

1937

Present : Abrahams C.J.

WIJEYSURIYA *v.* DALPADATU.420—*P. C. Panadure, 41,828.*

*Notaries Ordinance—Failure to transmit duplicates of deed—Duty of the Registrar-General—Failure of notary to give an explanation—Ordinance No. 1 of 1907, s. 29, Rules 24 and 33—Amending Ordinance No. 10 of 1934, s. 6 (d).*

The proviso to section 29 of the Notaries Ordinance does not impose an absolute duty on the Registrar-General to give a notary who has failed to transmit to the Registrar of Lands duplicates of documents in terms of rule 24, a further period of time within which he may comply with the requirements of the rule.

Under rule 33 a Notary is bound to give an explanation in writing of any irregularity, error, or omission which the Registrar-General discovers or thinks he has discovered, and which appears to him to be a breach of the law.

Failure to give an explanation is an offence under section 29 of the Notaries Ordinance.

**A** PPEAL from a conviction by the Police Magistrate of Panadure.

*H. A. Koattegoda* (with him *Dodwell Gunawardena*), for appellant.

*M. F. S. Pulle, C.C.*, for respondent.

*Cur. adv. vult.*

September 29, 1937. ABRAHAMS C.J.—

The appellant, a Notary Public, was convicted in the Police Court of Panadure of the offence of having failed to transmit or deliver to the Registrar of Lands, Kalutara, the duplicates of deeds drawn and attested by him during the month of December, 1936, on or before January 15, 1937, as required by rule 24 of section 29 of Ordinance No. 1 of 1907. He was fined for that offence Rs. 30. He was also convicted at the same time of the offence of having failed to give an explanation as regards his failure to transmit these duplicates as required by rule 33 of the same Ordinance, and he was fined Rs. 20. The appellant does not dispute the facts of the case. He admits that he failed to transmit the duplicates by the date mentioned. He also admits that when he was called upon for an explanation of his failure he gave no explanation. He pleads, however, that in law he did not commit either offence.

Rule 24 above mentioned reads as follows :—

“He shall deliver or transmit to the Registrar of Lands of the district in which he resides the following documents, so that they shall reach the Registrar on or before the fifteenth day of every month, viz., the duplicate of every deed or instrument (except wills and codicils) executed or acknowledged before or attested by him during the preceding month, together with a list in duplicate, signed by him, of all such deeds or instruments, which list shall be substantially in the form F in Schedule II. hereto, and he shall at the same time forward a similar list so signed by him to the Registrar-General. Provided, however, that in the case of wills and codicils only the number and date of the document shall be inserted in such list”.

Rule 33 above mentioned reads as follows :—

“ He shall, in regard to any irregularity, error, or omission discovered or alleged to have been discovered in the discharge of his duties as notary, and which appears to the Registrar-General to be a violation of the law, give an explanation in writing when required by the Registrar-General or by the Registrar of Lands under the order of the Registrar-General, but such explanation shall in no case be called for after the expiry of twenty-four months from the date of the commission of such irregularity or error, or of such omission ”.

The penalty provision under which the appellant was convicted occurs at a later point in section 29 and also reads as follows :—

“ And if any notary shall act in violation of or shall disregard or neglect to observe any of the rules and regulations contained in this section that are binding upon him, he shall be guilty of an offence, and shall be liable on conviction thereof to a fine not exceeding two hundred rupees, in addition to any civil liability he may incur thereby ”.

As regards the first conviction it is argued for the appellant that he had committed no offence because section 29 of the above-mentioned Ordinance was amended by section 6 (d) of the Notaries Amendment Ordinance, No. 10 of 1934, and in these circumstances protected him from prosecution. This amendment was inserted in section 29 of the principal Ordinance immediately after that penal provision to which I have referred, which reads as follows :—

“ Provided that where any notary shall act in violation of or shall disregard or neglect to observe the provision of rule No. 42 the Registrar-General may by a written notice served on him personally or sent by registered post call upon such notary to comply with the requirements of the said rule within such further time as he may specify for such purpose, and any notary who fails to comply with the terms of such notice shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding five hundred rupees ”.

Learned Counsel for the appellant contends that the effect of that Ordinance is to place an obligation upon the Registrar-General to notify every notary who has failed to carry out the directions in rule 24 of his failure to make such compliance and to give the notary a period of time within which he must make such compliance. He contends that since that was not done, and admittedly it was not done, no prosecution would lie.

The question then clearly is, has the Registrar-General a discretion to send such a notice or is he under an absolute duty to do so? It says that the “ Registrar-General *may, &c.,* ” and it has been decided in a number of cases, which it is not necessary to mention, that “ may ” never meant “ must ” or “ shall ”. Those cases furnish an overwhelming balance of judicial opinion on the point. As Cotton L.J. said in *In re Baker*, 44 Ch. D. 262, at page 270, “ the word ‘ may ’ never can mean ‘ must ’ . . . but it gives a power, and then it may be a question in what cases, where a Judge has a power given him by the word “ may ”, it becomes his duty to exercise it ”. Assuming for a moment that the Registrar-General has an absolute discretion and does not exercise it in the case of a particular notary who has failed to make compliance with

rule 24, what is the result? The result is that that notary is liable to a penalty for failing to do what the law says he must do. What individual notary can say that the Registrar-General was under an obligation to serve notice of an extension of time upon him? What was the intention of the legislature when the principal Ordinance was amended by the amending Ordinance? I think that it is obvious that the Legislature had in mind the hardship that can be caused to certain notaries who are unable to make compliance with the regulation in rule 24. I do not think that it can be seriously urged that the Legislature thought that it will be a hardship on every notary that he will be compelled to transmit the relevant documents by the 15th of the month. If the Legislature thought that, the simplest method of relieving notaries from the presumed hardship would have been to alter the date, but the Legislature did not do that but it gave the power instead to the Registrar-General to grant an indulgence. Since the Legislature could not have considered that rule 24 was too stringent for all notaries, can it then be said that it intended to give every notary irrespective of his reasons for failing to make compliance with rule 24 the benefit of the indulgence prescribed by the amending Ordinance? Learned Counsel for the appellant argues that that was the intention. I find myself quite unable to accept that. It seems out of the question that because some people are deserving of indulgence therefore everybody is to get it, the wilfully neglectful, the grossly negligent, and the grossly careless, the slightly careless, as well as the person with a complete excuse. The plain commonsense view of the matter is that the Registrar-General was invested with a discretion, and if he could be trusted to fix the period of time to which the indulgence should extend, it would be absurd to say that he could not be trusted to discriminate between a person who deserves that indulgence and a person who does not. I think on that point alone the appeal against this particular conviction fails.

As regards the second conviction, it is argued by learned Counsel for the appellant that if the first conviction is good the second conviction cannot stand because the appellant will then have been punished twice for the same offence. As I understand his argument he means this, that if it is an offence in the appellant to fail to send in these documents by the 15th of the month as required by rule 24, it cannot be an offence in him to fail to give an explanation as to why he committed that offence because it is obvious that there is no explanation to give. I cannot agree with that argument. Rule 33 imposes a duty upon every notary to give an explanation in writing of any irregularity, error or omission which the Registrar-General discovers, or thinks he has discovered, and which appears to him to be a breach of the law. I do not see any words of limitation in that rule which would relieve the appellant of the obligation to comply with it. The rule does not call upon him to give an explanation which satisfies the Registrar-General that no irregularity in fact has been committed. I do not see how he could escape the consequence of refusing to give an explanation by saying that he could not give a satisfactory one. This appeal too fails, and like the appeal against the first conviction must stand dismissed.

*Appeal dismissed.*