

Present : T. S. Fernando, J.

1956 H. LEELASENA, Appellant, and S. M. NADARAJAH
(Chairman, Urban Council, Bandarawela), Respondent

S. C. 900—M. C. Badulla-Haldumulla, 21,813.

Sentence—Continuing offence—Procedure for imposition of sentence—Requirement of separate charge and trial—Criminal Procedure Code, ss. 187, 425—Urban Councils Ordinance, No. 61 of 1939, ss. 166, 167, 229.

Where an enactment such as by-law 22 passed under section 166 of the Urban Councils Ordinance No. 61 of 1939 provides for the imposition of an additional fine for every day during which the contravention of it is continued after a conviction, the fine for the continuance of the offence cannot be lawfully imposed unless the continuing contravention is duly proved after a charge is framed or read out under section 187 of the Criminal Procedure Code and the other provisions of the Code relevant to the trial of a summary offence are complied with.

APPEAL from an order of the Magistrate's Court, Badulla-Haldumulla.

G. P. J. Kurukulasuriya, with M. M. Kumarakulasingham and Walter Jayawardene, for the accused-appellant.

K. C. Nadarajah, for the complainant-respondent.

Cur. adv. vult.

December 20, 1956. T. S. FERNANDO, J.—

On 11th January 1956 the accused-appellant in this case was charged in the Magistrate's Court with using and occupying on 1st January 1956 a stall in the Bandarawela public market, without being the holder or the servant or agent of the holder of a licence issued by the Chairman of the Urban Council, in contravention of by-law 3 of the by-laws relating to Markets made by the Bandarawela Urban Council and published in *Gazette* 8,806 of 31.10.1941, thereby committing an offence punishable under by-law 22 of the said by-laws. The accused was convicted of the said offence on 15th February, 1956, and sentenced to pay a fine of Rs. 50. He appealed to this Court, but his appeal was dismissed on 11th May 1956.

After the record was returned to the Magistrate's Court, the proctor for the complainant, the Chairman of the Urban Council, filed a motion in court on 15th June 1956 and moved that the accused be noticed to show cause why a continuing fine in terms of by-law 22 of the aforesaid by-laws should not be imposed on him. Thereafter on a date fixed for inquiry, the Chairman testified in the presence of the accused that the latter was continuing since the date of the conviction to occupy the stall without the authority of a licence notwithstanding the conviction. The accused neither gave nor called any evidence, and the learned Magistrate, after hearing counsel on his behalf, made order on 14th August 1956 imposing a fine of Rs. 25 per day as from 15th February 1956 till the accused vacates or is ejected from the stall.

The present appeal is from this order of 14th August 1956 and it raises the interesting question of the appropriate procedure to be followed where a person continues after a conviction the act that constituted the contravention of the law which was the subject of that conviction. Learned counsel for the appellant submits that the proceedings taken in the Magistrate's court of noticing the accused following upon a motion of the original complainant and holding an inquiry thereafter are not recognised and warranted by law and that the correct procedure to have followed would have been the institution of fresh proceedings in respect of the continuing contravention in the manner indicated in the Criminal Procedure Code. On the institution of proceedings in that manner the Court will observe the same procedure as in the case of any other summary trial. He submits that, apart from any other defect in the procedure followed, the failure to frame a charge is fatal to the legality of the continuing fine imposed on the appellant in this case. I am of opinion that the contention of counsel is sound and that the procedure followed in this case is not warranted by law.

It was contended in the Magistrate's Court that the application for the imposition of a continuing fine should have been made in the Magistrate's court at the time of the original conviction or, at any rate, in the Supreme Court at the time the appeal was argued. This contention was rightly rejected by the learned Magistrate. Reference might be made in this connection to the judgment of Schneider A.J., in the case of *Punchihewa v. Nicholas Appuhamy*¹ in which the validity of an order

¹ (1920) 8 C. W. R. 247.

made by a Magistrate imposing a continuing fine at the time of convicting a person for an offence under section 13 of the Housing and Town Improvement Ordinance, No. 19 of 1915, came up for consideration in the Supreme Court. The relevant words appearing in the said section 13 are "shall be liable on summary conviction to a fine not exceeding three hundred rupees, and to a daily fine of twenty five rupees for every day on which the offence is continued after conviction". It may be noted that there is a difference between section 13 of the Housing and Town Improvement Ordinance and the by-law we are concerned with in the present appeal in that the latter provides for the imposition of a continuing fine not only where a contravention is continued after a conviction but also after service of a written notice from the Chairman or an officer authorised by the Chairman directing attention to such contravention. As no question, however, arises in this case of the service of such a written notice by the Chairman or an officer authorised by him, the case is not distinguishable from *Punchihewa v. Nicholas Appukamy* (supra) on the point that the continuance of the contravention was itself an offence. Schneider A.J., in dealing with the point, stated that "the fine for the offence of not bringing the building into conformity with the approved plan after the conviction cannot be imposed until it has been proved to the satisfaction of the court that the accused failed after the conviction to bring the building into conformity with the approved plan. The offence can only be committed after the conviction, and any conviction in respect of that offence would be illegal until there is proof before the court of the commission of the offence". It is possible that the prosecution had this decision in mind when it refrained from applying for the imposition of a continuing fine at the time a conviction was entered against the accused on 15th February 1956. Schneider A.J. did not have occasion to state in the case referred to above what procedure was proper in the case of a prosecution in respect of a continuing contravention except to indicate that the failure to bring the building into conformity with the approved plan after the conviction was itself an offence. The question therefore remains whether the procedure actually adopted by the prosecution in invoking the aid of the court by motion to obtain an order for a continuing fine has any legal sanction.

By-law 22 of the by-laws in question is in the following terms :—

"Every contravention of any of these by-laws shall be punishable with a fine not exceeding fifty rupees, and, in the case of a continuing contravention, with an additional fine not exceeding twenty five rupees for every day during which the contravention is continued after a conviction thereof by a court of competent jurisdiction or after service of a written notice from the Chairman or an officer authorised by the Chairman directing attention to such contravention."

These by-laws have been made under the power conferred on the Urban Council by section 166 of the Urban Councils Ordinance, No. 61 of 1939. Section 167 of the same Ordinance enacts that every contravention of the by-laws shall be an offence under the Ordinance, and section 229 provides that every such offence shall be triable summarily by a Magistrate.

If every contravention of by-law 3 is an offence, then a continuing contravention is also an offence. Before any sentence can lawfully be imposed in respect of that offence there was a requirement that the offence be tried. The Magistrate was therefore required, inter alia, to comply with the provisions of section 187 of the Criminal Procedure Code in respect of framing or reading out of a charge. There was a failure in this case to frame any charge at all and to observe the other provisions of the Code relevant to the trial of a summary offence, and I am of opinion that the steps taken in the Magistrate's court on and after 6th July 1956 when the accused appeared in response to the notice served on him are without authority and cannot support the order appealed against.

Learned counsel for the respondent argued that there has only been a procedural irregularity and that such irregularity has not occasioned a failure of justice. He submitted that section 425 of the Criminal Procedure Code be utilised to maintain the order of the learned Magistrate. It is not possible to accede to this argument in view of the decision of a Divisional Bench of this Court in *Ebert v. Perera*¹ which held that the omission to frame a charge is not an irregularity which is covered by the said section 425. I therefore set aside the order imposing a fine of Rs. 25 a day as from 15th February 1956.

Appeal allowed.

