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POLICE
v.
GAVRIEL NICOLAOU.

[STRONGE, C.J., AND FUAD, J.]

POLICE

v.

GAVRIEL NICOLAOU, *Defendant-Appellant.*

(*Criminal Application No.* 35/36.)

Game and Wild Birds Law, 1934, *section* 16 (*a*) *and* (*b*) — "*Unlawfully in pursuit of game*" — *Sufficiency of averment in charge* — "*Carrying firearm in a Game Reserve without a permit in writing*" — *Onus of proof as to possession or non-possession of such permit.*

Appellant was convicted under section 16 (*a*) and (*b*) of the Game and Wild Birds Law, 1934, of (1) being found within a Game Reserve in circumstances indicating that he was unlawfully in pursuit of game and (2) carrying a firearm in a Game Reserve without a permit in writing from the Commissioner of the District.

Held, on a case stated by the District Court, that the circumstances justified the finding of the District Court that appellant was in pursuit of game, and that it was unnecessary to specify in the charge any particular kind of game.

Held also, that the onus of proof that appellant had not obtained a written permit did not rest upon the prosecution inasmuch as the fact whether the appellant was or was not possessed of a permit in writing was one peculiarly within his own knowledge and he could if possessed of one have produced it without difficulty.

Held, however, that the absence of any proof by the prosecution that the requirements of section 11 (4) of Law 38 of 1922 as to notices to the mukhtars had been complied with was fatal to the prosecution and that the conviction must be set aside.

This was a case stated by the Kyrenia District Court (Izzet, D.J.) under the Courts of Justice Law, 1935, section 23, for the opinion of the Supreme Court. The appellant was convicted under section 16 (*a*) and (*b*) of the Game and Wild Birds Law, 1934, (1) of being found within a Game Reserve in circumstances indicating that he was unlawfully in pursuit of game and (2) of carrying a firearm in a Game Reserve without a permit in writing from the Commissioner of the District.

Mitsides for appellant:

No offence upon either court was established because the first count against appellant is, it is submitted, bad inasmuch as the particular kind of game is not specified: *R.* v. *Oberlander,* 25 English and Empire Digest, 387 (Can.). Further, the prosecution should have given evidence of circumstances indicating it was game rather than wild birds accused was in pursuit of. There was no evidence that the mukhtars of the villages in the District had been given the notice required by Law 38/1922 section 11 (4). The prosecution, too, should have proved that appellant had no permit to carry a firearm in the Game Reserve:

Phipson on Evidence (1921 Ed.) p. 33 and cases there cited; Taylor on Evidence (11th Ed.) para. 371; *R.* v. *Turner* (Cockle's Cases on Evidence 139).

S. Pavlides (Crown Counsel) for respondents:

Submit it was not necessary for prosecution to give evidence that appellant had no permit: Paley on Summary Convictions, 9th Ed., pp. 324-326, and cases there cited. To have to specify in the charge the particular kind of game would be nullifying the section which speaks of game in general. As to the notices required by the Law of 1922 I submit the maxim *omnia praesumuntur rita esse acta* applies, and, alternatively, I rely on section 14 (2) of Law 3 of 1934.

Cur. adv. vult.

The following judgment was read by the Chief Justice:

STRONGE, C.J.: This is a case stated by the District Judge of Kyrenia. The appellant was convicted on two counts, the first of which charged him with being found within a Game Reserve in circumstances indicating that he was unlawfully in pursuit of game, and the second of which charged him with carrying a firearm in a Game Reserve without a permit in writing from the Commissioner. Both charges were based upon the provisions of section 16 (*a*) and (*b*) of Law 3, 1934. As regards the first count Mr. Mitsides contended that because the definition of the word "game" in section 2 of Law 3 of 1934 enumerates hares and several kinds of named birds a count which charges "game" *simpliciter* without specifying the particular kind of game is bad, and he also argued that evidence should have been given of circumstances indicating that it was some particular kind of "game" rather than "wild birds" that accused was in pursuit of. The words of section 16 (*a*) are "game or wild birds". As in the first of these contentions, Oke's Magisterial Formulist at p. 307 gives a form of summons for trespass in pursuit of game contrary to section 30 of the Game Act, 1831. That section makes it an offence to trespass by daytime on any land in search or pursuit of game or certain wild birds named in the section. "Game" is defined by section 2 of the Act and the Act is, therefore, so far as the points we have to consider are concerned, in *pari materia* with the local law. The form alluded to states that the person charged did trespass upon certain land in pursuit of game to wit..... the space following the words "to wit" being evidently intended for the insertion of the name of the particular kind of game. This form is after all merely the view of the learned author and does not so far as we can discover rest upon any judicial decision. On the other hand in *Morrison* v. *Anderson* (1913) (mentioned in Stone's Justice

