

1940

Present : Wijeyewardene J.

PERKINS v. SRI RAJAH.

898—M. C. Badulla, 1,577.

Local Government Ordinance—Permit to preach within U. D. C. limits—Revocation of permit—Authority of Chairman—Validity of by-law—Defect in charge.

The accused was wrongly charged under sections 164 and 168 of the Penal Code with having addressed an assembly within the limits of the Urban District Council of Badulla without a valid permit from the Chairman of the Council in breach of a by-law framed under the Local Government Ordinance.

It appeared that the accused had obtained a permit from the Chairman and that the latter had revoked it subsequently on representations made by the Police.

Held, that the Chairman had no power to revoke the permit arbitrarily.

Held, further, that the charge which was read out of the summons was bad as it did not refer to the by-law under which the accused was charged and to the *Gazette* in which it was published.

Quaere, whether the framing of the by-law in question could be justified under section 168 (8) of the Local Government Ordinance?

A PPEAL from a conviction by the Magistrate of Badulla.

R. R. Crosette-Thambiah, C.C., for complainant, respondent.

No appearance for accused, appellant.

Cur. adv. vult.

March 20, 1940. WIJEYEWARDENE J.—

The accused-appellant has been convicted of the offence of preaching to an assembly within the limits of the Urban District Council, Badulla, without a valid permit from the Chairman, Urban District Council, and sentenced to pay a fine of Rs. 20, and in default undergo simple imprisonment for three weeks.

On a written report made by an Inspector of Police under section 148 (b) of the Criminal Procedure Code, the Magistrate ordered summons to issue on the accused. When the accused appeared in Court on receiving the summons the Magistrate read the charge to him from the summons, and the accused pleaded not guilty. The summons sets out the charge as follows:—

“ You did on the 1st day of August, 1939, at preach or address an assembly or crowd within the limits of the U.D.C., Badulla, without a valid permit from the Chairman, U.D.C., and you thereby committed an offence punishable under sections 164, 168 (8) (d) of the Penal Code.”

Now section 164 of the Penal Code refers to a fraudulent or malicious infraction of duty by a public servant employed in the Government Telegraph Department, and section 168 of the Penal Code refers to the offence of personating a Public Servant. There is no section in the Penal Code

numbered as 168 (8) (d). Mr. Crosette-Thambiah who appeared for the complainant showed me a by-law published in the *Government Gazette* No. 7,973 of March 24, 1933, which enacts—

“No person shall preach or address any assembly or crowd or hold any meeting on any thoroughfare within the limits of the Badulla Urban District Council area except in pursuance of a permit from the Chairman of the Urban District Council and within the times and limits specified on such permit. Any person who shall commit a breach of this by-law shall be guilty of an offence and shall be liable on conviction to a fine not exceeding Rs. 50”.

This by-law is purported to have been made by the Urban District Council in the exercise of its powers under sections 164, 168 (8) (d) of the Local Government Ordinance, No. 11 of 1920. The reference in the summons to the Penal Code is clearly a mistake for the Local Government Ordinance, No. 11 of 1920, due to carelessness on the part of an officer of the Magistrate's Court. Moreover, the summons was defective as it did not refer to the particular by-law and the *Gazette* in which it was published. These defects in the summons show serious carelessness on the part of some responsible officer and it is somewhat disconcerting to find that the learned Magistrate did not detect them when, according to the record, he explained the charge to the accused from the summons. The conviction of the accused cannot be sustained in view of these defects.

The facts of the case are briefly as follows:—The Chairman issued a permit P 2 of May 24, 1939, granting the accused permission to “preach in the streets between the hours of 6 A.M. to 6 P.M. in the town of Badulla, for a period 24.5.39 to 23.11.39”. The permit stated that it was liable to be revoked—

- (1) when the meeting was attended by any obstruction to traffic or pedestrians ;
- (2) when the preaching caused annoyance to the public ;
- (3) if the holder failed to produce the permit when requested to do so by any Police Officer.

On July 22, 1939, the Chairman addressed a letter to the accused and sent it by registered post informing him that the permit was cancelled and requested him to return it to the office. This letter was in fact delivered by the postal authorities to the keeper of a boutique, where the accused took his meals often. The boutique-keeper handed the letter to one Perera who says he gave the letter to the accused on August 1 or 2. Both the boutique-keeper and Perera are witnesses for the prosecution. On August 1, 1939, the Assistant Superintendent of Police, Uva, found the accused preaching at 8.30 A.M. on a public road. The Assistant Superintendent of Police says that he was aware at the time that the accused's permit had been cancelled by the Chairman of the Urban District Council. He went to the accused and got the permit from the accused. He adds—

“When the accused took this permit out he also handed to me with it an envelope containing a letter from the Chairman, U. D. C., addressed to him. P 3 dated July 22, 1939, is a copy of the

letter that was in the envelope handed to me by the accused. The letter came out from the accused's pocket accidentally. I read it and handed it back to the accused immediately. I made a note of the number of the letter and the date”

