1943 *Present :* **Soertsz and Keuneman JJ.**

FERNANDO, Appellant, *and* THE KALUTARA POLICE, Respondent.

882—M. C. Kalutara, 16,385.

Seashore—Removing sand from part of seashore—Limit of seashore—Area reached by monsoon storms—Roman-Dutch law—Seashore Protection Ordinance (Cap. 310) s. 2.

On the western coast of Ceylon the furthest line reached by the sea during the ordinary south-west monsoon storms excluding exceptional or abnormal floods is the limit of the seashore for purposes of section 2 of the Seashore Protection Ordinance.

CASE referred by Keuneman J. to a Bench of two Judges. The facts appear from the argument.

H. V. Perera, K.C. (with him *E. B. Wickremanayake*), for the accused, appellant.—The accused has been convicted of removing sand from a prohibited area of the seashore. Under section 2 of the Seashore Protection Ordinance (Cap. 310) the Governor can proclaim only a part of the seashore as a prohibited area. It cannot be said that the place from where the sand was removed by the accused is seashore. The Magistrate has, by following the South African case of *Pharo v. Stephan*[1], erred in giving to the word " seashore " the meaning attached to it in Roman-Dutch law; we have no " winter-storms " in this part of the world. As the word occurs in a legislative enactment it should be given its ordinary English meaning, in the absence of a special definition in the enactment or unless the Ordinance is one dealing with any civil rights of the Crown. The meaning given to " seashore " in Webster's Dictionary is " all the ground between the ordinary high-water and low-water marks ", and in the Oxford Dictionary " the ground actually washed by the sea at high-tides ". According to *Attorney-General v. Chambers*[2] seashore is " the land covered by the ordinary flux and reflux of the ocean ". See also *Mudaliyar, Salpiti korale v. Silva*[3]. Where a word is not defined in an enactment it has to be given its ordinary and popular meaning—*Craie on Statute Law, p. 151.* The property in question in the present case has hitherto been always regarded as private property, and there is no warrant for holding it as seashore merely because the sea beats into it during stormy weather. Waves, unlike tides which are influenced by the sun and moon, are caused by winds and can sometimes beat far inland over and across private property.

T. S. Fernando, C.C., for the complainant, respondent.—As the word " seashore " has not been defined in the Ordinance, it must be given its ordinary and popular meaning. But as such popular meaning of the word is vague and the definitions given in the Dictionaries are indefinite,

[1] *S. A. L. R. (1917) A. D. 1.* [2] *(1854) 23 L. J. Ch. 662.*
[3] *(1935) 13 Times 2.*

one must have recourse to the legal meaning of the word. If the legal meaning is to be given, then what must be ascertained is the meaning the word obtains in the common law of this country. The common law in this part of the Island is the Roman-Dutch law. English decisions therefore have no application.

"Seashore" has been defined in *Pharo v. Stephan* [1] by a bench of three Judges. This definition was approved in the later case of *Surveyor-General (Cape) v. Estate de Villiers* [2], a decision by a bench of five Judges. Although there are no winter storms in this country, there is evidence in the case that the south-west monsoon lasts for about five months every year. There is therefore a regular stormy season occurring every year.

The decision in *Attorney-General v. Chambers* (*supra*) is not applicable. It was considered in *Pharo v. Stephan* (*supra*), and the reasons for its inapplicability are stated therein.

Cur. adv. vult.

December 20, 1943. KEUNEMAN J.—

This appeal was argued before me originally, and I referred it to a Bench of two Judges. It was later argued on April 7, 1943, before my brother Soertsz and myself, and was referred to the Magistrate for the recording of evidence on specified points. After some delay the evidence was recorded, and the appeal was further argued before us.

The accused was charged with removing sand from a prohibited place, to wit, the part of the seashore at Kalutara North, which lies between the northern administrative limit of Kalutara Urban Council and Kaluganga, proclaimed under section 2 of the Seashore Protection Ordinance (Cap. 310), published in *Government Gazette* No. 8,616 of May 24, 1940. The offence was punishable under section 5 of Cap. 310. The accused was convicted of this offence.