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of the Peace, 1926 Ed., p. 703), a decision of the Scotch Court of Justiciary, it was held, under the corresponding section of the Game (Scotland) Act, 1832, that a summons was not bad for duplicity which charged a trespass in pursuit of "game or rabbits". In *Pratt* v. *Martin* (1911, 2 King's Bench—90) the charge was one of trespass in pursuit of "game" and no exception was taken to the charge nor any observation made as to its form; and the charge in *Mayhew* v. *Wardley* (135, Revised Reports—812) to which a similar observation applies, was also for trespass in pursuit of "game". In *Horn* v. *Raine* (1898—57 Law Journal Queen's Bench—533) "game" was all that was stated in the charge. We are, therefore, of opinion that Mr. Mitsides's argument on this point fails. As to the non-production of evidence that it was "game" rather than "wild birds" that were indicated by the circumstances in which accused was found, the Court below had evidence that the appellant was in a Game Reserve, that he had a gun and a *vourga*, and that as soon as he saw the constable he took to his heels. The District Judge's view of these facts—and we are bound by his view—was that these circumstances indicated that appellant was in pursuit of game. They were certainly not in any way inconsistent with his being unlawfully in such pursuit. Had the evidence indicated clearly and beyond doubt that the appellant was in pursuit of "wild birds" only and not "game" then in view of the fact that there was no charge against appellant of being in pursuit of "wild birds" the Court would have had no power to convict and had it done so the conviction, in our opinion, would have had to be set aside.

In regard to count 5 Mr. Mitsides maintained that the conviction under it for carrying a firearm in a Game Reserve without a permit in writing from the Commissioner was bad because it was incumbent on the prosecution in order to succeed to prove that accused had no such permit and no such proof was adduced.

The general rule of evidence is that the burden of proving a proposition at issue lies on the party holding or alleging the substantial affirmative of the issue. If there were no exceptions to this general rule the prosecution would undoubtedly have had to prove that the defendant did not have a written permit.

There *are*, however, exceptions to this general rule. One of these exceptions is that where the subject matter of the allegations lies peculiarly within the knowledge of one of the parties that party must prove it whether it be of an affirmative or negative character and even though there be a presumption of law in his favour (Taylor Ev., 11th Ed., p. 284).

In *R.* v. *Turner,* 1816 (14 English and Empire Digest pp. 430-431) Bayley, J., is quoted as saying "I have always understood it to be a general rule that if a negative averment be made by one party which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative is bound to prove it and not he who asserts the negative". The judgment in the case mentioned was according to Paley on Summary Convictions (9th Ed., p. 325) the unanimous judgment of the Queen's Bench Division. In *Apothecaries Company* v. *Bentley* (1824) (14 English & Empire Digest 431) the action was one of debt for a penalty for practising as an apothecary without having obtained a certificate and it was held that it was not necessary for plaintiffs to prove that the party had not obtained his certificate, the onus lay on him to show that he had. To the same effect is *R.* v. *Scott* 1921 (6 Mews Digest, 1097) where it was held that the onus of proof of the possession of a licence or authority required by regulations under the Dangerous Drugs Act, 1920, lay on the defendant as it was a fact which was peculiarly within his own knowledge. In the case we are now considering the defendant was peculiarly cognisant of the fact whether or not he had obtained a permit in writing from the Commissioner and if he had obtained one could have no difficulty in producing it. This ground of appeal, therefore, is not, in our opinion, well founded.

As to both of the counts on which the appellant was charged Mr. Mitsides took the point that the place where appellant was carrying a firearm was not proved to be a Game Reserve in the absence of any evidence that the provisions of section 11 (4) of the Game & Wild Birds Law, 1922, so far as concerns the notices therein mentioned, had been complied with.

