

[WILSON, P., ZEKIA, VASSILIADES and JOSEPHIDES, JJ.]

THE ATTORNEY-GENERAL OF THE REPUBLIC,

Appellant,

v.

IBRAHIM KUR AHMED

Respondent.

(Criminal Appeal No. 2516).

1962

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THE ATTORNEY-
GENERAL

v.

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Wells—The Wells Law, Cap. 351—Disobedience to an order of the Court to fill in an unauthorised tunnel—Tunnel not within the meaning of well under the Wells Law—Duty of Judge to satisfy himself that the order sought to be enforced is on the face of it a valid one—Judge precluded from hearing evidence on the merits of the original case.

The respondent was ordered by the District Court of Kyrenia to fill in, an unauthorised underground tunnel dug without first obtaining a permit from the proper authorities, unless he obtained a covering permit within two months from the date of the order.

The respondent having failed to comply with the order was taken before the Kyrenia Court and charged under sections 3 and 13 of the Wells Law, Cap. 351. The Judge heard evidence and refused to punish the respondent for the alleged disobedience to the original order on the ground that neither the charge nor the evidence disclosed an offence under section 13 and acquitted and discharged the respondent as no *prima facie* case had been made against him.

The Attorney-General appealed against such an acquittal.

Held : (1) A Judge in exercising his jurisdiction to punish a defaulter for failing to comply with an order of the Court has to satisfy himself that the order in question on the face of it is a valid one and enforceable.

(2) An underground horizontal tunnel does not come within the definition of a well in the Wells Law, Cap 351 section 2 which reads :

“Well” means any shaft or boreholes sunk on any land for obtaining underground water and includes a line of wells.

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(3) As the original order was to fill in a tunnel and the jurisdiction of the Judge for punishing a defaulter is limited to cases where an order to fill in a well, shaft or borehole already exists, the second Judge, who was called upon to enforce the original order, was therefore justified in refusing to do so, since on the face of it the order was not one which empowered him to enforce it.

(4) (a) But it was not open to the Judge who was called to enforce obedience to the original order to depart from the record and hear evidence on the merits whether the construction concerned was a well or not.

(b) The second Judge had to confine himself to the record and to see whether on the face of it the record contained a good and enforceable order.

Appeal dismissed.

Per curiam : (1) If there is an allegation on the part of the defaulter that he had complied already with the order, the Court in such a case is not precluded from hearing evidence as to whether he carried out the original order.

(2) *The proper way is to obtain extension of time for lodging an appeal against the original order if there is a miscarriage of justice.*

Appeal against acquittal by the Attorney-General of the Republic.

The respondent stood charged before the District Court of Kyrenia (Cr. Case No. 1717/60) on one count of the offence of failing to comply with the order of the Court given in case No. 685/59 contrary to ss. 3 and 13 of the Wells Law, Cap. 351 and was acquitted by Avni, D.J.

A. Frangos for the appellant.

R. Denktash for the respondent.

The judgment of the Court was delivered by :—

ZEKIA, J. : The respondent in this case was taken before the Kyrenia Court and charged under sections 3 and 13 of the Wells Law, Cap. 351 for refusing to fill in an unauthorized

underground tunnel, having failed to obtain the permit within two months from the original order. The original order was of 1959 No.685, where the same respondent was charged that some time in June, 1959, did dig an underground tunnel 15 ft. long in plot 198/1 and S/P 12/31 of Ayios Epiktitos without first obtaining a permit from the proper authority. To this he pleaded guilty. He was fined £1 and in addition the tunnel was ordered to be filled in unless a covering permit was obtained within 2 months from that date. This was the original order and for disobedience to it the last proceedings were taken.

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The second judge who tried the case No.1717/60, for disobedience of the order, heard evidence and refused to punish the respondent for the alleged disobedience to the original order. He said "I hold, therefore, that neither the charge nor the evidence discloses an offence under section 13 of the Wells Law, and I, accordingly, acquit and discharge the accused. No prima facie case has been made against him". That is the concluding paragraph of his judgment.

This is an appeal against the said acquittal.

There is no doubt that a judge, in exercising his jurisdiction to punish a defaulter for failing to comply with an order of the Court, has to satisfy himself that the order in question on the face of it is a valid one and enforceable. In this case the order reads "to fill in a tunnel". The jurisdiction of the second Judge for punishing a defaulter who failed to carry out a previous order of a Court is in the instant case limited to cases where an order for filling in a well, shaft or borehole already exists. The original order, however, on the face of it, is not for either the one or the other. It has been contended that the phrase "the underground tunnel" comes within the definition of a "well" in the Wells Law, Cap.351.

This is not by any means clear to us and we do not think that a tunnel, a horizontal one, in the way it was described, comes within the definition of a shaft or borehole, under the Wells Law, and we think that the Judge who was called upon to enforce the original order was justified in refusing to do so since, on the face of it, the order was not one which empowered him to enforce it.

For this reason the appeal is dismissed.

On the other hand, we are of the opinion that the second

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Judge was not to hear any evidence. He had to confine himself to the record and to see whether on the face of it the record contains a good and enforceable order. It was not open to him to hear evidence and to go to the merits of the original order. Of course, that does not mean that if there is any allegation on the part of a defaulter that he had complied already with the order the Court is precluded from hearing evidence as to whether he carried out the original order. It was not open to him, apart from the record, to hear evidence on the merits whether it was a well or not. The proper way to deal is to obtain extension of time for lodging an appeal against the original order if there was a miscarriage of justice.

For these reasons the appeal is dismissed.

Appeal dismissed.