second, whether the Minister gave thought to them and was satisfied that they existed before deciding to issue the order" *(Chemo-Ta'as* v. *Minister of Commerce and Industry* (1) at 300).

(4) Finally, pursuant to section 2, the Law will apply "only during a period in which a state of emergency exists in the State by virtue of a declaration under section 9(a) of the Law and Administration Ordinance, 1948". No one disputes that such a state exists in the State to this day by virtue of such a declaration made long before the Law was enacted.

The reasoning of the District Court judges by which they found that the Minister of Health exceeded his authority when he enacted the provision of paragraph 3 of the Order is, in summary, as follows:

(a) The power granted the Minister in section 5(a) as above - including the power to regulate the matters mentioned in paragraph (1) - is tied to the state of emergency which prevails in the State and therefore to the fact of "irregular" life characteristic of such a period. The same thus holds true for the considerations which must lie behind his exercise of that power for purpose of maintaining an "essential activity"- that is to say, there must be a connection between them and such state of emergency.

(b) As a result, to the extent that the sole objective of maintaining "an essential activity" is also valid in a period of peace and is necessary for purpose of improving that "regular" daily existence which typifies it, the exercise of the stated power has no place since it has no connection to the state of emergency.

(c) In our case, it is readily apparent that only hygienic-sanitary considerations were behind the enactment of paragraph 3 of the Order. Since these considerations are inherent in an objective which also has its place in a period of peace - the objective of protecting public health - there is again no connection between it and the special state because of

which the Minister of Health was granted the power under consideration. It follows that enactment of the said provision constituted a departure from the framework of the Law.

(d) If we do not give the statutory provisions concerned such a limited interpretation, it would detract from the legislative power given to the sovereign legislature: the Knesset. On the other hand, such an interpretation does not empty of meaning the Minister of Health's powers in this area since, to the extent that health matters are bound up with the conditions of a state of emergency, he may take them into consideration when deciding whether the exercise of his power is necessary for maintaining "an essential activity" for which he sees a need.

I will quote a few sections from the District Court judgment which reflect the substance of the above reasoning.

> "It is true, indeed, that the state of emergency ... can include any period for which the Government finds this name appropriate, i.e., a state of affairs which is still so far from normal conditions of life and society that we are unprepared to recognize that we have already reached the peace and serenity of regular life ... but it is necessary for the Order under consideration ... to have some connection with some irregular state."

> "The Law under consideration does not speak of health explicitly. It is clear that the matters designated therein, such as security and supply of services and so on, are interrelated. Many health matters can be connected to these, such as health installations for a possible state of emergency. It is no wonder that the Minister of Health received power for secondary legislation under the Law. That is not to say that all matters of daily health became a question of an essential service or of State security. On the other hand, the annulment of the Order does not at all mean that the powers of the Minister of Health under this Law will be void of content."

> "In the present case the Minister exercised his powers for ordinary legislation against a background of regular life."
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> "The sanitary control of the transport of bread in the manner prescribed by the Order is, from a civilized perception of life, essential to a very regular style of life and without connection to any period of emergency. We need not decide whether this Order could have been issued as secondary legislation under the Public Health Ordinance or by means of licensing conditions under the Trades and Industries Ordinance... Possibly there is a need to amend the Laws under consideration. However, that is a matter to be brought before the Knesset, and the Minister of Health may not use special powers for that purpose."
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> "By a strict construction of the key words in the law, we protect the spirit of Knesset legislation."

In my opinion, the foregoing reasoning suffers from one basic fallacy. I am ready to agree - for the purpose of this appeal - with the view that when the Minister is about to exercise his authority, he must be satisfied that it is necessary for maintaining an activity which is essential not only from the standpoint of one of the purposes mentioned in the definition of the Law (see *supra)* but also having regard to the state of emergency which prevails in the State. Yet, if these conditions obtain, it is illogical to say that since the activity in question could be regarded as essential for ensuring normal daily life in peacetime as well, it can no longer be so regarded during a state of emergency, and heaven forbid therefore that the Minister exercise the power granted him by law in order to maintain it. As Mr. Bach, Deputy State Attorney, argued, concern for ensuring a regular supply of water is essential to the population at all periods and times; for this reason alone, should not the activity necessary to regulate matters in this area be regarded as essential when such a state prevails? The answer begs itself.

