

1930

Present : Maartensz A.J.

ZAKIR v. USOOF ISMAIL

395—M. C. Kandy, 2,377.

Municipal Councillor—Interest in contract—Vacating seat—Continuing offence—Limitation—Right to prosecute—Municipal Councils Ordinance, No. 6 of 1910, ss. 30, 33, and 236.

Where a Municipal Councillor, who is interested in a contract, acts as Councillor, he is liable to be convicted under section 33 of the Municipal Councils Ordinance, although he is bound to vacate his seat in consequence of such interest. The right to initiate a prosecution under the section is not limited to the Chairman of the Municipal Council.

An offence created by the section is a continuing one and a prosecution would not be barred if it is brought within three months of the date on which the person last acted as Councillor.

THE accused in this case was convicted of the following offences :—

- (1) That, being Councillor for Ward No. 2 of Kandy, he was interested in a contract with the Municipal Council of Kandy by the lease of a building site.
- (2) Being interested, in a contract with the Municipal Council of Kandy by tenancy of premises bearing assessment No. 239, Trincomalee street, offence punishable under section 33 of the Municipal Councils Ordinance, 1910,

and sentenced to pay a fine of Rs. 10.

Keuneman (with him *Abeyesekere*), for accused, appellant.—Section 230 gives the Chairman of the Municipal Council power to order proceedings to be taken for the recovery of fines and penalties and the punishment of persons offending against the provisions of the Ordinance. There is no section which gives a voter the right to prosecute. Hence a voter who wishes to prosecute must get the sanction of the Chairman to initiate proceedings. That this was the intention of the legislature

is clear from the fact that the section has conserved the right of a voter to proceed against the Chairman by *mandamus* to compel him to take action. The inclusion of the words “ or in any other respect ” in section 230 would show that the section refers to prosecutions of any kind.

On the first count the appellant was charged with having been interested in a contract in December, 1927, with Municipal Council of Kandy while being a Councillor. The contract is dated April, 1927. Section 31 states that any Councillor interested in a contract shall *ipso facto* cease to be a Councillor, the offence therefore was committed in April, 1927, and in terms of section 31 the appellant was therefore not a Councillor. The prosecution should have been brought within three months of that date.

The accused was further charged with being interested in a contract with the Municipal Council in December, 1929, and January, 1930, by leasing premises in Trincomalee street. This contract was between the firm of Ismail Brothers and the Municipal Council. The accused ceased to be a partner of the firm in December, 1929, and was therefore not in a contractual relation with the Municipality in January, 1930.

De Zoysa, K.C. (with him *Soertsz*), for respondent.—Section 230 refers to the right of an inhabitant to complain to the Chairman of the existence of a nuisance only. In other cases therefore a person has the right to prosecute directly.

The words shall “ *ipso facto* cease to be a Councillor ” means shall vacate his seat. A Councillor who does not vacate a seat is still a Councillor, and so long as he acts as Councillor will be liable to conviction under section 33. The accused having been a Councillor till December, 1929, the prosecution is not barred.

The transfer of the appellant's share in the premises No. 319 was in February, 1930. In January, 1930, he therefore had an interest in the premises, although he had previously ceased to be a partner in

the firm and is liable to conviction. Further, the transfer is a colourable one and made for the purposes of re-election. October 7, 1930. MAARTENSZ A.J.—

The accused in this case, a Councillor of the Municipal Council of Kandy, was convicted of the following offences;—

That he being Councillor for Ward No. 2 of Kandy : “ (1) Was about December, 1929, interested in a contract with the Municipal Council of Kandy, to wit, the lease of a building site in Ward street, Kandy ”.

“ (2) Was about December, 1929, and January, 1930, interested in a contract with the Municipal Council of Kandy, to wit, the tenancy of premises bearing assessment No. 359, Trincomalee street, offences punishable under section 33 of Ordinance 6 of 1910. ”

The accused having been fined Rs. 10 can only appeal upon a matter of law.

The matters of law certified in the petition of appeal are the following :—

(a) That it was not open to the complainant to initiate a prosecution against the accused.

(b) That in respect of the first contract the learned Magistrate was wrong in holding that the offence was committed in 1929, as it was committed, if at all, in 1927, and the prosecution is therefore barred by section 236 of the Ordinance.

(c) That in respect of the tenancy contract the Magistrate was wrong in holding that an offence was committed during the latter part of 1929 or the early part of 1930.

It was submitted in the petition of appeal that such an offence can only be committed once, and the accused having by reason of his interest in the first contract in 1927 ceased to be a Councillor, could not have committed any offence punishable under section 33 during the period from 1927 to 1930.

