1969 *Present:* **de Kretser, J.**

R. T. WILBERT and 3 others, Appellants, *and* NEWMAN (Police Sergeant), Respondent

S. C. 219-222/69—M. C. Galle, 55705

Forest Ordinance (Cap. 451)—Sections 3 and 20 (1)—Breach of Rule 7 (1) of Forest Rules No. 2 of 1966—Offence of felling trees is distinct from that of causing trees to be felled—Effect of duplicity of charge—Criminal Procedure Code, ss. 178, 425—Burden of proof.

In a prosecution for a breach of Rule 7 (1) of the Forest Rules No. 2 of 1966 framed under section 20 (1) of the Forest Ordinance—

Held, (i) that " felling trees " is an offence distinct from " causing trees to be felled ". The two offences, therefore, should be tried separately.

However, a charge which is bad for duplicity is not necessarily fatal to the conviction if it has not caused prejudice to the accused and is curable under section 425 of the Criminal Procedure Code.

(ii) that the burden of proving that the forest in which the offence is alleged to have been committed is " not included in a reserved or village forest " lies on the accused.

APPEALS from a judgment of the Magistrate's Court, Galle.

D. K. Liyanage, for the accused-appellants.

Shibly Aziz, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 18, 1969. DE KRETSER, J.—

The Accused in this Case were convicted by the Additional Magistrate of Galle of an offence against Rule 7(1) of the Rules framed under Section 20 (1) of the Forest Act Cap. 451 of the Legislative Enactments. They were sentenced to 2 years Rigorous Imprisonment each and they have appealed.

The Magistrate has contented himself with taking over the Charge on which he tried and convicted the Accused from the amended Plaint filed by the Police on 1.10.68. That Charge alleged that what they had done was " *to fell or cause to be felled* 7 trees of Domba, Hora, Keena without a valid permit " from the Kottawa Kombala proposed Crown Forest Reserve . . . and cause damage to the value of Rs. 250.

It should have been apparent to the Magistrate, if he had made the slightest study of the Charge, that " to fell trees " is an offence distinct from " causing trees to be felled ". I presume that he is aware that Section 178 of the Criminal Procedure Code enacts that " for every distinct offence of which any person is accused there shall be a separate Charge and every such Charge shall be tried separately.

It appears therefore that the submission of Counsel that the Charge as framed is bad for duplicity is well-founded.

I do not set aside the conviction for that reason only because it has been pointed out as far back as 1923 in the Case of *Police Sergeant, Lindula v. Stewart*[1] that the defect is not necessarily fatal to the conviction and may be cured under Section 425 of the Criminal Procedure Code if the Accused have not been prejudiced.

There is the evidence of the Inspector that he found the first and second Accused on the top of a tree in the act of cutting the large branches and the third and fourth Accused sawing a tree that had been already felled while in the near vicinity were other trees that had been felled. The men had no permit.

[1] *(1923) 25 N. L. R. 166.*

The evidence of the Forest Officers establishes that the felling had taken place in a forest which stands on Crown property which is not a Reserved Forest in terms of Section 3 of the Forest Act. The fact that there is a proposal to make it such has added some confusion to the matter which probably led to the original Plaint alleging that when Accused felled these trees they had committed an offence in a reserved forest.

Section 20 (1) of the Forest Act under which Rule 7 (1) is framed deals with any Forest "not included in a Reserved or Village Forest". It has been held in the Full Bench Case *The Mudaliyar, Pitigalkorale North v. Kiribanda*[1] that in a Prosecution under this Section or the Rules made under it the burden of proving that the forest in which the offence is alleged to have been committed is "not included in a Reserved or Village Forest" lies on the Accused.

As Grenier A.J. said in that Case "if he can produce a permit, or if he can show the land is his private property, there will be an end to the prosecution. Such positive proof is directly in his path to adduce, and he ought to be made to adduce it instead of calling upon the Prosecution to establish a negative."

In the instant Case the Accused have made no effort to discharge the burden on them. The Evidence of the Forest Officers shows that it is not a Reserved Forest in terms of Section 3. In my opinion the evidence is overwhelming that these Accused have felled trees in a forest without a permit and are therefore guilty of an offence under Rule 7 (1) of the Forest Rules No. 2 of 1966 which the prosecuting officer should note is the correct way of citing them.

The Charge as set out that the trees that were cut were Domba, Hora, and Keena while the only evidence of the species of tree is that two at least of them were described with some hesitation by the Inspector as "Godapora". The species of the trees is, fortunately for the prosecution, irrelevant to a Charge under this Rule. In my opinion there was no prejudice caused to the Accused at the Trial by the allegation made in the alternative that they had caused the trees to be felled.

I affirm the conviction of the Accused on the Charge that they had felled these trees without a Permit and so committed an offence under Rule 7 (1) of the Forest Rules No. 2 of 1966 framed under section 20 (1) punishable under Section 21. While the Law demands a Jail Sentence for this offence no reason is given by the Magistrate as to why he thought the maximum term of the imprisonment should be imposed. At the hearing of the Appeal it was submitted that the Grama Sevaka had recommended the issue of a Permit and that it was in anticipation of its issue that felling had commenced. That submission remained a submission. It appears to me that a Sentence of 3 months would be adequate punishment for the offence these Accused have committed.

The Appeal is dismissed subject to this variation in Sentence.

Appeal dismissed subject to a variation in sentence.

[1] *(1909) 12 N. L. R. 304.*