

1952

Present : Gunasekara J.

D. S. GNANAMUTTU, Appellant, and THANGIAH
(Inspector of Police), Respondent

S. C. 777—M. C. Kalmunai, 7,548

Notaries Ordinance (Cap. 91)—Breach of paragraph (a) of rule (35) in Section 30—Burden of proof.

The charge against the accused was that he did "being a notary and not being a proctor fail to live and hold office at the place approved by the Governor by warrant", in breach of paragraph (a) of rule (35) in section 30 of the Notaries Ordinance.

Held, that there was no burden on the prosecution to prove that the accused was not a proctor. The burden was on the defence to prove that he was.

APPEAL from a judgment of the Magistrate's Court, Kalmunai.

S. Nadesan, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 29, 1952. GUNASEKARA J.—

This is an appeal by a notary against a conviction of a breach of paragraph (a) of rule (35) in section 30 of the Notaries Ordinance (Cap. 91), punishable under section 31 of that Ordinance. The charge upon which he was tried alleges that he did "between 1st March and 15th July, 1950, being a notary and not being a proctor fail to live and hold office at the place approved by the Governor by Warrant dated 5th November, 1944, to wit Saindamaruthu in Karavaku pattu of Batticaloa District". The judgment however states that the charge alleges an offence committed "during the period 1.3.49 to 15.7.49"; and the question that the learned Magistrate has considered is whether the appellant committed the alleged offence in that period and not whether he committed it a year later as alleged in the charge. At the hearing of the appeal I invited the learned Crown Counsel's views on the question whether this circumstance vitiated the conviction and I agree with his submission that there has only been an error in the charge that has not occasioned a failure of justice. The period alleged in the report under section 148 (1) (b) of the Criminal Procedure Code, by which the proceedings were instituted, is 1st March to 15th July, 1949, and the record of the evidence indicates that the prosecution and the defence presented their cases upon the footing that that was the period alleged in the charge as well. The point that the appellant has been convicted of an offence with which he was not charged has not been taken in the petition of appeal and was not taken in the argument for the appellant; no doubt

for the reason that the parties as well as the Magistrate understood that the appellant was tried on a charge of having committed an offence in 1949 and not in 1950. There has been a clerical error in the charge that has not misled the appellant and which, in terms of section 171 of the Criminal Procedure Code, cannot be regarded as material, and cannot, in terms of section 425, be a ground for reversing the judgment under appeal.

The learned Magistrate held that during the period in question the appellant did not live at Saindamaruthu but lived at Kallar, six miles away. The main ground of appeal was that the finding that the appellant did not live at Saindamaruthu is erroneous, and that proof that he lived at Kallar is insufficient to establish the allegation that he committed a breach of the rule by failing to live at Saindamaruthu, for that would not exclude the possibility that he had a residence at each place. The charge is not that he contravened the rule by living at Kallar.

The appellant was appointed a notary by a warrant under the hand and seal of the Governor dated the 5th November, 1944, which authorised him to practise in the Batticaloa District "with residence and office at Saindamaruthu". From that time until the time of the trial in 1951 he was the tenant of two rooms adjoining each other in a building at Saindamaruthu owned by one Parihari, and one of these rooms he used as his office throughout that period. The prosecution sought to prove by the production of householders' lists that the other room was occupied by his clerk, one Ponniah. This fact was established beyond doubt, however, by the evidence of Parihari, who was called on behalf of the appellant and whose evidence on this point was accepted by the learned Magistrate. This witness stated that of the two rooms one was occupied by the clerk and his family, consisting of his wife and son, and the other by the appellant. According to him, at the time when he gave evidence, which was the 4th June, 1951, the clerk's wife was not there, having left two months earlier. Under re-examination he said that she had come into occupation of that room about 7 years previously—that is to say, in 1944. The appellant himself admitted that Ponniah and his wife and son occupied the room adjoining the office but denied that they did so in the period 1948 to 1949. This denial was disbelieved by the Magistrate.