The *Gazette* defines the northern and the southern limits of the prohibited area, and there is no question that the sand was removed from between the limits. The question we have to decide is whether the place the sand was taken from was part of the "seashore", for under section 2 the Governor has power to proclaim "any part of the seashore" as a prohibited area, and thereupon no person can remove sand, &c., from "such area or from the bed of the sea contiguous thereto to a distance of one mile from the shore". It is to be noted that, while the seaward limit is defined, the landward limit is not, and that will depend on the meaning of the word "seashore".

Counsel for the accused contended that the word "seashore" should be determined according to the English law, and cited the case of *Attorney-General v. Chambers* [3], where it was held that "in the absence of all evidence of particular usage, the extent of the right of the Crown to the seashore landwards is *prima facie* limited by the line of the medium high tide between the springs and the neaps".

[1] *S. A. Reports (1917) A. D. 1.* [2] *S. A. Reports (1923) A. D. 588.*
[3] *23 L. J. Ch. 662; 43 English Reports 486.*

Cranworth L.C. in this case stated " What is the *littus*? Is it so much as is covered by the ordinary spring tides, or is it something less ? "

" The rule of the civil law was '*Est autem littus maris quatenus hybernus fluctus maximus exclurrit* '. This is certainly not the doctrine of our law. All the authorities concur in the conclusion that the right is confined to what is covered by ' ordinary ' tides, whatever be the right interpretation of that word. By *hybernus fluctus maximus* is clearly meant extraordinary high tides, though speaking with physical accuracy, the winter tide is not in general the highest ".

Cranworth L.C. considered the authorities and came to the conclusion that " the Crown's right is limited to land which is for the most part not dry or maniorable ", and that this limit is " the line of the medium high tide between the springs and the neaps. All land below the line is more often than not covered at high water, and so may be justly said, in the language of Lord Hale, to be covered by the ordinary flux of the sea ".

If the English meaning of " seashore " is adopted, it is clear that on the evidence in this case the accused has committed no offence by removing sand from a prohibited area.

Counsel for the prosecution contended that in Ceylon the word " seashore " has to be given the meaning appropriate to it under the Roman-Dutch law, and not that under the English law. He cited the case of *Pharo v. Stephan*[1], where it was held that " under the Roman-Dutch law the boundary of the seashore is the furthest line reached by the sea during the ordinary winter storms, excluding an exceptional or abnormal flood ". This was a decision of three Judges. In the very learned and convincing judgments, the authorities in the Roman law, the Roman-Dutch law and the English law were fully discussed.

" The conclusion then to which I come ", said Solomon J.A., " is that the definitions in the *Corpus Juris*, which are all substantially to the same effect, were adopted by the Roman-Dutch jurists, and that by *maximus fluctus* (*hybernus*) they understand the furthest line reached by the sea during the ordinary winter storms, excluding an exceptional or abnormal flood. And if that is the Roman-Dutch law on the subject we must accept it as binding upon us, unless we are justified on some good legal ground in rejecting it ". He further quoted authority for the proposition that " *fluctus* in the definitions of *littus* does not mean tide, but the flow of the sea when agitated by storms ".

Maasdorp J.A. discussed the question whether " hybernus " referred to the winter season or the stormy season, and came to this conclusion:—

> " As a rule the line reached during the stormy season of the year by the water of the sea would be indicated by the effect of the water on the land, or it could be ascertained from the evidence of residents in the neighbourhood. Then again we must not take into account any extraordinary or occasional storm, but only annually recurring stormy weather. That is indicated by the word " hybernus " used in the definitions, which points to something happening every season ".

Solomon J.A. also cited authorities which lead to the conclusion that the reference is to a particular stormy season.