It was further submitted that the firm of Ismail & Co. were the landlords of the Council in respect of the premises

No. 359 in Trincomalee street ; that the accused having ceased to have an interest in the partnership business from and after December 20, 1929, had no interest in the tenancy contract from and after January 1, 1930.

The first objection is based on the provisions of section 230 of the Municipal Councils Ordinance, which enacts that the Chairman may direct any prosecution for any nuisance whatsoever and may order proceedings to be taken for the recovery of any fines and penalties, and the punishment of any persons offending against the provisions of this Ordinance or of any by-law made thereunder.

There are two provisos to the section which provide—

(a) That any inhabitant of a place may complain of the existence of a nuisance to the Chairman, who shall then inquire into the complaint so made and make order abating or remedying the same.

(b) That nothing contained in the section shall be held to preclude any inhabitant from proceeding against the Chairman of Council by *mandamus* or otherwise to compel him or them to put the provisions of the Ordinance in force for abating or remedying a nuisance or in any other respect or to restrain them from undue or illegal exercise of authority.

It was contended that the words “ may direct any prosecution ” and the words “ may order proceedings to be taken for the recovery of any fines or penalties ” gave a discretion to the Chairman to order proceedings to be taken, but limited the right to prosecute to the Chairman.

It was urged in support of this contention that if any person could take proceedings there would have been no necessity for the proviso that any inhabitant may compel the Chairman of the Council by *mandamus* to put the provisions of the Ordinance in force.

The learned Magistrate was of opinion that the words “ or in any other respect ”

in the second proviso refers to the provisions for remedying or abating a nuisance. In support of his view he referred to section 240 of the Ordinance which provides that the Magistrate by whom any fine is imposed by virtue of this Ordinance may award to the informer any portion not being more than one-half of the amount recovered.

I am unable to accept the appellant's contention that only the Chairman of the Council could have initiated this prosecution. If the legislature intended to limit the right to prosecute to the Chairman it would have enacted that all proceedings under the Ordinance should be initiated by the Chairman. The proviso in my opinion refers only to such proceedings as could only be taken by the Chairman of the Council.

By the Municipal Corporations' Act, 1882,¹ an action to recover a fine from any person for acting in a corporate office without being qualified or ceasing to be qualified or after becoming disqualified may not be brought except by a burgess of the borough, and by sub-section 5 the plaintiff is entitled to be paid a moiety of the fine recovered.

Under this section only a burgess can bring the action and no one else. If the Ceylon legislature intended that a prosecution under section 33 should be brought by the Chairman only an enactment in similar terms would have been embodied in the Ordinance.

The second objection that the offence was committed in 1927 is based on the date of the lease (P 21). By this lease dated April 22, 1927, the Municipal Council of Kandy leased to the accused and his two brothers an allotment of land situated in Colombo road or Ward street, Kandy, for a term of twenty-five years as from November 1, 1926. This lease was executed after the election of the accused as a Municipal Councillor for the triennial period commencing from January 1, 1927.

¹ 45 & 46 Vic. c. 50, s. 224.

It was contended that by the execution of the lease the accused *ipso facto* ceased to be a Councillor by reason of the provisions of section 30 of the Municipal Councils Ordinance, and that having ceased to be a Councillor he could not be prosecuted under section 33, which provides for the prosecution of a Councillor who is concerned or interested in any contract or work made with or done for the Council.

If this contention is sound, as observed by the Magistrate, section 33 of the Ordinance might very well be deleted. A similar contention was considered in the case of *Fletcher v. Hudson*,¹ which was an action against the defendant to recover a penalty of £50 under the Public Health Act, 1875,² for acting as a member of the Grasmere Local Board when he was disabled from so acting by the provisions of the statute. The defendant was elected a member of the Board in 1872 and continued as a member up to the time of the action. It was found as a fact that the defendant was concerned in a bargain or contract entered into by the Board. Rule 64 of schedule 2 to the Act in question declared that any member of a Local Board who, in any manner, is concerned in any bargain or contract entered into by such Board shall cease to be such member, and his office shall thereupon become vacant, and rule 70 imposed a penalty of £50 on any person who not being duly qualified to act as member of the Local Board or being disabled from acting by any provisions of this act, acts as such member. It was argued that the defendant did not come within the 70th rule because he was no longer a member. This argument was rejected by Brett and Cotton, Lords Justices, Bramwell L. J. dissenting.

This decision would have been clear authority against the appellant's contention if the wording of section 33 were similar to the wording of rule 70 of the

¹ (1881) L. R. 7 Q. B. D. 611.

