ARUMUGAM *alias* PODITHAMBI

v.

RANGE FOREST OFFICER

COURT OF APPEAL.
ABEYWARDENA, J. AND RAMANATHAN, J.
C.A. 136/83. M.C. MORAWAKA 19134.
APRIL 4, 1986.

Evidence – Charge under statutory rule, regulation or by-law published in Gazette – Is production of Gazette by the prosecution necessary? – Judicial Notice – Evidence of bad character led at trial by Judge – Is it fatal to a conviction?

When a charge is laid under a statutory rule, regulation or by-law which is required by law to be published in the Government Gazette the prosecution need not produce the gazette in which the rule or regulation or by-law appears in proof thereof. Reference to the particular gazette is sufficient. The Court can take judicial notice of the rule, regulation or by-law. The only exception to this is where the defence queries the existence of such an offence or law. The list of facts given in s. 57 of the Evidence Ordinance of which the Court may take judicial notice is not exhaustive and it is open to the Court to take notice of other facts.

Where evidence of bad character is given in a trial it is not fatal to a conviction by a judge (without a jury) if there is evidence to convict the accused and the judge is not influenced by the evidence of bad character.

Where the judge merely directs his mind to the question of the credibility of the accused but casts no burden on the accused, the conviction is not illegal

Cases refered to:

(1) *Peter Singho v. Werapitiya – (1953) 55 NLR 155*

(2) *Bazeer v. Perera – (1978-79) 2 SLR 185.*

(3) *Sivasampu v. Juan Appu – (1937) 38 NLR 369.*

(4) *Gunananda Thero v. Atukorale – 19 CLW 77.*

(5) *State of Bombay v. Balsara – AIR (1951) S.C. 318, 329*

(6) *Bogstra v. Co-operative Condensed Fabrik – (1943) 44 NLR 272*

(7) *Hassen v. I. P., Panadura – (1960) 72 NLR 449*

(8) *King v. Perera – (1941) 42 NLR 526*

APPEAL from conviction by the Magistrate of Morawaka.

R. I. Obeysekera, P.C. with *K. Ediriwickrema* and *C. Padmasekera* for the appellant.

T. Walaliyadde, State Counsel for Attorney-General.

Cur. adv. vult.

May 30, 1986.

RAMANATHAN, J.

The accused-appellant M. Arumugam was charged under two counts of the Forest Ordinance–

(1) That he did on or about the 28.12.80 enter without authorisation into a reserve forest to wit – the Diyadawa Reserve Forest which was declared to be a reserve forest by proclamation in the Government Gazette No. 8,240 of 21.8.1936 and thereby committed an offence of trespassing in a reserve forest punishable under section 6 (*a*) of the Forest Ordinance.

(2) That at the time and place aforesaid and in the course of the same transaction he did cut a milla tree and thereby committed an offence punishable under section 7 (1) of the Forest Ordinance.

The case was heard in the Magistrate's Court of Deniyaya and after trial the Magistrate found the accused guilty on both counts. On count 1 he was fined Rs. 500 with a default sentence of 3 months. On count 2 he was sentenced to 3 years' rigorous imprisonment.

The prosecution case was unfolded by the following witnesses. M. G. A. Silva of the Survey Department, Galle had produced for the inspection of court the Forest Survey Preliminary Plan No. 30. He stated the plan contained a lot numbered 35 and that this lot 35 had undergone amendments and lot 35 was now numbered lot 129. Furthermore, lot 129 was a reserved forest belonging to the State and Diyadawa was included within the Reserve Forest. The present charge referred to an offence committed within lot 129.

The next witness called by the prosecution was D. T. L. Appuhamy, a Range Forest Officer and has stated that on 28.12.80 he and S. K. Abeyratne a beat officer had detected the accused cutting a milla tree within the Diyadawa Reserve Forest. As the accused failed to produce the permit he was taken into custody along with the axe he had used to cut the tree. On the way to the forest office, the accused grabbed the axe from the Forest Officer and ran away. They had gone to the Police Station and with the assistance of the Police taken the accused into custody. This witness's evidence has been corroborated by the forest beat officer S. K. Abeyratne. The prosecution closed its case.

The accused gave evidence and stated that he lived close to the forest. His cow had got loose and gone into the forest. He had gone into the forest and caught the cow and returned to his house. When he was chopping an albizzia tree in his compound the forest officers had come and asked him as to why he had entered the forest. The accused had replied that it was to retrieve his cow. Then the forest officers had asked for the accused's axe. The accused had refused to give his axe and an argument followed between the accused and the Forest Officers. Thereafter the forest officers had gone away and subsequently returned with a police constable and taken the accused into custody. The accused denied having been taken into custody while cutting a milla tree.