[1] *S. A. Reports (1917) A. D. 1.*

The case of *Pharo v. Stephan* (*supra*) was apparently followed in the case of *Surveyor-General* (*Cape*) *v. Estate de Villiers*[1]. This was a decision of five Judges, where the question arose of interpreting the words in a grant " S.E. to the sea-coast ". In this case the position of the Crown and of the public in respect of the ownership and use of the seashore was also discussed, but we are not concerned with this matter in the present case.

What is the position in Ceylon ? I am of opinion that we are bound to adopt the Roman-Dutch interpretation of the word " seashore ", unless there is some good ground for rejecting that interpretation. The Roman-Dutch law applied to the maritime provinces, and the terms should be interpreted in accordance with that law. There is no evidence of any consistent interpretation in any other sense in reported cases. In fact this appears to be the first time that the word " seashore " has been defined. There is one difficulty, however, that in Ceylon we have no season which can be spoken of as winter. But there is a particular season, namely, the south-west monsson, which is a stormy season annually recurrent on this coast of Ceylon, and I think the phrase *fluctus hybernus* may well be applied to that season of the year, and that in this area the furthest line reached by the sea during the ordinary south-west monsoon storms, excluding exceptional or abnormal floods, would be the limit of the seashore.

As regards the evidence in the case, it seems clear that during the non-stormy period the highest point reached by the waves of the sea is the broken line marked C in the sketch SK 1. This line appears to correspond to the bank depicted in plan P 2. Beyond that and to the east is a sandy piece of ground extending 57 to 60 feet landwards. This is the portion from which the sand was removed by the accused. On this portion there are no houses or plantations. East of this portion is another piece of ground planted with coconuts extending 19 to 35 feet eastward to the beach road. There are four coconut trees on this piece about 40 years old. I am inclined to think that this planted portion may *prima facie* be regarded as not part of the seashore, but we are not concerned with it, but rather with the portion west of the planted area, for it was from that portion that the sand was removed.

In the evidence originally led, Mr. Cyril de Zoysa, the Chairman of the Urban Council, stated " I can say that during the south-west monsoon the waves beat right up to the beach road ", and his evidence was accepted by the Magistrate. In the later evidence recorded, Hendrick Perera, who is a fisherman living in the vicinity of the belt, practically opposite the spot where sand is alleged to have been removed, said that normally during the monsoon " the sea reaches almost close to the road—roughly about four or five feet of the road . . . . It happens regularly during monsoon time ". This is important evidence, because Hendrick Perera had exceptional opportunities for observation, and there is nothing in his cross-examination to suggest that he is an unreliable witness. This evidence establishes that the *maximus fluctus hybernus* reached well beyond the point where the sand was removed. For the defence also certain witnesses were called. R. W. Fernando,

[1] *S. A. Reports* (*1923*) *A. D. 588.*

a headmaster, who owns land about 100 or 200 yards from the spot and lives in a house 300 yards from the shore, said that he had only known the sea reach the road on one occasion, and that was at the spot where the accused removed the sand. In cross-examination he added " In monsoon time the waves do not regularly reach the road, in fact it has happened only once to my knowledge at or about the spot where the sand had been removed. The protective sand bank has been washed off during the monsoons ". This is the bank along broken line C in SK 1.

L. W. Peris, Vice-Chairman, Urban Council, who lived close by to the seashore said " During rough weather, *i.e.*, the south-west monsoon, the waves go beyond the sand bank. They go about six feet beyond the sand bank—not more ". The weakness of this evidence is that it does not specifically relate to the spot where the sand was removed. Simon Dalpathadu also spoke to the effect of waves in relation to his own house X 2 in sketch SK 1, which is considerably to the north of the spot where the sand was removed. He added, however, in cross-examination " The waves do not go up to the road even in monsoon time. It comes to about a fathom from the road ".

I think the evidence establishes that the waves of the sea during the south-west monsoon period reached the spot where the sand was removed, and this took place in the case of an ordinary storm, and not only in an exceptional or abnormal storm.

I think the offence alleged has been brought home to the accused. The appeal is accordingly dismissed.

Sobrtsz J.—I agree.

Affirmed.