1946 *Present :* **Dias J.**

SEENITHAMBY *et al.*, Appellants, *and* JANSZ (A. G. A.), Respondent.

616–621—M. C., Kalmunai, 1,754.

Charge of obstructing public servant—Food Control Guard, alleged public servant—Proof is necessary of his appointment and status as public servant—Penal Code, s. 183—Defence (Purchase of Foodstuffs) Regulations, 1942, Regulation 6.

Appeal Court—Request for new trial—Circumstances when it will not be granted.

Judicial notice will not be taken that a " Food Control Guard " is a public servant within the meaning of section 183 of the Penal Code or that he was duly appointed under Regulation 6 of the Defence (Purchase of Foodstuffs) Regulations, 1942.

The Court of Appeal will not order a new trial where the proceedings are so irregular that the Court by acceding to a request for a new trial will merely encourage slackness, negligence and inexactitude on the part of prosecutors.

Per DIAS J.—" Magistrates . . . . should themselves independently consider the matter and see that the charges, whether in summary or non-summary proceedings, are in due form and adequately set out the offence or offences "

APPEALS against certain convictions from the Magistrate's Court, Kalmunai.

G. E. Chitty (with him *G. T. Samarawickreme*), for the accused, appellants.

A. C. M. Ameer, C.C., for the complainant, respondent.

Cur. adv. vult.

October 23, 1946. DIAS J.—

The six accused appellants and the seventh accused were jointly charged with committing three offences alleged to have been committed on December 27, 1945, at a place called Periyakallar. In the first count the first and second accused alone were charged with transporting two bags of rice without a permit in breach of the appropriate Defence Regulations. In view of the arguments advanced at the hearing of this appeal, it is necessary that count two should be set out at length. It runs as follows :—

" At the time and place aforesaid and in the course of the same transaction, the above-mentioned seven accused did voluntarily obstruct Food Control Guards (1) S. Saravanai, (2) A. K. Rajadurai, (3) S. Seenithamby, and (4) V. Sanmugampillai acting under under the lawful orders of such public servants, and thereby committed an offence punishable under section 183, Chap. 15 N. L. E. of Ceylon."

This charge has been copied by the Magistrate verbatim from the Police plaint filed in the case.

In the third count the seven accused were jointly charged with voluntarily causing hurt " to the said Food Control Guards " under section 314 of the Penal Code.

The Magistrate found the first to the sixth accused guilty of the first two charges and the first accused alone guilty under the third charge. It is not clear how the Magistrate could have convicted any one other than the first and second accused under the first count, because that charge was preferred against them alone. He fined the first and second accused Rs. 300 each on the first charge. The second, third, fifth and sixth accused were fined Rs. 50 each on the second count while the first and fourth accused he sentenced to undergo four months' imprisonment on count two. On the third count he sentenced the first accused to one month's rigorous imprisonment.

The following submissions were made on behalf of the appellants :—

(*a*) Count 2 in the charge is defective in that it does not in terms of section 169 of the Criminal Procedure Code give sufficient notice of the matters with which the accused are charged, and in particular because the charge is unintelligible, the manner of the alleged obstruction is not specified, and the status of Food Control Guards to be considered " public servants " within the meaning of section 183 of the Penal Code has neither been alleged in the charge nor proved by the evidence.

(*b*) The third count has not been established, because if the persons to whom hurt is alleged to have been caused have not been proved to be Food Control Guards or " public servants " no offence would be committed by resisting them when these persons tried to stop the first and second accused.

(*c*) The charges disclose a misjoinder of charges and accused, because the three offences were not committed in the same transaction within the meaning of sections 180 (1) and 184 of the Criminal Procedure Code.

In a charge under section 183 of the Penal Code the prosecution has to establish (i.) that the persons obstructed were public servants, or persons acting under the lawful orders of a public servant, and (ii.) that the accused voluntarily obstructed such persons. I have carefully read through the record after hearing counsel, but fail to find any sufficient evidence which establishes the first ingredient necessary to constitute this offence.

