1945 *Present:* **Soertsz A.C.J.**

UDALAGAMA (S. I. Police), Appellant, *and* GIRIGORIS, Respondent.

202—M. C. Gampaha, 25,187.

Defence (Miscellaneous) Regulations—Misuse of Service petroleum—Government Analyst's certificate—Evidentiary value of—Regulation 17B (1), (2) and (3).

In a prosecution for misuse of Service petroleum in breach of Regulation 17B (1) or 17B (2) of the Defence (Miscellaneous) Regulations the certificate of the Government Analyst that the petroleum found in the accused's possession was Service petroleum is sufficient evidence to establish that the petroleum was Service petroleum if no objection is raised by the accused that a copy of the Government Analyst's certificate had not been served on him. It is not incumbent on the prosecution to prove, in every case, that a copy of the Government Analyst's certificate had been served on the accused, as a condition precedent to the production of the certificate.

APPEAL against an acquittal by the Magistrate of Gampaha.

D. Jansze, C.C., for the complainant, appellant.

G. E. Chitty for the accused, respondent.

Cur. adv. vult.

July 18, 1945. SOERTSZ A.C.J.—

This is an appeal, with the sanction of the Attorney-General, against the order made by the Magistrate acquitting the accused who had been charged with an offence in breach of Regulation 17B (1) published in the *Government Gazette Extraordinary* of May 16, 1944, or, in the alternative, with an offence in breach of Regulation 17B (2) *ibidem*.

In order to establish either of these charges, the Crown had to prove that the accused did possess the petroleum in respect of which the charges were laid, and also that that petroleum was Service petroleum.

There is ample evidence establishing the possession by the accused of this petroleum and that fact was not seriously disputed on the hearing of the appeal. The question in regard to which there was much discussion was the question whether there was sufficient evidence to establish that the petroleum was Service petroleum. A document P 3 was read in evidence by the officer conducting the prosecution, without any objection being made to its reception by the pleader for the accused. This document was signed by the Government Analyst who declared that the sample of petroleum, taken from the can which was found in the accused man's possession was Service petroleum.

At the conclusion of the case for the prosecution, the Magistrate called upon the accused for his defence. His pleader stated that he " does not call the defence ". The next thing on the record is the order of the Magistrate acquitting the accused on the ground that " there is no evidence to show that a copy of the Analyst's Report had been served on the accused as required by the regulations ". He, therefore, declined to act on the declaration in the document P 3. Without that document, there was no evidence on the record to establish that the petroleum was Service petroleum. The regulation which the Magistrate appears to have had in mind is 17B (3) which enacts that—

> " any petroleum spirit containing the compounds specified in paragraph (1) of this regulation shall be deemed to be Service petroleum ".

The compounds mentioned in paragraph (1) are " benzene-azo-alpha-naphthylamine " or " benzene-azo-ortho-cresol, or any mixture of those compounds. Section 17B (3) also provides that " a certificate of the Government Analyst certifying that any sample of petroleum spirit specified in the certificate contains the compounds aforesaid shall, subject as hereinafter provided, be sufficient evidence of the facts therein stated, provided that before such a certificate is tendered as evidence in any proceedings a copy thereof shall, not less than seven days before the

hearing, be served on the accused, and no such certificate shall be admitted in evidence, if the accused, not later than three days before the hearing . . . . . give to the prosecution notice requiring the attendance of the Government Analyst ".

In view of this provision and of the Magistrate's order of acquittal, it may be presumed although there is no note on the record to show it, that a submission was made to the Magistrate to the effect that it was incumbent on the prosecution to establish in every case, as a condition precedent to the production of the certificate that a copy of it had been served on the accused in the manner indicated in the proviso just referred to. It may also be presumed that the Magistrate accepted that as a valid submission and, for that reason, acquitted the accused.

I cannot agree with the view taken by the Magistrate. It will be observed that the proviso says that " before such certificate is tendered. . . . . *a copy thereof shall be served* not less than seven days before ", &c. and *not* that " before such certificate is tendered . . . . . a copy thereof *shall be shown to have been* served ", &c. In regard to the actual requirement of the proviso, the Court may under section 114 of the Evidence Ordinance presume, in accordance with the principle " omnia praesumuntur rite esse acta " that it had been complied with, particularly because no objection for non-compliance with this requirement was taken at the time the document was produced and admitted. The cases relied on by Mr. Chitty, namely, *Batt v. Mattinson* [1], *Smart & Son v. Watts* [2], *Dixon v. Wells* [3] are easily distinguishable from this case for, in those cases, there was admittedly, a non-compliance with a peremptory requirement under the Food and Drugs Act of 1875, whereas, in this case, there is not one word on the record to say or to suggest that a copy of the certificate had not been served on the accused. In the absence of such an objection, the presumption of regularity of procedure applies for, as I have already observed, it has not been made incumbent on the prosecution to prove, in every case, that a copy had been served on the accused, as a condition precedent to the production of the certificate. A provision such as this is not intended to be used as some sort of secret weapon with which to surprise a prosecution after it had closed its case having read in evidence the Analyst's certificate without any objection to its reception. It is disappointing to find that the Magistrate tolerated the attempt. It was, obviously, his duty, if he thought this was a case in which it was fit and proper for the accused to have an opportunity of examining the Analyst to give him an opportunity to do so. He certainly had that power at least under section 406 of the Criminal Procedure Code.

I set aside the order of acquittal. The guilt of the accused has been established beyond reasonable doubt. I convict him under the alternative charge and sentence him to two months' rigorous imprisonment.

Appeal allowed.

[1] *(1900) 82 L. T. 800.*

[2] *(1895) 1 Q. B. D. 219.*

[3] *25 Q. B. D. 249.*