If indeed it is asked why the legislature restricted application of the Law - and, consequently the exercise of the powers mentioned therein - solely to a period of emergency such that when that ends the Minister is no longer authorized to exercise them even for purposes of maintaining activities which meet the "essential" requirement, the

answer must be as follows: The Knesset saw need - in view of the existence in fact of a state of emergency in the State - to establish legislative machinery which could ensure that the essential matters with which the Law deals are regulated as far as possible in a manner which is both effective and speedy. Thus, it granted Ministers power of very broad scope to enact secondary legislation in the area concerned - power which it would not have been proper (so must our assumption be) to take from the sovereign legislature during a period of peace. The fact that the Knesset bestowed this legislative power only upon Ministers - as opposed to officials - is a sign that it was cognizant of the broad scope of the power but found it justified by the need to establish - having regard again to the essential objectives of concern to the State during a state of emergency - legislative machinery to serve those objectives in the manner most appropriate to the conditions of this state.

If this explanation for the legislative objective is correct, then it can be understood why the application of the Law was restricted to a state of emergency period. However, the point is that such an explanation tends to deny value to the viewpoint which says that the grant of the legislative power under consideration was intended to ensure maintenance of an activity which is "essential" only during a period as aforesaid and therefore this requirement is not met if the activity is of such a nature *also* during peacetime.

As will be recalled, under the definition in section 1 of the Law, the Minister may regard as "essential" an activity necessary "for the maintenance of regular supplies". Indeed it is difficult, if not impossible, to imagine an activity more essential than that required to ensure the regular supply of a commodity as important for residents - especially in a state of emergency - as bread. Surely it is clear that this specific objective also embraces the need to regulate that the transport of bread will be carried out under conditions guaranteeing that this commodity will reach residents-consumers in an edible form, and that not only that it should not be wasted but - and this is important - also that it is not injurious to public health. Otherwise, the supply of bread would be deficient and irregular. It follows that the Minister of Health lawfully enacted the provisions of paragraph 3 of the Order and did not then exceed in any manner the authority granted him by section 5(a)(1) of the Law.

I find support for my opinion in the judgment in *Gottlieb* v. *Minister of Commerce and Industry* (2), to which our attention was drawn by the Deputy State Attorney. That

case dealt with an order issued under section 5 of the Law, which imposed a prohibition on the use of "food colouring" in connection with the manufacture of sausages. One of the grounds for this prohibition was "to prevent the use of food additives which may be injurious to health" (at p.2183). It was argued by counsel for the applicant that this ground was unreasonable. The argument received the following reply from the President of the Court (Olshan J.):

> "'Regular supply' is a very broad concept; first of all, it means concern for an adequate supply provided without interruptions in an orderly fashion. 'Regular supply' also means unadulterated supply, and this term is so broad that it even includes the grounds which, according to the applicant, brought about publication of the Order" (at p. 2184).
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> "The definition of the term 'regular supply' is very broad, and I have not heard sufficient reason from counsel for the applicant to arouse doubt in me that the Order under consideration exceeds the framework of the Law under which it was issued" (ibid.).

If the ground of prevention of injury to public health was sufficient to allow the said prohibition as an essential activity necessary for maintaining an unadulterated supply of sausages, the same rule applies to the sanitary ground for the provision which is the subject matter of the present case and whose purpose is also to ensure an unadulterated supply of bread.

In this court, Mr. Weins, counsel for the respondent, emphasized that he no longer supports the reasoning of the District Court. Yet, the truth is that most of the arguments raised before us are in the same vein but dressed up differently. I will therefore mention here only one argument which he raised and which possibly does not come within this description. The argument - if I understood Mr. Weins properly - is that in as far as the Minister of Health was granted the powers mentioned in the Second Chapter of the Law, he may exercise them only in respect of those matters which he would deal with by the nature of his function, that the concept "regular supply" implies economic objectives exclusively, such as concern the quality of the commodity in respect of which the arrangement of supply is in effect, regulation of its just distribution, ensuring that a

reasonable price is fixed for it and like objectives, but that concern for regular supply (including the manner of transport) of bread - as opposed, for example, to concern for the regular supply of medical commodities - is thus not a matter of regulation for which the Minister of Health was granted the said powers.

I cannot, accept this argument. As to the second part of the argument, it has already been explained above that the term "essential activity" means for us any activity necessary to ensure that the supply of commodities such as foodstuffs - including their manufacture and transport - is carried out in a manner which does not affect public health. If that is the case, then it is logical - and this is the answer, to the first part of the argument - that it is precisely for the Minister of Health to exercise the power granted him in the Second Chapter of the Law in order to achieve the said objective.

