1953 *Present :* **Nagalingam A.C.J.**

SANITARY INSPECTOR, MIRIGAMA, Appellant, *and*
THANGAMANI NADAR, Respondent

S. C. 1,274—M. C. Gampaha, 5,596

Evidence Ordinance—Section 106—" Especially within the knowledge of any person "—Quarantine and Prevention of Diseases Ordinance—Contravention of Regulation 46—Burden of proof.

By section 106 of the Evidence Ordinance,

" When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. "

Held, that when the section refers to a fact as especially within the knowledge of a party, the term "especially" means "almost exclusively", if not "altogether exclusively", within the knowledge of a party.

The charge that was preferred against the accused was under the Quarantine and Prevention of Diseases Ordinance alleging that he did "being permanently or temporarily resident in a building in which was a person affected with a contagious disease, to wit, small pox, fail to inform the proper authority forthwith in contravention of Regulation 46 of the Regulations made under the Ordinance".

Held, that section 106 of the Evidence Ordinance did not cast on the accused the burden of proving that he had given information to the proper authority until some *prima facie* evidence at least had been first led by the prosecution of the failure on his part to give the information.

The presumption of innocence casts on the prosecution the burden of proving every ingredient of an offence even though negative averments be involved therein.

APPEAL against an order of acquittal from the Magistrate's Court, Gampaha.

H. N. G. Fernando, Acting Solicitor-General, with *A. Mahendrarajah*, Crown Counsel, for the Crown.

S. Nadesan, with *T. K. Curtis*, for the accused respondent.

Cur. adv. vult.

September 28, 1953. NAGALINGAM A.C.J.—

This is an appeal by the complainant with the sanction of the Attorney-General against an order acquitting the respondent of a charge that was preferred against him under the Quarantine and Prevention of Diseases Ordinance in that he did "being permanently or temporarily resident in a building in which was a person affected with a contagious disease, to wit, small pox, fail to inform the proper authority thereof forthwith in contravention of Regulation 46 of the Regulations made under the Ordinance".

The reason for the acquittal of the accused was that there was no evidence placed before the Magistrate to show that he had failed to inform the proper authority of the presence of the person so afflicted with the disease. The learned Magistrate felt himself bound, as in fact he was, to follow a decision of this Court on almost an identical question. That was a prosecution under Regulation 45 of the same Regulations, whereunder a medical practitioner was charged with having failed to give information in writing to the proper authority stating the name of the diseased person, his residence and the nature of his disease; he was convicted but on appeal Keuneman J. set aside the conviction and acquitted the accused, holding that—

"Material evidence which should have been led was not in fact led, namely that the *accused failed to give information to the proper authority.*

Apparently the prosecution completely overlooked the necessity of this evidence until after the case was over. In the circumstances I set aside the conviction and sentence." [1]

These observations are equally apposite to the facts of the present case.

The learned Acting Solicitor-General who appeared in support of the appeal, however, contended that that decision needed review, and contended firstly that it would be very inconvenient for the prosecutor to establish a failure on the part of an accused person to give the necessary information to the proper authority, which consists of a fairly large class of persons, and though for the purpose of construing a statute that may not be a very cogent argument, he, however, submitted secondly that whether notice was given or not was a fact especially within the knowledge of the accused and that under section 106 of the Evidence Ordinance the burden lay on him of establishing such fact.

Without burdening one's mind with regard to what the English cases have decided on similar or analogous matters, I think the proper approach to a determination of the question is to ascertain what are the facts which the prosecutor must establish under our law to secure a conviction. If one analyses the charge, it is apparent that the prosecutor must establish the following three ingredients :

(*a*) that the accused was permanently or temporarily resident in a building ;

(*b*) that in that building there was a person affected with a contagious disease of the kind set out therein ; and

(*c*) that he failed to inform the proper authority of the presence therein of the person suffering from such disease.

It was not gainsaid by the learned Acting Solicitor-General that under our law, as under the English Law, " the presumption of innocence casts on the prosecution the burden of proving every ingredient of the offence ". This principle has undoubtedly well recognised exceptions. One is that the Legislature itself may impose the burden of proving a fact on an accused person. Another is that in view of certain presumptions arising under the law of Evidence an accused would be under a necessity to rebut the presumption to avoid the consequences.

It is conceded that neither under the relevant Regulations nor under the Ordinance is the burden of proving any fact in relation to the charge expressly laid by the Legislature on the accused person ; and also that none of the presumptions created by sections 107 to 114 of the Evidence Ordinance applies to this case.

To turn to the charge, the proof of ingredients (*a*) and (*b*) has been given to the satisfaction of the Court. In regard to ingredient (*c*) there was no evidence ; but the contention of the learned Acting Solicitor-General is that by virtue of section 106 of the Evidence Ordinance the burden of proving that ingredient is on the accused, who must prove the fact of his

[1] *S. C. No. 449, M. C. Jaffna 21,445, S. C. Mins. 4.7.44.*

having given information to the proper authority if he wishes to escape the penal consequences that would otherwise flow.

