

Attorney-General v. Podiappuhamy

COURT OF APPEAL.

SOZA, J. AND ABUL CABER, J.

S.C. (C.A.) 99/78—M. C. NIKAWERATIYA 2650.

JUNE 11, 1980

Forest Ordinance (Cap. 451)—Regulations 2 and 9 framed under section 20(1)—Colonization Officer—Authority to enter prosecution under Forest Ordinance—Authorization of Government Agent for prosecution—Land Development Ordinance, section 168.

Held

(1) When two different charges under two Ordinances are available to the prosecution, there is no reason why the prosecution should not have the right to choose one of the Ordinances for the purpose of the charge, in an appropriate case.

(2) A person who is a Colonization Officer and a Public Officer within the meaning of the Criminal Procedure Code is entitled to enter a prosecution under the Forest Ordinance and to conduct the prosecution in the Magistrate's Court.

(3) The authority of the Government Agent is not required for a charge under regulation 2 framed under section 20(1) of the Forest Ordinance.

(4) Forest land remains forest land within the meaning of the Forest Ordinance despite several years of cultivation, if such cultivation is unauthorised.

Cases referred to

(1) *Sultan v. The Kachcheri Surveyor*, (1969) 74 N.L.R. 287.

(2) *Lovell v. Sinnadurai*, (1962) 54 N.L.R. 234.

APPEAL from the Magistrate's Court, Nikaweratiya.

D. P. Kumarasinghe, State Counsel, for the appellant.

Accused—respondent absent and unrepresented.

Cur. adv. vult.

June 19, 1980.

ABDUL CADER, J.

The accused was charged under Regulations 2 and 9 framed under section 20(1) of the Forest Ordinance. Evidence was led of an offence committed under Regulation 2 which reads as follows:—

“No person shall cut, clear or set fire to.....any forest without a permit or otherwise than in accordance with the conditions of such permit.”

There is the evidence of the Kachcheri Surveyor, Arasakularatne, who went to the land and prepared the survey plan, superimposed it on the Crown plan and produced them as P1 and P2 to establish the fact that the land involved was, in fact, a part of the forest. The Magistrate acquitted the accused for various reasons.

The Magistrate held that there was no evidence that this accused broke up the soil of the land in this case for the purpose of cultivation. He was influenced by the fact that all the witnesses agreed that this was a clearing where there had been an old

cultivation. Forest land yet remains forest land despite several years of cultivation, if it is unauthorized. We find that witness Herath has stated :

“ Ramiah mema idama udalu gamin sitiya. Ohu udallek aran udalu geva.”

which means that the accused was seen actually clearing the land. Section 2 makes it an offence to clear any forest land which will include the soil, too.

The Magistrate went on to hold that this action should have been filed under section 168(1) of the Land Development Ordinance. But, in view of the proviso contained in that section, it could well be that the prosecution thought that it would be more appropriate to frame the charge under the Forest Ordinance. When two different charges under two Ordinances are available to the prosecution, there is no reason why the prosecution should not have the right to choose one of the two Ordinances for the purpose of the charge.

In the case of *Sultan v. The Kachcheri Surveyor*, (1) Samerawickrame, J. held :

“ Where the real object of the prosecution under the Forest Ordinance is to protect Crown land the prosecution may proceed under that Ordinance even though there is a dispute as to the Crown's title to the land.”

In this case, there is no dispute as regards title.

The Magistrate then referred to sections 58 and 59 of the Forest Ordinance and held that since the prosecution was launched by a colonisation officer, this charge cannot be maintained. Section 78 defines a forest officer to include, *inter alia*, ‘all persons appointed.....to discharge any function of a forest officer.’ But there is no evidence that a colonisation officer has been appointed to discharge the functions of a forest officer.

However, counsel refers me to the case of *Lovell v. Sinnadurai* (2) where T. S. Fernando, J. held :

“ The complainant, being a forest officer within the meaning of the Forest Ordinance and a Public Officer within the meaning of the Criminal Procedure Code, was in every way entitled to enter prosecution and to conduct it in the Magistrate's Court. The learned Magistrate was in error, if I may say so with respect, when he stated that “an officer of the Forest Department cannot appear in court except through the Government Agent or the Assistant Government Agent as contemplated in sections 37, 38 and 39 of the Forest Ordinance.”

The Court is entitled to presume that the Colonization Officer is a Public Officer and, therefore, that portion of the judgement quoted, namely that a Public Officer, within the meaning of the Criminal Procedure Code, is entitled to enter a prosecution under the Forest Ordinance will apply to the prosecuting officer in this case.

Another ground urged by the Magistrate was that the Government Agent has not authorized the prosecution though he has signed the report to the Magistrate.

Although the Magistrate has not stated in his order under what section of the Forest Ordinance he has held that the Government Agent's authority was required, in the notes of the address by Counsel, there is a statement that his attention was drawn to section 37 of the Forest Ordinance. Apparently, it is because of sections 37, 38 and 39, the Magistrate has come to the conclusion that the Government should have authorized the prosecution of the accused, but an examination of section 37 would indicate that it is only where a forest offence has been committed leading to the seizure of productions by any forest officer or a police officer that the Government Agent is required to *forward* the report to the Magistrate in terms of section 37. The charge in this case has no relation to section 37 of the Forest Ordinance.

Our attention has not been drawn to any other section under which the authority of the Government Agent would be required for the prosecution in a case of this nature.

I, therefore, hold that there is nothing in the law to prevent a cultivation officer, being a public servant, from instituting proceedings under the Forest Ordinance when the charge relates to one of clearing or cutting a forest and that the authority of the Government Agent is not required for a charge under Regulation 2. On the evidence placed before the Magistrate that this accused was seen clearing the land which was not denied by the accused, who did not give evidence, the accused should have been convicted of the offence with which he was charged. I, therefore, set aside the order of acquittal and convict the accused of the offence with which he is charged.

The record is to be returned to the Magistrate who will impose an appropriate sentence.

SOZA, J.—I agree.

Appeal allowed.