Present : Dalton J.

1927.

WEERASINGHE *v.* DEONIS.

698—P. C., Galle, 28,142.

Forest Ordinance, 1907—Charge under section 21 (1)—Evidence of similar offence—Admissibility—Evidence Ordinance, s. 167.

In a prosecution under the Forest Ordinance, evidence that the accused had been previously convicted of a similar offence is inadmissible.

APPEAL from a conviction under section 21 (1) of the Forest Ordinance of unlawfully and without the permission of the Government Agent clearing up Crown land. The defence of the accused was that he was an employee of a man named Jayasekere who, so far as he was aware, was the owner of the land. Evidence was then led on behalf of the Crown to show that Jayasekere had made claims on previous occasions on other lands and had been prosecuted and convicted for those acts. It was also proved that in a case, in which Jayasekere was convicted, the appellant himself was an accused party. Despite objection the Police Magistrate admitted the evidence and convicted the accused.

[1] *2 C. L. R. 113.*

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Weerasinghe v. Deonis

January 28, 1927. DALTON J.—

This is a case arising under the Forest Ordinance of 1907. The appellant has been convicted on a charge of unlawfully and without the permission of the Government Agent, clearing and breaking up the soil of Puwakgahahena, which is a land at the disposal of the Crown and not included in a reserved or village forest. That charge is laid under the provisions of section 21 (1) of the Ordinance; under that section power is also given to the Governor in Council to make rules with respect to any forest or any particular forest. The material rule in question in this case is the first rule of the rules framed for forests in the *Government Gazette* of July 18, 1913. That rule is in the following terms:—

> "No land at the disposal of the Crown shall be cleared for chena cultivation without the permit of the Government Agent of the Province, or the Assistant Government Agent of a district of the Province for his district."

The accused was fined Rs. 15. Certain grounds of appeal were proposed to be argued by Mr. de Zoysa on his behalf, but it is clear that only the fourth ground can be argued: that is a matter of law which is duly certified in the Petition of Appeal by a Proctor of the Supreme Court. That ground is to the effect that evidence has been wrongly admitted, which evidence influenced the judgment of the Magistrate so as to cause the Magistrate to convict the accused. The defence of the accused in respect of his action is that he was the employee of a man named Jayasekere, who so far as he was aware was the owner of the land in question. Evidence was thereupon led on behalf of the prosecution to show that Jayasekere had made various claims on previous occasions to other Crown lands, and had been prosecuted, and had further been convicted for those acts. It was also proved by the prosecution that in the second case in which Jayasekere was convicted the appellant himself was an accused party. Then the Chief Clerk of the Police Court of Galle was called and produced records in the cases, which records went to show that Jayasekere and others had been convicted for offences similar to the offence charged, and that one of those others was the present appellant. Objection was taken to that evidence being led at the time, but the Magistrate apparently without going into the objection merely ruled in the following words: "The evidence may go in." Therefore at the close of the case for the prosecution the learned Magistrate had admitted evidence to show that on a previous occasion the accused had been convicted of a similar offence. In supporting the admission of that evidence Crown Counsel has argued that the evidence is admissible in view of the defence, for the purpose of showing the state of mind of the accused in the present case; that inasmuch as he had previously

been convicted of clearing Crown land together with Jayasekere, that that fact showed that he was not acting *bona fide* in cultivating or breaking up the land alleged in the present case.

The question of admission of this class of evidence has been dealt with at length in *King v. Seneviratne.*[1] In that case the case of *Makin v. The Attorney-General of New South Wales,*[2] is cited and followed. I might read here an extract from that latter case which forms a clear guide to one in deciding whether or not in this particular case the evidence was rightly or wrongly admitted. Lord Herschell in that case says:—

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purposes of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the Acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."

It is obvious as pointed out there that it is very difficult to draw a line, but it is very difficult to my mind to say in this particular case that the evidence complained of was not led for the purpose of showing that the accused, having been convicted of a similar offence with Jayasekere before, was in all likelihood a person who, from his criminal conduct or character, had committed the offence now charged with. I personally am quite satisfied I shall not have admitted that evidence, and Crown Counsel himself admits that if he had been the Magistrate he would have been inclined to reject that evidence. It seems to me as I stated that the evidence admitted was evidence which should not have been admitted.

The question remains then to decide if it was admissible, has it influenced the Magistrate in his judgment? If we refer to the judgment it will be found that the Magistrate came to the conclusion that, although the accused was a tool, as he calls him, in the hands of Jayasekere, he did not believe he was acting in good

[1] *27 N. L. R. 100.* [2] *1894. A. C. 57 (65).*

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faith. It is quite impossible for me to say, as I must say if the conviction is to be upheld, that the Magistrate was not influenced by that evidence which was wrongly admitted. There is a further point however, as it has been argued that the Crown, having shown that the land was Crown land and that the accused broke up that land, have shown that he had then committed an offence under the Ordinance in the absence of any proof by him that would give him the benefit of sections 38 and 72 of the Penal Code. Section 72 provides that an act done by a person by a mistake of fact, believing himself to be justified by law shall not be an offence. This question is fully dealt with in the judgment of this Court in *Weerakoon v. Ranhamy* [1] when the court held in the case of an offence under section 21 of the Forest Ordinance, that that was an enactment which belonged to a special and unqualified class of prohibitions, yet it was subject to the provisions of section 72 of the Code.

The argument put before me is that the accused has in fact made no defence. He has given no evidence that he was acting under a *bona fide* mistake of fact. That is so. On the other hand, it seems to me that an ignorant man, and I take it the appellant is an ordinary villager, might well think that when the Crown had led evidence to show that he had been previously convicted it was hardly worth his while going into the witness box to state that in the particular case before the Court, he was in fact acting under a *bona fide* mistake of fact. I am not satisfied he would not have done so if that evidence had not been wrongly led by the prosecution. Then it was suggested that under the provisions of section 167 of the Law of Evidence the improper admission of evidence is no ground for a new trial, or even for the reversal of any decision if it appears to the Court that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision. As I stated before, I am not able to say that if this evidence had not been admitted the Magistrate would have come to the conclusion that the accused was not acting *bona fide*. I am further not satisfied that if this evidence was not admitted the accused himself might not have given evidence to show that he was acting *bona fide*.

Taking the case as a whole it seems to me that the conviction must be set aside, because it is impossible for this Court to say that the Magistrate has not been influenced in his conclusion as to the guilt of the accused, by that evidence of the previous conviction. I would therefore allow the appeal and set aside the conviction. No question is of course decided as to the rights of any parties to the land.

Conviction set aside.

[1] *23 N. L. R. 33.*