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## KARUNARATNA *v.* RAPIEL.

*P. C., Colombo, No. 79,388.*

*Beating of tom-tom without license—Ordinance No. 16 of 1865, ss. 6, 8, 10, and 90—Evidence of disturbance of repose of inhabitants—Setting out limits of "town."*

It is not necessary for a prosecution under section 90 of the Police Ordinance, 1865, to prove that the beating of tom-tom within a "town" without a license disturbed the repose of the inhabitants of the locality.

Where a Proclamation set out the limits of a "town" under section 8 of that Ordinance as follows: "Limits of Welikada,—Salpiti korale and Hewagam korale,"—

*Held* that that was a sufficient setting out of the limits under section 6.

IN a garden situated in Kittampahuwa beyond the limits of the Colombo Municipality the accused was carrying on a comedy, beating the drums called *dola* or *demala-bera* with the fingers, between 9 P.M. and 4 A.M. on 3rd January, 1903.

A Proclamation dated 3rd April, 1897, published in the *Government Gazette* of 30th April, 1897, was produced showing that several sections of the Police Ordinance, 1865, including section 90, shall from and after 1st May, 1897, "come into operation within

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the limits specified in the schedule hereto;" and the schedule contained the following words: "*Limits of Welikada,*—Salpiti korale and Hapitigam korale."

It was admitted that the place where the drum was beaten, viz., Kittampahuwa, was within the limits of Welikada, but no proof was offered to show that the repose of the inhabitants had been disturbed by the drum beaten in the night.

The Police Magistrate, Mr. R. B. Hellings, sentenced the accused to a fine of ten rupees.

He appealed.

*Walter Pereira,* for the appellant.—There is no proof that the drum was beaten within a town or limits to which the Ordinance No. 16 of 1865 applies. The word "town," section 6 enacts, shall include any village or limits set out for the purposes of this Ordinance; but the village Kittampahuwa is not set out in the Proclamation produced. The Proclamation only states that the limits of Welikada are Salpiti korale and Hewagam korale. The Proclamation ought to have been fuller, as also the evidence. It is not proved that the repose of the inhabitants was disturbed during that night. The words of the enactment requiring the taking out of a license do not refer to tom-tom beating, but to the discharge of firearms, &c., previously mentioned. Phear, C.J., held that the words "beat drums or tom-toms" are not connected with the words "unless they should have obtained a license from the Police Magistrate." *Holland v. Kapugama, 1 S. C. C. 90.* It is not enough that one man only should be disturbed, but the inhabitants generally of the locality. *Holland v. Ratnapala, 2 S. C. C. 165; Amat v. Odris Appu, 3 S. C. C. 167.* Bonser, C.J., pointed out that the Full Court in over-ruling the decision of Phear, C.J., above cited by its decision reported in *9 S. C. C. 204,* fell into the absurdity of holding that a Magistrate is authorized to license persons to make a noise in the night so as to disturb the repose of the inhabitants, but he felt himself bound by it. *Marshall v. Gunaratne, 1 N. L. R. 179.* Consequently, Lawrie, J., held in *van Houten v. Soota, 2 S. C. R. 160,* that it was not necessary to allege and prove that beating a tom-tom was calculated to frighten horses or disturb the repose of the inhabitants. If this construction were correct, there would have been a different arrangement of the words in section 90.

*Cur. adv. vult.*

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The accused was convicted of beating tom-toms on the 20th and 31st December, 1902, and the 3rd January, 1903, without

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obtaining a license from the Police Magistrate of Colombo or the Superintendent of Police or Provincial Inspector entitled to grant the same, under section 90 of the Police Ordinance, No. 16 of 1865, and fined Rs. 10 for each offence.

On appeal it was objected by the learned counsel for the appellant that the alleged tom-tom beating did not take place within a town or limits to which the Ordinance was applicable. It is admitted, however, that the place where the beating occurred viz., Kittampahuwa, is within the limits of Welikada, and that, by Proclamation under section 8 published in the *Gazette* of 30th May, 1897, it was proclaimed that section 90 of the Ordinance should come into operation within the limits specified in the schedule thereto, *i.e.*, the limits of Welikada. In my opinion this amounts to a setting out of limits for the purposes of the Ordinance as marked in section 6 interpreting the word " town ".

The next point taken by Mr. Pereira was that, in order to convict the accused legally under the section, it must be proved that the tom-tomming was a noise made in the night so as to disturb the repose of the inhabitants, and that this was an essential ingredient of the offence. I have looked at the cases cited by Mr. Pereira, *i.e.*, *1 S. C. C., p. 90; 2 S. C. C., p. 165; 3 S. C. C., p. 167; 9 S. C. C., p. 90; 1 N. L. R., p. 179; 2 S. C. R., p. 160*, and I feel that the Full Court case reported in *9 S. C. C., p. 90*, not only binds me, but is in accordance with my own views as to the proper construction to put on section 90. I would hold with Mr. Justice Clarence that each of the proceedings mentioned in the first six lines of the section, separated by comas and the disjunctive " or," constitute offences, unless they are licensed, as the section goes on to say.

As regards the absurdity of licensing a noise at night which disturbs the repose of the inhabitants, such noises may often arise during the performance of religious duties by some classes of the community, and may well be the subject of police restriction.

Mr. Pereira suggests that, if this construction were correct, the word " other " should precede the word " noise " in the third proceeding. Otherwise it would be useless to mention tom-toms and other music, as they would be covered by the word " noise ".

In my opinion, however, the words " other music " in the second proceeding convey the idea that beating a drum or tom-tom is supposed to be music and not noise. Hence the word " other " would be superfluous in the third proceeding.

I think it is not therefore necessary to allege or prove that the beating of tom-toms was to the disturbance of the repose of the inhabitants, and would dismiss the appeal.