The Police Officer appears to deserve commendation for efficiency for observing the letter which came out by accident from the accused's pocket and for having thought it useful to read the letter and note its date and number in spite of the fact that he was then aware that the permit had been cancelled by the Chairman and he had no reason to believe that there would be any question as to the letter having reached the accused without delay. The learned Magistrate accepts “unhesitatingly” the evidence of the Assistant Superintendent of Police on this point and states that he has not the “slightest doubt” in holding that the Chairman's letter must have reached the accused before August 1, in spite of some difficulty created by the evidence of two other witnesses for the prosecution, the boutique-keeper and Perera. I may add that the accused appears to have charged the Superintendent in M.C., Badulla, No. 1,394 with assault, wrongful restraint and wrongful confinement in respect of certain acts alleged to have been committed by him at the time of the arrest. The Magistrate acquitted the Assistant Superintendent of Police on August 21, 1939.

There is a conflict of evidence with regard to the reasons for the cancellation of the permit. The evidence of the Assistant Superintendent of Police on this point is—

“I wrote to the Chairman on 22.7.39 asking him to withdraw the permit issued to the accused as I found that the accused had published a pamphlet inciting communal feelings and he was also distributing similar pamphlets. I do not hear what the accused preached. I thought the accused was a dangerous man to be allowed to preach.”

The Chairman, Urban District Council states in his evidence—

“On 22.7.39 on representations made to me by the A. S. P., Uva, I wrote to the accused a letter informing him that the street preaching licence issued to him is cancelled I thought that if I could issue the permit I could also withdraw it. I thought the object of the by-law was to control preaching. I went through the file of the accused and found that he was on the Black List of the D.I.-G. of Police. The accused had refused to give the permit to the Police and I was satisfied with it. When I withdrew the permit I did not look into the by-law specially.”

The Chairman whose attention was drawn to the permit and the by-law in the course of his cross-examinations appears to justify the revocation of the permit on the ground that the accused had committed a breach of condition (3) appearing on the permit requiring the production of the permit when requested to do so by a Police Officer. Besides the Chairman, the prosecution has called seven witnesses including two members of the Police Force. But none of these witnesses have stated that the

accused at any time committed a breach of condition (3) given in the permit. In one part of his evidence the Chairman seems to suggest that the "cancellation" was induced by some discovery which he made in "the Black List of the Deputy Inspector-General of Police". In the absence of any evidence as to the character and contents of this Black List to which the Chairman makes a cryptic reference I am unable to understand the exact nature of the reason which the Chairman suggests as one of the possible reasons.

I wish to add moreover that if it became necessary for me for the purpose of this appeal to consider the soundness of the reasons given by the Assistant Superintendent of Police for the action taken by him in asking the Chairman to revoke the permit I would have had no material before me on which I could have reached a decision as to the adequacy of the reasons given by him. The Assistant Superintendent of Police has merely stated that in his opinion the pamphlet issued by the accused incited communal feelings. A Court cannot be expected to surrender its judgment to a Police Officer and hold that the tendency of the pamphlet was to incite "communal feelings" and the person publishing the pamphlet was therefore a "dangerous man" merely because the Police Officer states so in his evidence.

I am not satisfied on the evidence that the accused has committed a breach of the conditions subject to which the permit was issued to him. Nor do I think that the Chairman of the Urban District Council could arbitrarily revoke the permit. The authority cited by the learned Magistrate (*Inspector, Sanitary Board, Wadduwa v. Podi Nona*) deals with building regulations and has no application in the present case.

The accused was not represented at the hearing of the appeal and I did not have therefore the advantage of hearing Counsel on the question whether the by-laws referred to are not *ultra vires*. Section 164 of the Local Government Ordinance, No. 11 of 1920, empowers a District Council subject to the approval of the Local Government Board to make only such by-laws as may appear to the Council necessary for the purpose of the exercise of its powers and duties under the Ordinance. Now the particular by-law discussed in this case is purported to have been made under section 168 (8) of the Ordinance which sets out the purpose as follows:—

"The regulation of processions and assemblages and of the performance of music in thoroughfares".

It is, to say the least, open to serious doubt whether the framing of this particular by-law could be justified under section 168 (8) of the Ordinance. On the other hand section 166 of the Ordinance declares that by-laws purporting to be made under the Ordinance shall, when published in the *Government Gazette*, become as legal, valid and effectual as if they had been enacted in the Ordinance and the modern tendency of the Courts has been not to scrutinize too strictly the by-laws made by a public body on the ground of unreasonableness but to support them if possible by a benevolent interpretation—unless it is quite clear that the

public body has exceeded its powers—and credit those who are to administer them with an intention to do so in a reasonable manner. (*Cassell v. Jones*¹.) I do not think it however desirable that I should express a definite opinion on the validity of the particular by-law as the matter was not argued before me.

I allow the appeal and acquit the accused.

Set aside.