To avoid misunderstanding, I should add that, in my opinion, no legal importance attaches to the question of which Minister (among the Ministers authorized by the Government) exercises some of the powers of control mentioned in the Second Chapter, provided that his action comes within the framework of one of these powers and that the conditions of which section 3 speaks are met. Indeed, it is very possible that the Government acted as it did in this matter with the intention that the said Ministers share among themselves the exercise of those powers in accordance with the areas with which they are accustomed to deal; it is also not impossible that an arrangement in this spirit was made among them. Nevertheless, that has no significance from the standpoint of the Law and is of no concern to the court. Furthermore, it also cannot be assumed that it is possible to carve out boundaries, as aforesaid, for each and every matter. Thus, behind the prohibition which was the subject of the Order dealt with in *Gottlieb* (2) stood an economic in addition to the "health" consideration (at p.2183), and that Order was issued by the Minister of Commerce and Industry (Kovetz HaTakanot 5720, No. 994, p. 809). The comments of Cohen J. in *Reisky* v. *Director-General of Ministry of Health* (3) (at p. 1379) on which counsel for the appellant relied are irrelevant here. There the statutory provision in issue, granted exemption from import duty for motor vehicles built in such manner as to be "designed for medical rehabilitation" subject to the condition that they "were imported with the prior approval of the ... Director-General of the Ministry of Health". In light of the transparent purpose of this condition, one can with all respect agree with Cohen J. when he says that "the very authorization of the Director of the Ministry of Health in this regard

proves that only considerations of health and medicine may be legitimate considerations before him". It is obvious that no analogy can be drawn from these comments to the various areas in respect of which the Ministers may exercise the broad powers granted them under the Law which is the subject of our consideration.

My final conclusion thus is that the appeal should be allowed, the judgment of the District Court set aside, and the judgment (conviction and sentence) of the Magistrate's Court reinstated.

Before concluding, I wish to make the following observation. For the purpose of my reasoning above, I have not taken into account one of the arguments of the Deputy State Attorney, that if it becomes clear that the declaration as to the existence of a state of emergency in the State still remains in effect, this Court should then not review whether a connection exists between this state and the exercise by the Minister of some of the powers concerned. I think, however, that whether or not a basis exists for this argument, it would be well for the Minister possessing the power to consider seriously whether the said state really requires the exercise thereof in this or-another concrete situation. I want to say that from a general standpoint I have a certain sympathy for the approach of the District Court even though I have tried to show that the Law makes it impossible to support it in the instant case. My sympathy stems from the fact that the state of emergency has existed by virtue of the aforesaid declaration for more than fifteen years; and even though far be it from me to give a hand to creating an atmosphere of serenity as to the state of security and the economy of the country at the present time, it is also true that it is difficult over such a long period to have citizens maintain the feeling of "tension" usually inherent in the existence of the aforesaid state as regards each and every matter. Therefore, it is desirable that those matters requiring regulation without any connection to the dangers stemming from the state of emergency should be regulated by ordinary legislation of the Knesset which is not necessarily intended for a state of emergency even if, as to one matter or the other, the sovereign legislature comes to realize that it is better to transfer the power to enact secondary legislation to the executive authority, and then prescribes such a solution by law. It is to these matters that my comments are directed, because in respect thereto it would be well for the Ministers to exercise sparingly the broad and drastic powers granted them in the Control Law. (A violation of the provision of the Order in question - as any violation of a provision prescribed by regulation or order enacted under the Control Law -

constitutes a felony carrying a maximum penalty of seven years imprisonment.) In this connection, the words of the learned C.K. Allen (in his book, *Law and Orders,* second edition, p. 66) are worthy of note, that as regards the exercise in England of comparable powers, the history of the years following the World War are evidence of the phenomenon that -

> "Government by decree, once made, is extremely difficult to unmake, and that 'emergency', once it has taken hold, is a very tough plant to uproot".

And before this, at p. 54:

> "It is part of the democratic process, even during war, to be vigilant that emergency expedients do not exceed the real necessities of the situation, as, from their very nature, they always tend to do."

It should be noted that my comments are not to be regarded as prescribing any rule, and the conclusion should not be drawn from them that Ministers have in the past been excessive in the exercise of the legislative power under consideration. (Cf. Prof. H. Klinghoffer's comments in similar connection in the *Jubilee Book for Pinhas Rozen,* p. 118) I have only intended to warn against a possible orientation in the future not to remain faithful to the principle of the rule of law.

SUSSMAN J. I concur.

HALEVI J. I concur.

Appeal allowed.

Judgment given on October 1, 1963.