

1938

*Present* : Keuneman J.RODRIGO *v.* SYLVESTER.

283—M. C. Colombo, 15,733.

*Municipal Council Ordinance—Neglecting to construct a privy—Not a continuing offence—Prescription—Ordinance No. 6 of 1910, ss. 190, 197, 236.*

Where the accused was charged under section 190 of the Municipal Council's Ordinance with neglecting to construct a water-closet after written notice by the Chairman,—

*Held*, that the offence was not a continuing one and that the prosecution was prescribed under section 236 of the Ordinance.

To render a person liable for a continuing offence under section 197 of the Ordinance, there must be a previous conviction for this offence.

<sup>1</sup> (1934) *Appeal Cases* 332.

**A** PPEAL from a conviction by the Municipal Magistrate of Colombo.

*N. M. de Silva*, for accused, appellant.

*L. A. Rajapakse* (with him *J. R. Jayawardana*), for complainant, respondent.

*Cur. adv. vult.*

September 5, 1938. KEUNEMAN J.—

The accused was charged under sections 190 and 197 of Ordinance No. 6 of 1910 with neglecting to construct a water closet on the premises No. 429, Skinner's road, after written notice by the Chairman requiring him to construct this had been served on June 10, 1937. The main defence in the case was prescription under section 236 of the same Ordinance inasmuch as the complaint was made on November 10, 1937, more than 3 months after the offence. The learned Magistrate held that the offence was a continuing offence, and that section 236 did not afford a defence. He convicted the accused, and sentenced him to a fine of Rs. 10, in default 10 days' simple imprisonment. The accused appeals from this conviction.

The relevant words of section 190 are as follows:— "In case the Chairman shall be of opinion that any privy or water closet . . . shall be necessary . . . for any house . . . , the owner of such house . . . shall within 30 days after notice in this behalf by the Chairman, cause such privy or water closet to be constructed in accordance with the requisition contained in such notice". The section continues to the effect that where the requisition has not been complied with, the Chairman can cause the privy or water closet to be built, and the expenses incurred are to be payable by the owner.

Section 197 of the same Ordinance states that whoever contravenes any provisions under the chapter in which section 190 occurs, is liable on summary conviction to a penalty, and that whoever continues to contravene any such provision, after the expiry of one week from such conviction, is guilty of a continuing offence and liable on conviction to a further penalty.

It is clear that the accused is not guilty of a continuing offence, under the latter portion of section 197, as there is no previous conviction in this respect in existence.

It is however argued for the respondent that the offence committed by the accused is in its nature a continuing offence, and that section 236 has no application, and I am referred to the case of *Bartholomeusz v. Ismail*<sup>1</sup> which was a prosecution under section 156; to *Zakiv -v. Usoof Ismail*<sup>2</sup> a prosecution under section 33; to *Chairman, M. C. Colombo v. Silva*<sup>3</sup> a prosecution for carrying on a certain business without a licence.

In each of these cases the learned Judge considered the nature of the offence, and held that the offence was a continuing one, and that section 236 did not afford a defence. I think these cases throw no light on the question whether the offence under section 190 is a continuing offence or not. It will be necessary for me to consider that question by determining the true construction to be given to section 190.

<sup>1</sup> 37 N. L. R. 301.

<sup>2</sup> 32 N. L. R. 172.

<sup>3</sup> 4 O. W. B. 150.

Under section 190 of Ordinance No. 6 of 1910, the Chairman is empowered to give notice in writing to the owner of any premises requiring the building of a privy or water closet. After receipt of such notice, the owner must within 30 days cause the privy or water closet to be constructed in accordance with the requisition. If the owner fails to do so within the 30 days, he "contravenes the provisions" of this section within the meaning of section 197. I think the offence is complete where the owner fails to carry out the terms of the requisition within 30 days, and that it would be no defence to a prosecution for the owner to aver that he has complied with the requisition after the 30 days. The imposition of the time limit is important, and I am of opinion that the offence cannot be regarded as a continuing offence.

In this case the Chairman's notice was served on June 10, 1937. On failure by the owner to complete the work required within thirty days thereafter, he committed an offence. Proceedings against the owner were not initiated until November 10, 1937, more than three months after the commission of the offence. Accordingly under section 236 the owner cannot be made liable to any fine or penalty.

I have also been referred by Counsel for the respondent to *Chepstow Electric Light & Power Co. v. Chepstow Gas & Coke Consumers Co.*<sup>1</sup>, but I think this deals with a different question. In that case there was no time limit placed on obedience by the requisition, and Lord Alverstone C.J. expressed his doubt as to whether "the time of limitation can be said to begin to run where persons are continuing to disobey an order which is always operative until it is obeyed". The learned Chief Justice under these circumstances discusses but does not decide the question as to the point of time when the disobedience of the order was of such a character that the offence could be said to have become complete.

I set aside the conviction and acquit the accused.

*Set aside.*

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<sup>1</sup> L. R. (1905) 1 K. B. 198 at 210