It is common ground that at no time in the years 1944 to 1951 had the appellant's name been entered in the householders' lists in respect of the rooms in Saindamaruthu. The prosecution adduced evidence to the effect that in respect of the period June 1947 to June 1950 his name had been included annually in the lists relating to a house in Kallar, where admittedly his wife and children were living, and that in those lists he had described himself as the chief occupant of that house. The appellant himself admitted that in the six and a half years during which he had his office at Saindamaruthu he continued to enter his name in the householders' lists as the chief occupant of the house at Kallar. He has also been registered as a voter in the Periya Kallar Ward of the Karavaku North Village Committee area upon the footing that he had been resident in Kallar for a continuous period of six months in the

period 1st March, 1947, to 31st August, 1948, and at an election held in April, 1949, he was elected to represent that ward. He has not been registered as a voter in respect of Saindamaruthu, which is a ward of the Karavaku South Village Committee area.

A prosecution witness named Mustapha, who was a clerk in the office of the Divisional Revenue Officer and who lived in Saindamaruthu, gave evidence to the effect that on his way to and from the office he regularly met the appellant riding a bicycle, with a bag on its luggage carrier. He himself went daily to his office between 6 and 9 in the morning and returned between 4.30 and 6 in the afternoon, and he would meet the appellant in the mornings riding towards the appellant's office from the direction of Kalmunai which is on the way to Kallar, and in the opposite direction in the evenings. He used to meet him in this way, he said, in 1949 and during a period of about 2 to 3 years before the middle of July, 1949. A village headman, who lives in a house thirty yards away from the appellant's office and within sight of it, also gave evidence to the effect that he had seen the appellant riding a bicycle in the direction of Kalmunai and away from his office in the evenings, and towards his office from the direction of Kalmunai in the mornings, and that he used to carry a suitcase on the luggage-carrier. The evidence of these two witnesses about the appellant's movements was not contradicted, but the appellant explained that in the period during which he had his office at Saindamaruthu, from 1944 to the time of the trial, he had his morning tea and dinner at a hotel in Kalmunai about a mile from his office, and that he would go there in the mornings at 6.30 or 7 and return to the office after his morning tea and go again for dinner at 5.30 or 6 p.m. and return at about 8 or 8.30 p.m. The learned Magistrate disbelieved this explanation.

The other witnesses who were called for the prosecution gave evidence to the effect that the appellant was a resident of Kallar. One was a retired teacher named Kanagasabai who had lived all his life at Kallar and the other was the Chairman of the Village Committee of Karavaku North. They gave evidence in June, 1951, and the former stated that at that time the appellant had been living in Kallar for 38 to 40 years, and the latter that to his knowledge he had been living there for about 12 years. Each of them had contested the appellant at a Village Committee election, and the appellant suggested that they had a grudge against him and that their evidence was false. According to him, from the time when he opened an office at Saindamaruthu in 1944 he slept either in the office or in the room adjoining it, and visited Kallar only on Sundays. The learned Magistrate has considered this evidence and the other evidence called for the defence upon which the appellant relied for corroboration of it, and he has accepted the evidence that during the period in question the appellant lived at Kallar and not at Saindamaruthu, and has disbelieved the appellant.

There is no ground for disturbing the learned Magistrate's findings on the questions of credibility of evidence that arose for his decision. The evidence accepted by him establishes beyond doubt that in the period 1st March to 15th July, 1949 (and indeed during the whole of the period

November, 1944, to May, 1951) the appellant was the tenant of two rooms at Saindamaruthu, one of which was used by him as his office and the other as quarters for his clerk, and that neither of them was used or intended to be used as a place of residence for himself, and further that his only place of residence was at Kallar. In my opinion the learned Magistrate's finding that at the material time the appellant failed to live at Saindamaruthu must be affirmed.

Mr. Nadesan also contended that the conviction is bad for the reason that there is no evidence that the appellant was not a proctor. I do not think that this case is distinguishable from the case of *Perkins v. Dewadasan*¹ where it was held that in a trial on a charge under section 41 of the Medical Ordinance No. 26 of 1927 (now section 39 of Cap. 90) the burden of proof on the issue as to whether the accused was a medical practitioner lay on the accused. There was no burden on the prosecution to prove that the appellant was not a proctor. The burden was on the defence to prove that he was.

The appeal is dismissed.

Appeal dismissed.

