

1906.

January 23.

DEPUTY FISCAL, KALUTARA, v. MAYA NONA.

P. C., Panadure, 20,345.

Obstruction—Licensed surveyor appointed by Deputy Fiscal—Powers of Deputy Fiscal—"Public officer"—Ordinance No. 4 of 1867—Penal Code, ss. 19 and 183—Civil Code, s. 286.

A Deputy Fiscal has no power under section 286 of the Civil Code to license a surveyor to prepare a diagram or map to be annexed to a Fiscal's conveyance; and obstruction to a surveyor licensed by the Deputy Fiscal for that purpose is not punishable under section 183 of the Penal Code.

A PPEAL from a conviction under section 183 of the Penal Code.

Bawa, for accused, appellant.

Van Langenberg, A. S.-G., for respondent.

23rd January, 1906. LAYARD, C.J.—

The appellant in this case appeals against his conviction under section 183 of the Penal Code. The conviction, as recorded by the Magistrate, is to me unintelligible. The Magistrate seems to have thought, as I gather from the form used, that the Surveyor Arnold Gunawardana was a public servant. I can find no authority to support the position that the surveyor—who, it is alleged, was a licensed surveyor duly authorized by the Deputy Fiscal of Kalutara—is a public servant.

The Solicitor-General, who argued the case for the respondent, invited my attention to the eleventh description in section 19 of the Penal Code. I think, however, that a licensed surveyor, who is merely employed by a public servant for a particular purpose, does not come under the description of an "officer." To be an "officer" a person must hold some office, and the eleventh description in section 19 only refers to every "officer," and not every "person" so as to include both officers and persons other than officers. I cannot hold, therefore, that Surveyor Arnold Gunawardana was a public servant. I might, however, properly amend the conviction and hold the appellant had committed an offence, because he had obstructed Surveyor Arnold Gunawardana, while acting under the

lawful orders of a public servant, in the discharge of his public function. To enable me to do this, however, I must be satisfied that the public servant who gave the orders to Arnold Gunawardana was by law entitled to give such orders to Arnold Gunawardana whilst acting in the discharge of his public functions.

1906.
January 23
LAYARD,
C.J.

The Magistrate has, I understand from the terms of his conviction, found that Arnold Gunawardana was a licensed surveyor, *i.e.*, a surveyor licensed as such under our statutory law, and that he was duly authorized by the Deputy Fiscal of Kalutara, acting in the discharge of his public duties, to make a survey.

The appellant's counsel argues that the only person who can be authorized to make a survey of a property duly seized and sold in execution is a competent surveyor who has been licensed by the Fiscal for that purpose, and he invites my attention to the latter part of the proviso to section 286 of the Civil Procedure Code. It seems to me clear from the words in the whole of that section, and from the language used in the latter part of it, that the only person who can be employed to prepare a diagram and map of the land duly sold in execution of a mortgage is a surveyor who holds a license from the Fiscal. The first part of the section refers to both Fiscal and Deputy, but the Legislature when dealing, under the latter part of the proviso, with the person who should prepare a diagram or map, was careful to enact that he must receive a license from the Fiscal, and omits all mention of the Deputy Fiscal in that proviso. I cannot, therefore, construe the latter part of the proviso as authorizing the employment of a surveyor licensed by a Deputy Fiscal.

It is true, as pointed out by the Solicitor-General, that Ordinance No. 4 of 1867 gives Deputy Fiscals within their districts the right to exercise the powers and perform the duties which under that Ordinance can be exercised and performed by the Fiscal of the Province, and it is also true that in the Ordinance No. 4 of 1867 there was contained a provision similar to that in Ordinance No. 2 of 1889. But the Legislature which passed Ordinance No. 2 of 1889 did not define the Fiscal as including the Deputy Fiscal, and when dealing with the duties of a Fiscal has in several instances provided that such duties may be performed also by the Deputy Fiscal. Such is the case in this very section. It, however, seems in the latter part of this section to restrict the power of licensing competent surveyors to the Fiscal.

Again the provisions of section No. 8 of Ordinance No. 4 of 1867 only refer to the execution by the Deputy Fiscal of powers and duties required by that Ordinance to be exercised and performed by the Fiscal, but the section which I have just been construing is not contained within the Ordinance No. 4 of 1867.

1906. I think, therefore, that as, in this case, it has been established that
January 23. the surveyor was one licensed by the Deputy Fiscal for the purpose of
LAYARD, C.J. preparing a diagram or map in manner provided by the proviso to
section 286 of Ordinance No. 2 of 1889, the conviction of the appellant
cannot stand. The Magistrate has not found he was licensed by the
Fiscal, and the evidence does not disclose he was so licensed as
section 286 requires. Several other important points have been
raised by appellant's counsel. It is, however, unnecessary for me to
discuss them, because I have upheld his objection to the conviction.
The conviction will be set aside and the appellant acquitted.