I cannot see my way to agree with this contention. When the section refers to a fact as being especially within the knowledge of a party, the term " especially " there means " almost exclusively " if not " altogether exclusively " within the knowledge of a party, and not that the fact is one within the knowledge of the one party as well as of the other. English Judges use the term " peculiarly within the knowledge of a party " for the phraseology adopted by the framers of the Evidence Ordinance in section 106 thereof.

One of the earliest cases where an elucidation of the term " peculiarly within the knowledge " of a party is to be found is the case of *K. v. Turner* [1]. The prosecution was for possession of game by the accused, " he being a person not having lands, &c., nor being a person in any manner qualified or authorised by the laws of the realm to kill game, nor being a person entrusted with such game by any person or persons qualified to kill game ". No evidence for the prosecution was given of the fact that the accused was a person who had no lands or had not been qualified or authorised by the laws of the realm to kill game, or that he had not been entrusted with game by a person qualified to kill game. The accused was convicted and in upholding the conviction all the Judges agreed that each one of the qualifying matters was peculiarly within the knowledge of the accused person. The following extract from the judgment of Holeroyd J. clearly furnishes the reason for the view that was taken, that those were matters peculiarly within the knowledge of the accused person, and throws light on the meaning to be attached to that phrase :

> " Now all the qualifications mentioned in the Statute are peculiarly within the knowledge of the party qualified. If he be entitled to any such estate as the Statute requires, he may prove it by his title deeds or by receipt of rents and profits or if he is son and heir or servant of any lord or lady of a manor appointed to kill game, it will be a defence. All these qualifications are peculiarly within the knowledge of the party himself, *whereas the prosecutor has probably no means whatever of proving the qualification.* "

To appreciate fully this passage, it must be borne in mind that title deeds in England, unlike in Ceylon, are private documents in the custody of parties themselves; nobody else is able to have access to them, nor are there public offices where such deeds are registered excepting in certain very limited areas to which it is unnecessary to make any reference for the purposes of the present discussion. That is an important factor which should be borne in mind. So that, the holder of a title deed alone can establish his title to the land, and it will be correct to say that that is a fact which is *peculiarly* in the sense of exclusively within the knowledge of the accused person, and is not one of which the prosecutor could have any knowledge. Similar observations would apply to the other qualifications referred to by the learned Judge, namely whether the accused is the son and heir or servant of a person lawfully entitled to kill game.

[1] *(1816) 5 M. & S. 206.*

Section 106 to my mind embodies the same principle and has been construed in the same sense in India :—

> " It is particularly clear that section 106 contemplates facts which in their nature are such *as to be within the knowledge of the accused and of nobody else,* for instance his own intention in doing an act (illustration C) or the fact that he purchased a ticket though he was subsequently found to be without one (illustration B). It has no application to cases where the fact in question having regard to its nature is such as to be capable of being known not only by the accused but also by others if they happen to be present when it took place. It cannot in my opinion be invoked to make up for the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused." —*per* Niamat Ullah J. in *Ram Bharosi v. Emperor* [1].

Can it be said that whether the accused person gave information to the proper authority or not is not as much a fact within the knowledge of the proper authority as the accused himself? That the burden of proving a fact especially within the knowledge of a person is thrown upon him by section 106 of the Evidence Ordinance does not mean that in a criminal case the principle that the burden of proving every essential ingredient necessary to constitute the offence lies at every stage of the case on the prosecution is in any way modified or whittled down or that the golden thread of the presumption of innocence of the accused thereby gets snapped and that the prosecutor could say that merely because a particular fact is within the knowledge of the accused person he need not lead any evidence of such fact though it may constitute an essential element of the offence.

I should like at this point to draw attention to the second illustration given under section 106 ; a person is charged with having travelled without a ticket ; would it be sufficient to give evidence only of the fact that the accused was found travelling in a train without leading any evidence at all as to whether the accused had a ticket or not ? And if there was no evidence about the non-possession of a ticket can there be the slightest doubt but that the prosecution cannot be said to have proved its case ? If on the contrary the prosecution did lead some evidence of that fact by establishing that the accused when called upon to produce the ticket did not do so, would there be any doubt but that the prosecution had placed a prima facie case against the accused? In those circumstances the accused cannot be heard to contend that there was no proof that he had not in fact bought a ticket or that having bought one he had misplaced or lost it. Where such a contention is put forward by the accused, the burden would indisputably be upon him to prove the fact of his having purchased the ticket and also of his having misplaced or lost it, if such be the case.

Though the learned Acting Solicitor-General cited the case of *Huggins v. Ward* [2] which may be said to lay down the law in a contrary sense, he did not feel himself justified in contending that without some slight proof at least being led before Court of the fact that the accused had no

[1] *(1937) 38 C. L. J. 205.*

[2] *(1873) L. R. Q. B. 521.*

ticket, the prosecution could be said to have established its case, and ultimately veered to the view expressed in Phipson on Evidence. [1]

> " These cases (under the old game laws), however, have been considered to rest partly upon the construction of the Acts, and in the absence of statutory provision the better opinion now seems to be that in general some prima facie evidence must be given by the complainant in order to cast the burden on his adversary. "

In fact, Phipson's comment *loc. cit.* on *Huggins v. Ward* (supra) is, "this case would probably not now be followed ".

