

1947

Present : Wijewardene J.

AHAMADU LEVVAI, Appellant, and SYLVESTER, Respondent.

*S. C. 772—M. C. Trincomalee, 7,585.**Housing and Town Improvement Ordinance (Cap 199), ss. 3, 5—Erection of building—
Contravention of Ordinance—Operation of Ordinance—Burden of proof.*

Where a person is charged with building in contravention of the provisions of the Housing and Town Improvement Ordinance the burden is on the prosecution to show that the area in question is one to which the provisions of the Ordinance apply.

APPEAL from a judgment of the Magistrate, Trincomalee.

M. M. Kumarakulasingham (with him *M. P. Spencer*), for the accused, appellant.

B. C. F. Jayaratne, C.C., for the Crown.

Cur. adv. vult.

October 28, 1947. WIJYEWARDENE J.—

The proceedings in this case were instituted on a written report by "The Board of Health, Harbour Villages and Kinniya, Trincomalee, by its Sanitary Assistant, G. Sylvester". The plaint bears the endorsement "Approved" above the signature of some person described as "Chairman, Board of Health, Harbour Villages and Kinniya". The report states that the accused, "a resident of Vellaimanal, Trincomalee" erected "a building boutique (*sic*) without the approval of the Chairman, Board of Health, Harbour Villages and Kinniya" in breach of section 5 of the Housing and Town Improvement Ordinance and thereby

committed an offence punishable under section 13 of the Ordinance. The report which has been "approved" apparently by a responsible official does not state where the "building boutique" has been erected. The Magistrate accepted this report and without recording any evidence issued summons to the effect that he had received a complaint that the accused had erected at *Trincomalee* a building in breach of section 5 of the Ordinance. It is difficult to understand whence the Magistrate got the information that the building in question was erected at Trincomalee. When the accused appeared on summons, the Magistrate read out the charge from the summons. The accused, who was undefended, did not call any evidence. At the close of the case for the prosecution the Magistrate convicted the accused and sentenced him to pay a fine of Rs. 35.

Section 3 of the Housing and Town Improvement Ordinance, as amended by Ordinance No. 16 of 1947, and section 5 of the same Ordinance read as follows :—

3. "This Ordinance shall apply :—
 - (a) within the administration limits of a Municipal Council, Urban Council, Town Council, Local Board or Sanitary Board.
 - (b) within any further limits in which it shall be declared to be in force by resolution of the State Council."
5. "No person shall erect or re-erect any building within the limits administered by a local authority, except in accordance with plans, drawings, and specifications approved in writing by the Chairman."

By section 2 of the Ordinance, as amended by Ordinance No. 24 of 1946 "Chairman" in section 5 for the purposes of this case would be the Chairman of the Urban Council, Trincomalee, if the building is within the Urban Council area, or the Assistant Government Agent, Trincomalee, if the building is outside such limits. It was admitted at the argument that there was an Urban Council in Trincomalee.

Now the evidence in the case does not show whether the building was erected within or outside the Urban Council area of Trincomalee. If the building is within the Urban Council area, the "Chairman" whose written approval the accused had to get was the Chairman, Urban Council, Trincomalee, and not the Chairman, Board of Health. If the building is in a place outside the limits of the Urban Council, then the Ordinance would not apply to the case unless the Ordinance had been declared by a resolution of the State Council to be in force in such a place. There is no reference to such a resolution throughout the proceedings in the case, nor is there any reference to any *Gazette* where such a resolution has been published. At the argument before me the Crown Counsel produced the *Government Gazette* of March 29, 1946, publishing a resolution of the State Council under section 3 of the Ordinance in respect of a number of villages including Vellaimanal. In the first place there is no evidence to show that the building was erected in the village of Vellaimanal which was alleged in the written report to be the village where the accused resided. My attention was not drawn to this fact at the time the case

was argued before me. The Crown Counsel argued on the footing that the building was erected in the village of Vellaimanal. He contended that it was not necessary for the prosecution to prove at the trial that the Ordinance had been brought into operation within any specified area, as the Ordinance became operative in such area the moment the State Council passed the necessary resolution. He invited my attention to *Jayakodi v. Paul Silva*¹, which he submitted supported his argument. I find some difficulty in following that argument. Take a case where a Government Agent prosecutes a person for erecting a building without his approval in an area not coming under section 3 (a) of the Ordinance. Suppose the Government Agent leads evidence to show only (1) that the accused had erected a building in such an area and (2) that he did not give his approval in writing. Could the Magistrate convict the accused on that evidence? If he did so, would he not run the risk of convicting an accused who had erected a building in an area where the Ordinance was not in force? Could it be said that the burden rests on the accused in such a case to prove that the particular area had not been brought under the Ordinance by a resolution of the State Council? How is he to prove the absence of such a resolution? It is, however, not necessary to give a decision on this point as there is another difficulty in the way of the prosecution even if it is assumed that the area has been brought under the Ordinance, as in that case the authority from whom the accused had to get the written approval was the Assistant Government Agent, and not the Chairman of the Board of Health as set out in the charge read out to the accused. The Crown Counsel was not in a position to show how the Chairman of a Board of Health appointed presumably under section 2 of the Contagious Diseases Ordinance could claim to be the Chairman of a local authority within the meaning of section 5 of the Housing and Town Improvement Ordinance.

I allow the appeal and acquit the accused.

Appeal allowed.