The copy of the Defence (Purchase of Foodstuffs) Regulations, 1942, handed to me by Crown Counsel contains no definition of " Food Control Guards ". Regulation 6 (1) empowers a person authorised thereto in writing by a Government Agent to stop vehicles or vessels used in contravention of the Regulations. The accused were not alleged to be transporting rice in a vehicle or vessel, and there is no evidence that these Food Control Guards had any authority in writing Similarly Rule 6 (2) empowers a person authorised in writing by the Government Agent to enter, inspect and search places or premises. There is no proof that these Guards had any such authorisation, and they were not endeavouring to make any search or inspection. Crown Counsel has referred me to Regulation 2 (2) of the Defence (Miscellaneous) Regulations where it is provided that " any person entrusted or vested by or under any defence regulation with any duty, power or authority shall be deemed to be a " public servant " within the meaning of the Penal

Code." The point, however, is that there is no evidence at all that any of these Guards have, in fact, been entrusted or vested with any duty, power or authority under the Defence (Purchase of Foodstuffs) Regulations under which they purported to act. The only evidence is that the witnesses Saravanai, Rajadurai and Sanmugampillai have stated that they are Food Control Guards and that they were out on patrol when the incidents occurred. In my view such assertions do not prove they were in fact public servants. This was a prosecution undertaken by the Police. The plaint has been signed by a person styling himself " A. G. A. (E), Kalmunai " and countersigned by one K. Kandiah who is the Inspector of Police, Kalmunai, and a Police Sergeant conducted the prosecution. It is therefore greatly to be regretted that by reason of the negligence of these public servants a matter which should have been capable of easy proof has been omitted.

Crown Counsel has cited the case of *R.v. Dingiri Menika*[1] which decides that where in a charge of obtructing a public servant under section 183 the public servant states that he holds the appointment in question, and that statement is not contradicted, it is not necessary to produce his act of appointment. It is to be noted that in that case there was no appearance for the accused respondent. A person stated that he was an " arachchi " and no question was raised as to his status until the trial Judge took it up in his judgment. Everybody knows what an " arachchi " is, but who and what is a " Food Control Guard " ? In *Perera v. Alwis*[2], this Court refused to take judicial notice of a " Price Control Inspector ". I am unable to judicially notice a " Food Control Guard ". It was the duty of the prosecution to establish that the persons obstructed were " Food Control Guards " and that such Guards were " public servants ". There has been a failure of proof of an ingredient of the offence and for that reason alone charge 2 fails.

A further serious defect in this charge is that it does not specify the manner in which the alleged obstruction was caused. *R. v. Paramanpalam*[3]. I cannot leave this part of the case without expressing surprise as to how an " A. G. A. (E) " and an Inspector of Police came to pass such a defectively worded plaint, and how the Magistrate came to adopt and copy this gibberish into the charge he framed. I can only surmise that this was done by some clerk, and the Magistrate adopted it without studying it and satisfying himself that it was a good and proper charge. The sooner such negligent practices cease, the better it will be for the administration of justice.

Magistrates must not slavishly adopt as charges the plaints tendered by the police, either in summary or non-summary cases, but should themselves independently consider the matter and see that the charges, whether in summary or non-summary proceedings are in due form and adequately set out the offence or offences.

In my opinion the second charge fails because a requisite ingredient has not been established.

With regard to the third charge, the Magistrate has held that the case has been exaggerated by the prosecution witnesses. The doctor found that Rajadurai had a superficial abrasion on the root of his ring

[1] *(1929) 31 N. L. R. 301.* [2] *(1944) 45 N. L. R. 136.*
[3] *(1935) 37 N. L. R. 385.*

finger. The doctor said that, in his opinion, he would expect to find a deeper injury if it was caused by Rajadurai snatching a knife from another. Saravanai had a contusion on his forehead. Assuming that the first and second accused were transporting rice, and that Saravanai and his companions stopped them and wanted to take them forcibly to the Food Control Station, it is but natural that the accused would resist, and that their friends would come to their aid. There is no proof that these men were public servants or that the accused knew or had reason to believe that they were public servants. There is no proof that the Guards disclosed their status or authority. I do not think that the accused exceeded their rights of private defence in the circumstances, and this charge fails.

In regard to the first charge, the first and second accused gave no evidence. There is direct evidence that they were seen transporting two bags of rice. When questioned they stated they had no permits. In the *mêlèe* which followed, the bags of rice disappeared. Some of the split rice was produced at the trial. The evidence which the Magistrate has accepted establishes the charge under section 4 of the Defence Regulations. The fact that the Guards have not been proved to be public servants does not affect the guilt of the first and second accused on count 1.

I have been asked to send back the case as against the first to the sixth accused on count 2 for a new trial. I do not think I shall be justified in so doing. To accede to such a request will merely encourage slackness, negligence and inexactitude on the part of prosecutors. (*Mendis v. Kaithan Appu*[1]; *Rosemalecocq v. Kaluwa*[2]).

In view of these findings, it is unnecessary to consider whether there has been a misjoinder of charges and accused.

I affirm the conviction and sentences of the first and second accused under count 1. I set aside the convictions and sentences under count 2 and discharge the accused under that count. I acquit the first accused under count 3 and the third, fourth and fifth accused under count 1.

Appeals of first and second accused partly allowed.
Appeals of the other accused allowed.