

1967

Present : Tennekoon, J.

K. S. PODI SINGHO, Appellant, and M. A. KARUNARATNE (Public Health Inspector), Respondent

S. J. 698/67, with Application 381—M. C. Gampaha, 4539/B

Housing and Town Improvement Ordinance (Cap. 268)—Sections 13 (1), 15 (1) (3)—Offence of occupying a building without obtaining a certificate of conformity—Continuing fine—Circumstances when it may be imposed.

The accused appellant was charged with having occupied on 21st November, 1964, a building in contravention of section 15 (1) of the Housing and Town Improvement Ordinance. The Magistrate found him guilty and imposed a sentence as follows:—"I impose a penalty fine of Re. 1 per day (continuing fine) from 21/11/64".

Held, that in a charge under section 15 (3) of the Housing and Town Improvement Ordinance there must always be an allegation of continuing contravention beyond one day if the court is to be invited to exercise its power of fining for more days than one. If the charge laid refers to occupation in contravention of the law by reference to a single day, the court's power to impose a continuing fine does not exist.

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

Colvin R. de Silva, with Malcolm Perera and W. N. H. Dias, for the accused-appellant.

G. E. Chitty, Q.C., with E. B. Vannitamby, for the complainant-respondent.

V. S. A. Pullenayegum, Crown Counsel, with Faisz Mustapha, Crown Counsel, on notice.

Cur. adv. vult.

November 6, 1967. TENNEKOON, J.—

The appellant in this case was convicted on a charge which reads as follows :—

“You are hereby charged that you did on 21/11/64 occupy a building by the side of the railway station road, Mirigama within the limits of Town Council of Mirigama without obtaining a certificate from the Chairman, Town Council, Mirigama, and thereby committed an offence under section 15 (1) of the Housing and Town Improvement Ordinance, and punishable under section 15 (3) of the aforesaid Ordinance.”

The plaint was filed on the 2nd of January, 1966, and the learned Magistrate having found the accused guilty after trial imposed sentence as follows :—

“I impose a penalty fine of Re. 1/= per day (continuing fine) from 21/11/64.”

Counsel for the appellant did not challenge the conviction itself, but he submitted that in view of the fact that the charge referred to the occupation of the building on the 21st of November only, the Magistrate had power to fine only in respect of that day, and that no continuing fine could have been imposed by him.

Subsections (1) and (3) of section 15 of the Housing and Town Improvement Ordinance read as follows :—

“(1) No building constructed after the commencement of this Ordinance shall be occupied, except by a caretaker, until the Chairman has given a certificate that such building, as regards construction, drainage, and in all other respects, is in accordance with law.

(3) Any person who occupies or allows to be occupied any building in contravention of this section shall be guilty of an offence, and shall be liable to a penalty not exceeding twenty-five rupees for each day during which the contravention continues.”

Counsel for the appellant submits that in order to enable the Magistrate to exercise the power of imposing a penalty of fine for any days during which the contravention is continued, the charge should specify not only the date on which the accused occupied the building in contravention of subsection (1), but that it should also state the period during which the accused continued to occupy the building in contravention of that subsection ; such period necessarily being before the date of the institution of the criminal proceedings. Some assistance in understanding section 15 (3) may be derived by comparing it with section 13 (1) of the same Ordinance. That section provides that a person who does certain acts in contravention of the provisions of the Ordinance “shall be liable on summary conviction to a fine not exceeding Rs. 300/=, and to a daily fine of Rs. 25/= for every day on which the offence is continued after conviction”. There is here a provision for an ordinary fine upon conviction ; the power to impose a continuing fine is in relation to acts committed after the conviction. In the case of *Cooray v. Peiris*¹ it has

¹ (1962) 65 N. L. R. 192.

been held that when a person is convicted of the offence of contravening section 13 (1) (a) of the Housing and Town Improvement Ordinance, the court has no jurisdiction to impose a daily fine in anticipation of the offence being continued after conviction. Section 15 (3) contains no provision for the ordinary kind of fine at all. Indeed it contemplates *ex facie* a continuing contravention coupled with a power in the court to impose a penalty regulated by the number of days during which the occupation in contravention of the section has been continued.

It seems to me that in a charge under section 15 (3) there must always be an allegation of continuing contravention beyond one day if the court is to be invited to exercise its power of fining for more days than one. If the charge laid refers to occupation in contravention of the law by reference to a single date the court's power to impose a fine for continuation of occupation in contravention of the law does not exist. In the present case the accused was charged only with occupation of the building without a certificate on the 21st of November, 1964. There was no allegation of continued occupation beyond that day; any evidence of occupation beyond that date would have been irrelevant. Accordingly the powers of the court to impose a penalty in respect of any succeeding dates on which the accused may occupy the building in contravention of the law have not been invoked. The sentence cannot go beyond the offence of which the accused is convicted. I must not however be taken, as saying that there cannot be a further prosecution in respect of periods of occupation after the 21st of November, 1964, if that be the case.

Counsel for the respondent submitted that the continuing fine of Re. 1/=per day was valid but effectual only up to the date the accused pleaded to the charge. Learned Crown Counsel who appeared as *amicus* also supported the view that the sentence was valid and would be effective up to such date as the accused ceased to occupy without a certificate but not going beyond the date of conviction. Having regard to the nature of the charge framed in this case which did not allege occupation beyond a day it is unnecessary to consider these submissions.

It must be noted that I have assumed, for the purposes of this judgment, that it is legitimate to read the word "penalty" in section 15 (3) of the Housing and Town Improvement Ordinance as equivalent to "fine" and that a Magistrate's court has jurisdiction to try offences under that subsection. No argument was addressed to me by any of the Counsel appearing before me on these two points and accordingly this judgment should not be taken as a pronouncement of this court on either of those points.

While affirming the conviction, the sentence imposed by the Magistrate is set aside. I substitute for it a fine of Rs. 15/=in respect of the charge on which the accused was convicted, viz., occupation of a building in contravention of section 15 (1) of the Ordinance on 21/11/64.

Sentence altered.