

1953

Present : PULLE J.

Y. D. BABY APPUHAMY, Appellant, and R. SIVAGURU
(Additional Colonization Officer), Respondent

S. C. 1,192—M. C. Anuradhapura, 10,917

*Irrigation Ordinance, No. 32 of 1946—Section 92 (a)—Prosecution thereunder—
Nature of evidence required.*

In a prosecution under section 92 (a) of the Irrigation Ordinance for wilfully and mischievously blocking up an irrigation channel there must be proof that the channel is part of an irrigation work.

APPEAL from a judgment of the Magistrate's Court, Anuradhapura.

N. E. Weerasooria, Q.C., with *S. C. E. Rodrigo*, for the accused appellant.

E. H. C. Jayetilleke, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 18, 1953. PULLE J.—

The appellant in this case was convicted under section 92 (a) of the Irrigation Ordinance, No. 32 of 1946, of wilfully and mischievously blocking up or demolishing an irrigation channel. Various submissions have been made in the petition of appeal against the conviction but the one which merits attention is the allegation that there was no evidence that the channel which, admittedly, was blocked up was comprised in an "irrigation work" within the meaning of that expression in the Ordinance.

According to the sketch put in evidence the water which feeds the channel in question comes from Alankulama tank and the channel must have served at one time only a single proprietor named Kanagasabai who owned a large tract of fields. That tract has been divided up. The larger part of it is owned by the brother of the appellant and two others and comparatively small extent of $4\frac{1}{2}$ acres towards the end of the channel is owned by one Somapala who complains of the damage caused to him by the blocking.

It is said in the evidence called for the prosecution that this channel is part of an irrigation work called the Nachchaduwa Scheme. If that be so, it would have been an easy matter to have produced a plan or tracing showing the relevant irrigation works and the proprietors of the lands served by those works. I can well understand that this particular channel is not shown in the plans but if it was constructed by the Irrigation Department or at the expense of the proprietors in pursuance of their statutory powers, reliable evidence ought to have been

easily forthcoming. If, as it appears to be the case, the intervention of the Assistant Government Agent had been sought successfully to compel the appellant to desist from blocking up the channel sufficient material at the Kachcheri ought to have been available to fix the character of the channel as an irrigation work in respect of which statutory powers could have been exercised.

The only irrigation receipt produced is one dated after the offence. Reliable evidence of previous receipts unambiguously pointing to payments by Somapala for water obtained from the channel in question would have been helpful. He may not have retained the earlier receipts, as he alleges, but records of those payments ought to have been available. The difficulties created by the inconclusive character of the evidence are not diminished by the assertion that Alankulama tank is a private tank fed by the Nachchaduwa tank and that there should be a list at the Kachcheri of shareholders entitled to take water from the tank. Whether Somapala was entitled as a shareholder to take water has not been established by the production of any list.

This is a case in which the best evidence as to whether the channel was comprised in an irrigation work has not been adduced. I do not, therefore, think it safe to allow the conviction to stand. I have anxiously considered whether there should be a re-trial. If at all, only one proprietor has suffered damages recoverable in a Court by the act of the appellant. The civil remedy is available. The offence was in 1951 and it was the duty of the prosecution to prove that the channel was part of an irrigation work.

The conviction and sentence are set aside and the appellant is acquitted.

Appeal allowed.