I shall now pass on to a consideration of the other authorities cited on behalf of the appellant. In the case of *Rex v. Cohen* [2] undoubtedly it was held that once it is proved that a person was in the possession of dutiable goods in such circumstances as would entitle a Court to find that he was consciously in possession of them the onus was on the accused person to prove that duty had in fact been paid, although there was no evidence placed by the prosecution before the Court to prove either that no duty had been paid or that there were circumstances from which the Court could draw the inference that no duty had been paid. But that view was based upon the express provision of the Statute, which provided :—

> " If in any prosecution in respect of any goods seized for non-payment of duties or for the . . . . recovering of any penalty or penalties under the Customs Act, any dispute shall arise whether the duties of customs have been paid in respect of such goods . . . . then, in every such case the proof thereof shall be on the defendant in such prosecution. " (Section 259, Customs Consolidation Act, 1876.)

This case, therefore, falls within the well known principle enunciated by Taylor in his Law of Evidence [3] :

> " Necessity of giving . . . . prima facie evidence on the part of the prosecution having been found in the great majority of criminal cases not only useless but highly inconvenient, the Legislature has in many instances interfered sometimes by describing the offence and omitting all mention of the negative matter, but generally by expressly enacting that *the burden of proving authority, consent, lawful excuse and the like* should lie on the defendant. In such cases, the defendant by the express language of the Statutes relating to them is bound to protect himself by showing the existence of some lawful authority or excuse. "

Within the same principle falls also the case of *Buckman v. Button* [4]. The charge here was that the accused person was carrying on business (of a kind referred to in the Orders under which information was laid) without having applied to be registered as required by the Orders. The relevant provision of the Orders, sub-section 5 of section 1 of the Limitation of

[1] *9th ed. at p. 41.*
[2] *(1951) L. R. K. B. 505.*
[3] *12th ed. sec. 372.*
[4] *59 T. L. R. 261.*

Supplies (Miscellaneous) (No. 5) Order under which the prosecution was launched provided that—

> "No person who is required by this article to be registered shall carry on any business referred to in this Article after the prescribed date unless he had made that application."

The language of this Article places the burden of proving the excuse or qualification, namely that the offender has made the necessary application, on the offender himself by virtue of section 39 of the Summary Jurisdiction Act, 1879, sub-section 2 of which states :—

> "Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act . . . . creating the offence *may be proved by the defence but need not be specified or negatived in the information or complaint*, and if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant."

It was held that the burden of proving that the accused had not committed the offence by showing that he had applied to be registered was on him and not on the prosecution.

The third case is that of *Rex v. Oliver* [1] which was a prosecution for supplying sugar as a wholesaler otherwise than under the terms of a licence. In this case too the burden of proving that the accused had a licence or permit was fairly and squarely laid on him by the Statute itself, which runs as follows :—

> "Subject to any directions given or except under and in accordance with the terms of a licence, permit or other authority granted by or on behalf of the Ministry no wholesaler shall by way of trade . . . . supply . . . . any sugar."

Had, for instance, the Regulation in the present instance run as follows :

> "No person shall permanently or temporarily reside in any building in which there shall be any person affected with any contagious disease unless he shall forthwith inform the proper authority thereof"

there can be no question but that the prosecution need only prove (*a*) that the accused person had resided in a building, (*b*) that in that building there was a person affected with the contagious disease, and then it would be upon the accused person to establish that he had informed the proper authority, for the offence would consist in occupying a building in which a person affected with a disease was present and not consist in a failure to do an act such as to give information of the presence of a diseased person. In those circumstances on his failure to do so he could properly be found guilty of the offence as under section 105 of the Evidence Ordinance the burden of proving the exception would lie on him.

[1] *(1944) 1 K. B. 68.*

Mr. Nadesan on the other hand relied upon the case of *Over v. Harwood* [1] where it was expressly stated that the presumption of innocence casts on the prosecutor the burden of proving every ingredient of the offence even though negative averments be involved therein. For an application of the principle enunciated in this case, see *Nair v. Saundias Appu* [2], a Divisional Bench case.

In the present case, as stated earlier, the ingredient (c), though a negative averment, is an essential element of the offence and must be established by the prosecution. There is not an iota of evidence to support ingredient (c) of the charge as set out earlier. It will be idle to contend that any burden rests on the accused to prove that he gave information till some prima facie evidence at least has been given of the failure on his part to do so. In the absence of such evidence there is no case for him to answer. The presumption of innocence continues in his favour and has not been displaced by the prosecution. The judgment of Keuneman J., if I may say so with respect, embodies the correct view in regard to the question, and I therefore see no reason to make an order for reviewing that judgment.

In the result the order of acquittal must be affirmed and the appeal dismissed, which I do hereby.

Appeal dismissed.