Section 14 (2) of Law 3 of 1934 provides that any area prescribed under section 11 of the 1922 Law shall be deemed to be a Game Reserve. Now, if we look at section 11 it is clear that an Order in Council made under its authority is not statute law enacted by the legislature of the Colony but is what is known as substitute legislation, that is, legislation made by a person or body bound by the terms of its delegated or derived authority. With reference to legislation of this kind the late Mr. Craie's book on Statute Law (3rd Ed.) says at p. 259 that Courts of Law will not as a general rule give effect to it unless satisfied that all the conditions precedent to its validity have been fulfilled and that the Courts will, therefore, require due proof that it has been made and promulgated in accordance with the statutory authority unless the statute directs that such subordinate legislation be judicially

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noticed. The learned author goes on to say, at p. 261, that if the statutory conditions are not complied with the Courts will treat the subordinate legislation, etc., as invalid unless the conditions are merely directory. So what we have to consider here is whether the requirements as to notices in subsection 4 of section 11 are merely directory in their nature or are conditions precedent to the validity of the Order in Council the making of which is authorized by the section in question. In *Jones* v. *Robson*, 1901, 1 Q.B. 673—a case of omission to give notice of an order made by a Secretary of State under section 6 of the Coal Mines Regulation Act, 1896—the words " by order, of which notice shall be given in such manner as he may direct " were held by Bruce and Phillimore, JJ. to be directory only. " I think ", says Bruce, J., in his judgment, at p. 680 of the report " that the order comes into force when it is made by the Secretary of State and although power is given to him to give notice of the order and to direct how notice shall be given of the order, yet that is not essential to the order coming into operation but is merely directory and the fact that no notice is given does not prevent the order from having effect. Therefore, I have come to the conclusion that the order was good and valid although there is no evidence before us of any notice given by the Secretary of State or of any direction as to how the notice should be given ". The wording of the section we are now considering is, however, different from that of the section upon which the decision in *Jones* v. *Robson* proceeded. Section 11 (1) of the Law of 1922 says " the High Commissioner in Council may *subject to the provisions hereafter contained* ", that is to say, subject to all the subsequent provisions of the section. The section confers a power but expressly subjects it to specific provisions contained in the following sub-sections. Those sub-sections are three in number, and there is nothing in the section to contradict or restrict the words " subject to the provisions hereafter contained " so as to make them applicable to some only of the three ensuing sub-sections. Had the legislature intended, for example, that, as was suggested during the argument, the exercise of the powers conferred should be subject only to the limitations set out in sub-sections (2) and (3) of the section it would doubtless have said " subject to the provisions of sub-sections (2) and (3) of this section ". In that event it would, we apprehend, have been very difficult, if not, indeed, as we are inclined to think, impossible to contend that the requirements of sub-section (4) were conditions precedent to the validity of the Order in Council. As it stands, however, power to make the Order is conferred " subject to the provisions hereafter contained " words which quite clearly include sub-section (4) as well as

sub-sections (2) and (3). The case is consequently distinguishable in our opinion from *Jones* v. *Robson* and the requirements as to notices in sub-section (4) of section 11 of the Game and Wild Birds Protection Law, 1922, are conditions precedent to the validity of any Order in Council made under the section and are not directory merely. It follows that in order to establish that an area had been validly described as a permanent reserved area proof of the notices mentioned in sub-section (4) of the section was necessary and no such proof having been given it was not established that the area was validly prescribed as a permanent reserved area under Law of 1922. If it was not so validly prescribed then there was nothing which by virtue of section 14 (2) of Law 3, 1934, could be deemed a Game Reserve.

FUAD, J.: I concur.

Conviction set aside.

[STRONGE, C.J., AND THOMAS, J.]

ANTONIS KONTEADES, *Plaintiff-Respondent,*

v.

GULAN YUSUKJIAN, *Defendant-Appellant.*

(*Civil Appeal No.* 3554.)

Building contract — Clause providing that orders for extras must be in writing — Verbal orders for extras given by building owner — Liability of building owner for — Supervising engineer — Building owner's power to dismiss.

Where the defendant, a building owner, (1) resisted payment for building extras on the ground that she had not given any written order therefor as required by the contract, and (2) refused payment of the final instalment, payable by the terms of the contract on handing over the completed work, on the ground that the certificate of completion by the supervising engineer was not binding, because before that certificate was given he had been dismissed as supervising engineer.

Held as to (1), that the defendant by giving oral orders for extras which from their nature she must be taken to know would entail extra cost to carry out, and having seen the expenditure being incurred on them, was liable to pay for them.

Held as to (2), that the approval or condemnation of works and materials having been left by the contract to the sole discretion of the supervising engineer it was not competent to the defendant to revoke his authority as sole judge of the work or dispute his judgment.

Appeal by the defendant against a judgment of the Nicosia District Court (Abbott, P.D.C.) dated 10th February, 1936, awarding plaintiff £77. 7*s.* 5½*p.* and costs.

C. Tornaritis for appellant:

Completion and handing over is a condition precedent to payment of the final instalment and here the evidence shows that the work was not in fact completed. Halsbury's