

1921.

Present : Schneider A.J.

WAMBECK v. MOHIDEEN.

583—P. C. Chavakachcheri, 10,587.

Forest Ordinance, 1907, s. 52.—Possession of avaram bark—No evidence that bark was collected from Crown land—“ Found in or brought from forest ”—Presumption.

The accused was charged with having illicitly cut and collected from Crown land some 85 bags of avaram bark without a permit issued by a Forest Officer, an offence in breach of section 21 (1) (c) of the rules framed under the Forest Ordinance, 1907 (*Gazette*, May 10, 1918). There was no evidence that the accused did actually remove the bark from Crown land. The accused, when asking for a permit to remove the bark which he had stored, stated that he removed the bark from private lands. The evidence for the prosecution was to the effect that accused could not have collected therefrom more than 32 bags. The Magistrate held that accused had failed to repel the presumption arising under section 52 of the Forest Ordinance that the bark in the remaining 53 bags was the property of the Crown.

Held, that the presumption created by section 52 did not arise, as there was no evidence that these 53 bags contained bark “ found in or brought from a forest.”

THE facts appear from the judgment.

H. J. C. Pereira, K.C. (with him *Arulanandan*), for accused, appellants.

M. W. H. de Silva, C.C., for complainant, respondent.

July 22, 1921. SCHNEIDER A.J.—

The accused was charged that between February and August, 1919, at Elephant Pass and Morasmoddai, he did “ illicitly cut and collect from Crown land 85 bags of avaram bark without a permit issued by a Forest Officer,” and thereby committed an offence in breach of section 21 (1) (c) of the rules framed under the Forest Ordinance, 1907, and dated April 23, 1918, and published in the *Government Gazette* of May 10, 1918, and punishable under section 22 of that Ordinance. He was convicted of having possessed wrongfully between February and August, 1919, at Morasmoddai, 53 bags of the bark in question, the property of the Crown, which is described as an offence punishable under section 22 of Ordinance No. 16 of 1907. The description of the offence in the conviction is clearly wrong, nor is any offence disclosed by that description, which is punishable

under the law, mentioned by the Magistrate. I am at a loss to understand why the Magistrate departed from the language of the plaint and the reference to the law in it. Even if there is such an offence as wrongfully possessing bark, the property of the Crown, there is no evidence that the accused possessed the number of bags given at the place given and for the period named. But counsel for the appellant waived the objection he might rightly have urged against the conviction for this reason, and argued the appeal upon the ground that the evidence did not justify the conviction upon a charge of having cut and collected the 85 bags of the bark without a permit from a Crown land.

The date of the offence is stated to be between February and August, 1919. The plaint was lodged on February 25, 1921, nearly two years after the first commission of the offence. The evidence proves that the accused is a dealer in the bark in question, which appears to be used for some commercial purpose, and that he had competed unsuccessfully with a rival for the lease of the right to collect the bark from certain Crown lands. The bark is collected from a shrub which is to be found growing wild in private as well as Crown lands, the shrub being cut down to the ground for the collection of the bark.

The accused on January 15, 1920, requested the Assistant Conservator of Forests by petition (C 1) to grant him a permit to remove a quantity of the bark, which he stated he had collected from private lands and stored at Morasmoddai and Elephant Pass. The Assistant Conservator of Forests held an inquiry on February 21, 1920 (C 17). There is nothing in the notes of this inquiry to show why the accused should not have been granted a permit. In C 2 a petition dated May 22, 1920, presented by the accused to the Conservator of Forests, Kandy, he complained that the Assistant Conservator of Forests had not granted him a permit. To this petition the accused annexed documents giving particulars as to the private lands from which he had collected the bark. The evidence for the prosecution is that the accused could not have collected any more than 32 of the 85 bags stored at Morasmoddai. The Magistrate has convicted the accused, holding that the accused had failed to repel the presumption arising under section 52 of the Forest Ordinance that the bark in these balance 53 bags was the property of the Crown. I am unable to agree with the learned Magistrate as regards his findings on the facts or as regards the law. As regards the facts, the prosecution is undoubtedly stale. No explanation has been offered for the delay of nearly two years before the prosecution was commenced. From the very outset the accused's story was that he had collected the bark from certain private lands and had also bought from villagers. The prosecution has called one Sinnetamby, who has stated that he collected the bark at the instance of the licensee under the Government, and had sold

1921.
 SCHRAMMER
 A.J.
 Wambeek v.
 Mohideen

1921.
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 SCHNEIDER
 A.J.
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*Wambuck v.
 Mohideen*

the bark to the accused. He says he did so as the accused paid him better, but that the accused did not ask him to collect. The evidence of Mr. Templer, the Assistant Conservator of Forests, is that he estimates the quantity of bark which could be collected from the number of bushes cut down or by looking at the stumps or sticks, and that he made his estimate from the stumps he found on the lands he inspected. There is also evidence furnished by the witnesses for the prosecution that from the stumps alone no estimate as to the quantity of the bark collected could be made, nor how many branches any shrub had ; and that the shrubs are of different sizes, some yielding more bark than others. Mr. Templer's inspection was over six months after the bark had been collected by the accused. It seems to me, therefore, that at the best the estimate which Mr. Templer could have formed is a very rough one, and may be out by even 50 per cent. from the actual outturn. Mr. Templer visited but a few only of the lands, for the rest he relied upon the correctness of a permit for removal granted by an Udaiyar to the accused. The prosecution has made no allowance for the bark which the accused purchased, apart from what he collected. There is no evidence that the accused caused the bark to be collected in any Crown land. If one is to accept the figures given by the witnesses for the prosecution—such as Mr. Templer—the extent of Crown land from which the 53 bags had been collected must have been considerable. In his evidence Mr. Templer says that one block of 20 acres would have yielded three bags only, another of 10 or 12 acres two or three bags only, and yet there is no evidence that the accused had collected from any Crown land. In my opinion, therefore, the prosecution has failed to prove that any of the bark was collected by the accused from Crown land. The Magistrate has convicted the accused mainly upon the presumption created by section 52 of the Forest Ordinance, which he holds applies in the facts of this case. I cannot agree with him. What section 52 enacts is that when a question arises as to whether any "forest produce" is the property of the Crown, such produce shall be presumed to be the property of the Crown till the contrary is proved. "Forest produce" is defined in section 3 as including parts of plants (bark would come under this description) "when found in or brought from a forest." There is no evidence whatever that these 53 bags contained bark found in or brought from a forest. The presumption does not arise. If a person when found in possession of a bark readily procurable from a shrub growing in most gardens and of little value is under obligation to prove that he is lawfully in possession of that quantity back to a nicety, or the presumption would be that the bark is the property of the Crown, it would lead to some very astounding results.

I would, therefore, set aside the order of the Magistrate, and acquit the accused.

Accused acquitted.