The main submissions made by counsel for the appellant were as follows:

Firstly, the prosecution had not produced the particular gazette mentioned in the charge sheet to establish the boundaries of the reserve forest which was an essential ingredient in the charge. This failure to produce the gazette was fatal to the prosecution case, and M. S. A. Silva's oral evidence by referring to a map was insufficient to establish the boundaries of the reserve forest. The milla logs cut down by the accused had not been produced in court as a production.

Secondly, the trial judge had permitted inadmissible evidence of the accused's bad character that the accused had been convicted of an offence previously into the record. This was prejudicial to the accused getting a fair trial. Learned counsel cited *Peter Singho v. Werapitiya* (1).

Thirdly, the trial judge had misdirected himself on the burden of proof and had placed a high burden of proof on the accused-appellant.

On the question of the failure to produce the specific gazette referred to in the charge, learned counsel referred to *Bazeer v. Perera* (2). In this case it was held that the charge did not refer accurately to the reserved forest specified in the gazette and hence the conviction was bad.

It was also observed in that case that it was incumbent for the prosecution to produce the gazette in evidence at the trial to establish the boundaries of the National Park and oral evidence was insufficient. It was further held that the Order did not fall into any of the classes of documents enumerated in section 57 of the Evidence Ordinance of which the court was bound to take judicial notice.

I have perused section 57 of the Evidence Ordinance which states a court shall take judicial notice of the following facts:

"All laws or rules having the force of law, now or heretofore in force or hereafter to be in force in any part of Ceylon".

It would appear to me that the term 'All Laws' must necessarily include written laws. The term 'Written Law' is defined in the Interpretation Ordinance, section 2 (*gg*) as—

"Written laws shall mean and include all Ordinances and Acts of Parliament, and all orders, proclamations, letters patent, rules, by-laws, regulations, warrants and process of every kind made or issued by anybody or person having authority under any statutory or other enactment to make or issue the same in and for Ceylon".

This definition includes proclamations, rules, by-laws and regulations. It appears that proclamations and orders would fall within one of the classes of documents falling within section 57(1) of the Evidence Ordinance provided they constitute "Law". Thus where a charge is laid under a statutory rule, regulation or by-law which is required by law to be published in a Government Gazette it has been held that the prosecution is not bound to produce the gazette in which the rule or regulation or by-law appears in proof thereof in order to establish the charge. There would be sufficient compliance with the requirement of law if in the complaint or report to court there is a reference to the gazette in which the rule appears. (See *Sivasampu v. Juan Appu* (3)).

To answer the question whether the contents of a proclamation or order constitute "Law" one has to examine the enabling Act and the order contained in the proclamation or order. Section 6(*a*) of the Forest Ordinance provides that any person who trespasses in a reserved forest shall be guilty of an offence. Similarly, section 7 (1) creates the offence of cutting a tree in a reserved forest. Section 78 defines a reserved forest as a forest and every part of a forest declared under the relevant provisions of the law. The order contained in the proclamation declares the land within certain specified limits as 'reserved forests', for the purpose of the Ordinance.

To ascertain whether there is any prohibition of any specific type of activity within any particular forest one has therefore to examine the Ordinance and the relevant regulation or order made thereunder. The offence created by the Ordinance is inchoate until the Order is made

specifying the "reserved forest". So it is the Act and the Order which jointly specify the offence and thereby constitute 'law'. As long as the proclamation is part of the law, the court has a duty to judicially notice it. (See *Gunananda Thero v. Atukorale* (4)).

It is pertinent at this stage to refer to the treatise on the Law of Evidence by Woodroffe and Amir Ali – 14th Edition, Vol. 2, pages 1472 and 1473 where the following passage occurs:

> "In *State of Bombay v. Balsara* (5) the Supreme Court pointed out that a notification issued in exercise of powers conferred by a specific provision in an Act of the Legislature, has the force of law as if made by the Legislature itself.....after this pronouncement of the Supreme Court, the question whether a notification issued by the Government or any Competent Authority in the exercise of delegated powers of legislation can be judicially noticed cannot be doubted. The notification is part of law itself and therefore judicial notice of the notification can be taken under section 57 of the Evidence Act".

The learned authors have also proceeded to consider whether proof of such notifications are necessary and stated that –

> "Indeed it is not necessary that notifications should be tendered as exhibits in the case for the court has to take judicial notice of them".