² 38 & 39 Vic. c. 55.

statute considered in the case I have referred to. But section 33 does not say "any person" but "any Councillor" nor are there any words which indicate that the penalty is imposed on a Councillor acting while not qualified to act.

I am of opinion however that section 33 was intended to penalize a Councillor who acts as Councillor after he became concerned or interested otherwise than as shareholder in a Joint Stock Company in any contract or work made with or done for the Council. I accordingly hold that the accused by entering into the contract P 21 became liable to prosecution under the provisions of section 33.

The next question is whether the prosecution is barred by the provisions of section 236, by which a prosecution is barred unless the complaint respecting an offence is made within three months next after its commission. According to my construction of section 33 the accused committed an offence each time he acted as Councillor, and a prosecution will be barred by section 236 if the complaint against him was not made within three months after he last acted as Councillor.

I can find no evidence on the record of the last date on which he acted as Councillor. Mr. Jayatileke, the Secretary of the Council, said in his evidence that the accused sat on January 1, 1927, till November 16, 1929. It is not clear from this evidence that the accused acted as Councillor on November 16, 1929. The documents marked P 19 are notes of meetings but do not show that the accused acted as Councillor. In the absence of such evidence the date on which the offence was committed was April, 1927, and the prosecution is barred.

It is unnecessary, in view of the conclusion I have come to, to discuss the validity of the assignment executed on December 20, 1929, but I think I should point out that the assignment of the lease without the privity of the Council is of no avail. By the Municipal Corporations' Act, 1882,¹ a person is disqualified from being

elected and being a Councillor if and while he is interested in any contract with the corporation, and it has been held that the assignment, of the contract before the election without the privity of the local authority would not remove the disqualification. (*Rex v. Franklin*.¹) I quote from section 628 of *Halsbury's Laws of England*, vol. 19, as the Irish Reports are not available.

The third objection to the conviction depends on whether the accused ceased to be in contractual relation with the Council by ceasing to be a member of the firm of Ismail Brothers.

The accused's brother, M. Ismail, gave evidence to the effect that the accused ceased to be a partner in December, 1929. In proof of this fact he produced a certificate of registration of the firm, D 6, dated December 20, 1929, according to which the members of the firm were the accused's brothers. This certificate was issued after the Registrar had been notified that the accused had ceased to be a member of the firm.

I agree with the Magistrate for the reasons given by him that this alteration in the constitution of the firm is a colourable one and effected for the purposes of the accused's re-election as Councillor for the triennial period commencing from January 1, 1930.

A contractual relation with regard to the premises 359 in Trincomalee street commenced in October, 1927, and as regards the accused's membership of the Council for the three years commencing from January 1, 1927, there is no evidence that he acted as Councillor within three months of the date of the prosecution and the prosecution is barred by section 236. The prosecution was laid within three months of the accused's re-election as Councillor in January, 1930, and the accused would be liable to conviction under section 33 if his contractual relation with the Council did not cease by his retirement from the firm of Ismail Brothers.

¹ 45 & 46 Vic. c. 50 s. 12 (c).

¹ (1872) 6 I. R. C. L. 239.

I am of opinion that it did not. The accused and his two brothers are the owners of the building, and the accused continued to be the owner of a share till 1930. The contract of tenancy was made between the Council, the accused, and his two brothers and that relationship continued, although he retired from the firm, unless a new tenancy was created between the Council and the new firm. I am, therefore, of opinion that the accused was properly convicted under section 33 of the Ordinance for being in January, 1930, interested in a contract with the Municipal Council of Kandy, namely, the tenancy of premises No. 359, Trincomalee street.

I set aside the conviction on the first count of the charge and alter the conviction on the second count to a conviction for being interested in a contract with the Municipal Council of Kandy in January, 1930. The fine is a nominal one and I see no reason to alter it.

The appeal 595 A is an appeal by the complainant against the acquittal of the accused of an offence under section 32 of the Ordinance. I think this question is concluded by the decision of Garvin A.C.J. in *S.C. No. 26 D. C. Inty. Kandy* (Election Petition) delivered on June 19, 1930. That was an appeal by the accused in this case against an order of the Chairman erasing his name from the list of persons entitled to be elected Councillors. It was successfully contended in appeal that section 31 did not apply to the case of a Councillor who was interested in a contract with the Council. It was held that section 31 applied to the disqualification in section 10 (4), which makes no reference to such a case.

For the reasons set out in that judgment, I am of opinion that the penalty provided by section 32 does not apply to the case of a Councillor interested in a contract with the Council.

The appeal of the complainant is accordingly dismissed.

Appeal dismissed.