1940 *Present :* **Moseley S.P.J.**

BRERETON *v.* RATRANHAMY

274—M. C. Ratnapura, 27,575.

Charge under Tea Control Ordinance, No. 12 of 1938 (Cap. 299)—Offence in respect of repealed Ordinance No. 11 of 1933—Power of Supreme Court to alter charge—Absence of Attorney-General's sanction—Fatal irregularity—Criminal Procedure Code, s. 425.

The accused was charged under section 35 (1) (d) of the Tea Control Ordinance, No. 12 of 1938, in respect of a declaration made under Ordinance No. 11 of 1933 which was repealed by the first-mentioned Ordinance.

The prosecution was sanctioned by the Tea Controller as required by Ordinance No. 12 of 1938, but not by the Attorney-General as required by Ordinance No. 11 of 1933. The evidence disclosed an offence under section 36 (1) (d) of Ordinance No. 11 of 1933, which in respect of offences committed under it was kept alive by the proviso to section 42.

***Held*, that the Supreme Court had power to alter the conviction to one under section 36 (1) (d) of Ordinance No. 11 of 1933, but that the absence of the Attorney-General's sanction was not curable under section 425 of the Criminal Procedure Code and rendered the trial a nullity.**

APPEAL from a conviction by the Magistrate of Ratnapura.

N. E. Weerasooria, K.C. (with him *N. Kumarasingham*), for accused, appellant.

J. E. M. Obeyesekere, for complainant, respondent.

Cur. adv. vult.

November 19, 1940. MOSELEY S.P.J.—

The appellant was charged "that on July 22, 1933, he did furnish to the Government Agent of the Ratnapura District a declaration on Form B (small holding) in respect of a land called Kumbalmullawatta at Morahela for the purpose of registering same as a Tea Small Holding knowing that the extent of nine acres declared by him in the said declaration as an area 'wholly planted with tea' was incorrect and that he thereby committed an offence punishable under section 35 (1) (*d*) of the Tea Control Ordinance No. 12 of 1938".

He was convicted and sentenced to pay a fine of Rs. 250.

He has appealed on the following grounds :—

(1) that the declaration made by him was made under the provisions of Ordinance No. 11 of 1933 and that an offence in respect thereof is not punishable under Cap. 299 ;

(2) that a prosecution in respect of an offence under Ordinance No. 11 of 1933 may not be instituted without the written sanction of the Attorney-General ;

(3) that the charge does not disclose an offence against either Ordinance ; and

(4) that the evidence does not support the conviction.

Counsel for the respondent concedes that there has been an offence against Cap. 299, but contends that the situation is met by the proviso to section 42 of Ordinance No. 11 of 1933. That section runs as follows :—

"This Ordinance shall continue in force for a period of five years reckoned from the appointed day :

Provided that the expiration of this Ordinance shall not affect any penalty, forfeiture, or punishment previously incurred under this Ordinance or under any rules made under this Ordinance, or affect any legal proceeding or remedy in respect of any such penalty, forfeiture, or punishment, and any such legal proceeding may be instituted, or continued, or enforced, and such penalty, forfeiture, or punishment may be imposed as if this Ordinance had not expired."

Counsel, as I have observed, concedes that the charge should have been laid as punishable by section 36 (1) (*d*) of Ordinance No. 11 of 1933, but says that, since the Magistrate has found that such an offence has been committed, it is competent for this Court, in the exercise of its powers under section 347 (*b*) (ii.) of the Criminal Procedure Code, to alter the finding to bring it into conformity with Ordinance No. 11 of 1933. He brought to my notice the case of *R. v. Baron Silva et al*[1], in which there had been a conviction for conspiracy. The conviction survived an appeal and it was only subsequently that it was discovered that the Ordinance which created the offence of conspiracy was not in force at the time of the commission of the alleged offence. It was held that the power of the Appeal Court to alter a verdict was not confined to cases mentioned in sections 181 and 182 of the Criminal Procedure Code. In that case the finding, which had been one of conspiracy was altered to one of abetment which offence the Appeal Court held was supported by the evidence. In my opinion the decision in that case may with propriety be followed in this case before me.

In regard to the omission to obtain the sanction of the Attorney-General, it is contended, and I think properly, that the object of this requirement is to protect private persons from frivolous and vexatious prosecutions. In *Atapattu v. Punchi Banda alias Nilame*[2], the absence of sanction was held to be cured inasmuch as no objection to want of sanction was taken at the trial, and it must therefore be assumed that the prosecution was neither frivolous nor vexatious. In the present case the sanction of the Tea Controller, as provided by section 35 (2) of Cap. 299 was obtained. It may therefore be taken that the prosecution was not frivolous or vexatious. The section of the Criminal Procedure Code, however, by virtue of which it is now sought to cure the omission to obtain the sanction necessary to institute proceedings for an offence against Ordinance No. 11 of 1933 is section 425 which provides that no judgment of a Court of competent jurisdiction shall be reversed on appeal on account, *inter alia*, of the want of any sanction required by section 147, unless such want has occasioned a failure of justice. I am satisfied that no failure of justice has been occasioned in this case by the omission to obtain the proper sanction, but the case is not one of those embraced by

[1] *4 Times of Ceylon L. R. 3.*

[2] *13 C. L. W. 73.*

section 147. No other provision of law has been brought to my notice under which this particular omission might be cured. It seems to me that in the absence of the required sanction the trial is a nullity.

I therefore allow the appeal. The conviction and sentence are set aside. The fine, if paid, must be refunded.

Set aside.