I am in respectful agreement with these views. A duty is cast on court to give judicial recognition to a law wherever it is found. A Regulation or Proclamation which is part of the law need not be proved by leading evidence of its contents since the law requires that the court should "judicially notice" such law without any such proof. The only exception, in my view, to this would be where the defence queries the existence of such an offence (or law). In this case no such query was raised.

The learned Magistrate was entitled to proceed on the assumption that it was an offence to commit the alleged acts in the Diyadawa Forest, without requiring proof (by means of the gazette) that the latter forest was indeed made a reserved forest by proclamation. There was, in my view, sufficient evidence that the act was committed in the Diyadawa Reserve Forest. I am of the view that the non-production of the gazette is therefore not fatal to the conviction.

Although section 57 of the Evidence Ordinance gives a list of the facts which the court shall take judicial notice, this list is not exhaustive and it is open to a court to take notice of facts other than those

mentioned in the section. The principle is set out in *Bogstra v. Co-operative Condensed Fabrik* (6). In *Hassan v. I. P. Panadura* (7) for the purpose of ascertaining whether the village of Keselwatta (where the offence took place) came within the province of Panadura, Weeramantry, J. held that he was entitled by virtue of section 57 of the Evidence Ordinance to consult an appropriate book of reference prepared by the Department of Census and Statistics, thereby satisfying himself that there was sufficient material that the offence was committed within the area proclaimed.

The second submission made by counsel for the appellant was that the trial judge had permitted inadmissible evidence relating to the accused's bad character to be elicited and thereby the accused had been prejudiced. He cited the case of *Peter Singho v. Werapitiya (supra)* where Gratiaen, J. observed in a case tried before a Magistrate (not before a Jury) that he does not see how this distinction can be drawn where a judge of first instance has in spite of his legal training and experience permitted through an improper appreciation of law to allow evidence to be led which was of such a character as to prejudice the chance of a fair trial on its real issues of a case. Gratiaen, J. did not follow *King v. Perera* (8) but considered whether to send the case back before another Magistrate for retrial. As the offence was committed over four years ago it did not seem just to call upon the accused to defend himself a second time. Therefore he set aside the conviction and acquitted the accused.

In *Peter Singho v. Werapitya (supra)* Gratiaen, J sat alone while in *King v. Perera (supra)* a different judicial attitude was adopted. Howard, C.J. sat with Soertsz, J. who agreed that in a case where evidence of bad character of the accused had been given in a trial before a District Judge, it was not fatal to a conviction as there was ample other evidence to convict the accused and the Judge was not influenced by the fact of the accused's bad character.

I do not think that any of the judges who sat in these two cases wished the judgment to lay down an inveterate principle of law. Their views have to be considered in the background of the cases before them. I am prepared however to state that a mere misreception of evidence (even of bad character) will not necessarily vitiate the conviction especially if the rest of the evidence placed before the court (like in this case) was of a satisfactory nature.

It was also submitted by counsel for the appellant that the Magistrate had misdirected himself on the burden of proof by casting a burden on the accused.

However, I find that having referred to the evidence given by the accused the Magistrate has merely made the observation that the version of the facts given by the accused has not been supported by any other evidence. He has gone on to observe that if this version of the facts were true the accused had the opportunity of going to the Police or Grama Sevaka at that time, and that the evidence does not disclose that the accused did any such thing.

It is clear that there has been no misdirection on the burden of proof as in the next paragraph the Magistrate has expressly stated that both charges against the accused have been proved beyond a reasonable doubt.

I am satisfied that the Magistrate has placed no burden on the accused and merely directed his mind to the question of the credibility of the accused as a witness and that evidence of the accused does not even cast a doubt on the prosecution evidence.

We are satisfied that the appellant has had a fair and impartial trial. The trial judge has accepted the evidence of Appuhamy which was corroborated by Abeyratne. The trial judge has satisfied himself that the offence was committed within Diyadawa Reserve Forest and his findings are supported by evidence. We, accordingly affirm the conviction of the accused-appellant on both counts.

On the question of sentence we have considered the fact that the offence was committed over five years ago. On count 2 we have decided to reduce the sentence from 3 years' imprisonment to 2 years' imprisonment. We are also of the opinion, that the ends of justice will be met by suspending this 2 years' imprisonment for 7 years' from today. On count 1 the fine and the default sentence in lieu will stand.

Subject to the above variation in the sentence on count 2 the appeal is dismissed. The Registrar is directed to return the record to the Magistrate's Court to enable the Magistrate to comply with the provisions of section 303 of the Criminal Procedure Code.

ABEYWARDENA, J. – I agree.

Appeal dismissed.
Sentence varied.