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

MAYOR OF GALLE *v.* THE ESTATE & MOTOR ENGINEERING COMPANY.

756—M. C. Galle, 3,565.

Motor Car Ordinance, No. 45 of 1938 s. 30—Mayor is a Municipal servant—Possession of unlicensed motor lorry—Recovery of licence duty—Certificate of licensing authority.

The Mayor of Galle is a Municipal servant within the meaning of section 148 (*b*) of the Criminal Procedure Code.

The power of a Court to order the recovery of the licence duty under section 160 (1) of the Motor Car Ordinance can only be exercised on the production of a certificate signed by the licensing authority stating the amount of duty which would have been payable if the licence had been duly issued.

APPEAL from a conviction by the Magistrate of Galle.

Gilbert Perera, for accused, appellant.

A. H. C. de Silva, for complainant, respondent.

Cur. adv. vult.

December 17, 1940. MOSELEY J.—

The appellant was charged with the possession of a motor lorry for which no licence was in force. Proceedings were instituted on a written report by the Mayor of Galle which is as follows :—

"This 5th day of July, 1940.

I, Wijayananda Dahanayake, Mayor of Galle, in terms of section 148 (b) of The Criminal Procedure Code, 1898, hereby report to Court, that The Estate and Motor Engineering Co., Ltd., Galle, on or about the first day of January, 1940, possess a motor lorry bearing registered No. X 1640, for which a motor car licence was not in force, in contravention of section 29 (1) of the Motor Car Ordinance, No. 45 of 1938, and thereby committed an offence punishable under section 158 of the said Ordinance read with section 150 (1) thereof.

I further request that the sum of Rs. 120 being the licence duty payable by the said person on the said motor lorry for the year 1940 be recovered in terms of section 160 (1) of the said Ordinance.

W. DAHANAYAKE,
Mayor of Galle.
(Licensing Authority.)"

It is common ground that notice of non-user, as provided by section 30 of the Motor Car Ordinance (No. 45 of 1938) was given in respect of the year 1939. It is also agreed that a similar notice was not given in regard to 1940, although the manager of the appellant Company testified that the Company had taken steps at the end of 1939, towards cancellation of registration.

The finding of the learned Magistrate is "Guilty on both counts. Sentence—warned and discharged on the first count and convicted and sentenced to pay Rs. 120 or in default two months' simple imprisonment on the second count".

The first point taken in appeal is that the complaint, that is the written report, is irregular in that the Mayor is not a "municipal servant" within the meaning of section 148 (1) (*b*) of the Criminal Procedure Code. In this connection I have been referred to section 67 (1) of Cap. 194 of the Legislative Enactments which provides for the appointment of a Municipal Commissioner "who shall be, next to the Mayor, the chief executive officer of the Council, and to whom all other Municipal officers and servants shall be subordinate". Section 68 of the same Ordinance provides for the appointment of a number of other persons who shall be deemed, with the Commissioner, to be "executive officers of the Council". A possible inference is that only persons subordinate to the Mayor, Commissioner and other executive officers can be correctly styled "municipal servants". This may be so for the purposes of Cap. 194. Is it, however, to be supposed that the Legislature in framing section 148 (1) (*b*) of the Criminal Procedure Code deliberately conferred a right upon subordinate servants and withheld it from their superior officers? In my opinion the term "municipal servant" means a servant of the Municipality in the wider meaning of the latter word, that is to say, a servant of the self-governing township rather than a servant

of the governing body. There is therefore, in my view, no irregularity in the complaint in this respect. Nor is there in regard to the description of the accused, a matter for which provision is made by section 45 (3) of the Criminal Procedure Code.

In regard, however, to the finding it is difficult to understand how the learned Magistrate came to treat the charge as if it contained two counts. It seems to me that the appellant was properly convicted of possession of a motor vehicle for which a licence was not in force. Further, it seems that the Magistrate was right, in the circumstances of the case, in taking a lenient view of the offence. It was then open to him, upon production of a certificate signed by the licensing authority and stating the amount of duty which would have been payable if application for the licence had been duly made and the licence duly issued, to order that amount to be recovered from the accused.

No such certificate was produced, but the Magistrate appears to have treated the second paragraph of the complaint in the light of a certificate and not only ordered the amount to be paid but imposed a term of imprisonment in default. Inasmuch as it is expressly provided that the amount is to be recovered as though it were a fine, the imposition of a default term is clearly illegal and in any case could not be allowed to stand. Moreover I do not see how the second paragraph of the complaint, which is in the nature of a request and is probably intended to be a reminder to the Court of the power conferred by section 160 (1), can by any stretch of imagination be regarded as the certificate contemplated by that section.

The conviction on what has been termed the "first count" is affirmed. The order for payment of Rs. 120 and for the default term of imprisonment is set aside.

The appeal, to that extent, is allowed.

Conviction on 1st count affirmed.
Conviction on 2nd count set aside.