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

COLLEREC, Appellant, *and* BENEDICT, Respondent.

*871—M. C. Negombo, 44,686.*

*Keeping unauthorised market—Accused's application for licence not disposed of—Premature prosecution—Amendment of plaint—Ought not to be allowed to add a charge which would otherwise be prescribed—Urban Council's Ordinance, No. 61 of 1939, ss. 150, 151, 152, 164, 230.*

A prosecution in respect of maintaining a private market without a licence, in breach of section 151 of the Urban Councils Ordinance, ought not to be launched till the application which was duly made by the accused for a licence has been properly disposed of.

A new charge cannot be substituted for the charge contained in the plaint which was filed earlier if, on the date on which application is made for the substitution, the offence in respect of which the new charge is sought to be made is prescribed by statute. It is impossible for the complainant, in such a case, to urge that the new charge is no more than an amendment of the first complaint and that it was not prescribed on the date of the first complaint.

APPEAL against a conviction by the Magistrate of Negombo.

*L. A. Rajapakse, K.C.* (with him *H. W. Jayewardene*), for the accused, appellant.

*Mackenzie Pereira*, for the complainant, respondent.

*Cur. adv. vult.*

October 15, 1945. SOERTSZ A.C.J.—

At the end of March, 1945, either on the 28th or 29th or 30th of that month—the Magistrate's figures at the top of the plaint are so illegible that it is impossible to say what the exact date is—a Sanitary Inspector of the Negombo Urban Council filed a plaint charging the appellant with

an offence committed on December 28, 1944, in breach of *section 150* punishable under section 164 of Ordinance No. 61 of 1939. Summons was ordered, upon this plaint, for April 14, 1945. On that date, the appellant appeared and pleaded not guilty and the trial was fixed for May 5, 1945. On that date, what purported to be an amended plaint, according to the Magistrate's description of it, was filed charging the appellant with an offence on December 28, 1944, in breach of *section 151* of that Ordinance, itself punishable under section 164. The appellant was now charged in respect of this plaint, and he pleaded not guilty and the trial was fixed for May 19, 1945. At the end of the trial, the Magistrate convicted the appellant and sentenced him to pay a fine of Rs. 100 and a " continuing fine " of Rs. 50 for each of the dates December 28, 29, 30 and 31, 1944. The appeal is from that conviction and sentence. The contentions on behalf of the appellant were—

(*a*) that, in any event, the " continuing fine " could not have been imposed on the facts proved in the case;

(*b*) that this prosecution should not have been launched in the peculiar circumstances of this case;

(*c*) that the prosecution was barred by section 230 of the Ordinance, the complaint not having been made within three months next after the commission of the offence.

In regard to point (*a*), the imposition of the continuing fine is palpably erroneous and reveals a surprising misinterpretation of the simple and clear words of section 164. The " continuing fine " is leviable only in cases in which in disregard of a notice of suspension of a licence, the party noticed carries on a market. There is no question here, at all, of the appellant's licence having been suspended. That part of the sentence cannot, therefore, stand in any event.

In regard to point (*b*), the offence alleged in the plaint in respect of which the appellant was ultimately charged and of which he has been convicted, as that he continued to maintain a private market in the year 1944 without the requisite licence issued by the Chairman of the Council, and that he was found to be so maintaining it on December 28, 1944. It is clear from the provisions of section 152, particularly from the terms of sub-section 2 read with Form B that a licence, in the case of a market other than a new market, should be applied for and obtained in respect of each ensuing year before the end of the preceding year. By-law No. 5 published in the *Government Gazette* No. 7,995 of August 4, 1933, entitles a party who " wishes to pay the licensing fees calculated on the percentage basis . . . . . " to " produce proof of the annual profits . . . . to the satisfaction of the Chairman at least a month before the date on which he desires the licence to issue ". In accordance with this requirement, the appellant made application on *November 23, 1943*, to be allowed to pay the 1944 licensing fees on a percentage basis. His application was well within the time prescribed by the by-law for such an application. But he heard nothing about it till *March 16, 1945* (see P3), and it seems monstrous that he should now be charged with having failed to pay the 1944 licensing fee and with having carried on his market on December 28, 1944, although it was the shocking delay on the part of the Chairman in

giving his decision upon the appellant's application that involved him in this default. Moreover, P 3 says in reference to the accounts submitted by the appellant in support of his application for assessment on a profit percentage basis " I have to inform you that the accounts are not in conformity with the requirements of the by-laws of this Council ". It is not stated in what respect they fail to conform. Ten days later the appellant was sent letter D1 threatening him with prosecution unless he paid Rs. 250 before 10 A.M. on March 28, 1945. D 1 bears date March 26. 1945, and appears to have reached him on March 29. By a stroke of the pen, the appellant is deprived of the right of appeal to the Executive Committee given him by section 152 (5) of the Ordinance. The new to which one is driven by these facts is far from flattering to a responsible public body such as an Urban Council must be supposed to be. Obviously the Council's officers had been grossly dilatory and were now trying to make the appellant the scapegoat. I hold that this prosecution ought not to have been launched till the appellant's application had been properly disposed of.

The next question (c) is whether this prosecution is barred by section 230. That section provides that " no person shall be liable to any fine of penalty under this Ordinance . . . . for any offence triable by a Magistrate unless the complaint respecting such offence shall have been made within three months next after the commission of such offence ". The first complaint appears to have been made, as I have already observed, either on March 28, 29 or 30, 1945. Let us assume that it was on March 28, 1945, and therefore within the three-month period according to the rule laid down in *Radcliffe v. Bartholomew* [1], *South Staffordshire Tramway Co. v. Sickness and Accident Assurance Association* [2] and other cases. But that complaint was in respect of an offence in breach of section 150, an offence for which, on the facts, the appellant was admittedly not liable. The charge under section 151 of which the appellant has been found guilty was not made till May 5, 1945, long after the expiry of the three-month period. It is impossible for the complainant to attempt to surmount that difficulty by pretending that the new charge was no more than an amendment of the first complaint. That would be to delude oneself with words. In *Mabro v. Eagle, Star & British Dominions Insurance Co., Ltd.*[3], Scrutton L.J. said " The Court has always refused to allow a party or a cause of action to be added where, if it were allowed the defence of the Statute of Limitations would be defeated. The Court has never treated it as just to deprive a defendant of a legal defence. If the facts show that . . . . the new cause of action sought to be added is barred, I am unable to understand how it is possible for the Court to disregard the Statue ". That principle applies with even greater force to a criminal prosecution.

I, therefore, hold that the appellant was not liable to be prosecuted for the alleged breach of section 151 on December 28, 1944, on a plaint fild on May 5, 1945. I set aside the conviction.

*Conviction set aside.*

[1] *(1892) 1 Q. B. 161.*

[2] *(1891) 1 Q.B. 402.*

[3] *L. B. (1932) 1 K. B. 485.*