1942 *Present :* **Howard C.J.**

ROBINS *v.* GROGAN.

90—M. C. Matale, 9,179.

Document—Letter written in breach of Defence Regulations—Proof of hand-writing—Re-trial—Evidence Ordinance, s. 67.

A document cannot be used in evidence unless its genuineness has been either admitted or established by proof, which should be given before the document is accepted by Court.

A new trial should not be ordered to enable the prosecution to fill up gaps in the evidence or when the prosecution by its own negligence failed to produce evidence, which it was bound to do.

APPEAL from a conviction by the Magistrate of Matale.

R. L. Pereira, K.C. (with him *R. G. C. Pereira*), for the accused, appellant.

H. W. R. Weerasooriya, C.C., for the complainant, respondent.

Cur. adv. vult.

43/21

March 25, 1942. HOWARD C.J.—

The appellant was convicted by the Magistrate, Matale, for recording and communicating by letter to another person information, being or purporting to be information with respect to the number, description, disposition and movement of Forces in breach of section 14 (2) of the Defence (Miscellaneous) Regulations published in *Government Gazette* No. 8,533 of October 20, 1939, and thereby committing an offence punishable under section 52 (3) of the said Regulations. For this offence the appellant was fined a sum of Rs. 750. She appeals against her conviction and sentence. The only evidence called by the prosecution was that of Mr. Robins, the Assistant Superintendent of Police, Kandy, who produced a letter dated December 28, 1941, which had been intercepted in Censorship on December 31, 1941, and examined by an authorised Examiner. This letter communicated information with regard to the movements and disposition of troops in Ceylon. The address at the top of the letter was Opalgalla Group, Rattota, and it was signed "Phyllis". The letter was contained in an envelope addressed to Mrs. H. M. C. Barlow, Corrie, Charters road, Sunningdale, Berks, England. In accordance with Censorship requirements the name and address of the sender was written on the envelope as follows :—

"From Mrs. J. R. Grogan, Opalgalla Group, Rattota, Ceylon".

Mr. Robins also testified to the fact that the Christian name of Mrs. Grogan was Phyllis, as at the foot of the letter. No evidence was called by the appellant. Her Counsel contended that the prosecution had not proved that the signature or the handwriting of so much of the letter and envelope as is alleged to be in the handwriting of the appellant was in her handwriting. In this connection he cited section 67 of the Evidence Ordinance. In convicting the appellant the Magistrate held that the prosecution had led sufficient evidence to prove that the appellant wrote the letter and the envelope. He also stated that there was enough evidence against the appellant to throw the burden on her to show that she did not write these documents. As she had not chosen to get into the witness-box and deny that the letter and envelope were in her handwriting the evidence for the prosecution was uncontradicted.

In my opinion it is impossible to support the finding of the Magistrate. Section 67 of the Evidence Ordinance is worded as follows :—

> "If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."

A document cannot, therefore, be used in evidence until its genuineness has been either admitted or established by proof which should be given before the document is accepted by the Court. Where there has been no admission as to the execution of a document which has been produced, it becomes necessary to prove the handwriting. No such proof was adduced in this case by the prosecution. In fact the Magistrate held the onus of proving one of the ingredients of the offence was shifted, or put in other words the accused had to establish her innocence.

I have come to this conclusion with great regret and in this connection have considered whether I am empowered under section 347 (*b*) of the Criminal Procedure Code to order a new trial. One can hardly conceive of a person in the position of Mrs. Grogan not going into the witness-box and denying the authorship of the letter, if in fact she had not written it. There is therefore every reason to suppose that the appellant committed this very serious offence. If this is so, she has only escaped punishment by a flaw in the evidence. On a new trial, legal proof that the appellant wrote the letter would no doubt be forthcoming and the technical flaw in the evidence would be rectified. At first glance, therefore, it seems to be eminently a case in which I should order a new trial. Unfortunately it has been laid down that a new trial should not be ordered to enable the prosecution to fill up gaps in the evidence or when the prosecution by its own negligence failed to produce evidence which it was bound to. Thus in *Hamdu Meah v. King Emperor* [1], Moore J. stated as follows:—

> "The petition of appeal sets out various contradictions in the evidence and draws attention to the lack of corroboration of the informer in material points. The retrial is apparently ordered for the sole object of enabling the prosecution to reconcile these discrepancies and to fill up the deficiencies in the evidence pointed out by the appellant. I think it would be unfair to the appellant to order a new trial under such circumstances."

The same principle was also formulated in *Jeremiah v. Vas* [2]. There is no doubt that the principle laid down in the two Indian cases I have cited apply with equal force to the facts of the present case. In the circumstances, I have no power to order a new trial and the conviction must be set aside and the appellant discharged. In the result, an offence, the seriousness of which I find it impossible to exaggerate, goes unpunished through the failure on the part of those responsible for the prosecution to ensure that legal proof to establish the offence was before the Court. It is difficult to understand the mentality of persons who in contravention of regulations framed for the safety of the country disseminate in correspondence information of a military character. It not only indicates a deplorable attitude of irresponsibilty, but also a total disregard of the well being of the country and the Empire of which it forms part. The enormity of the offence in this case is increased by reference made by the writer of the letter to other matters not of a military character, but which could not but fail to spread alarm and despondency amongst those by whom the letter was read. I can only characterise this letter as a document of a most reprehensible character. The communication of its contents did not constitute a mere technical offence. In fact the sentence passed by the Magistrate erred if anything on the side of leniency.

Set aside.

[1] *11 Cr. Law Journal Reports, 685.*

[2] *(1911) 36 Mad. 457.*