

CASIE CHETTY v. MENDIS.

M.C., Colombo, 1841.

1904.

May 13.

Ordinance No. 15 of 1862, s. 1 (8)—" Fish "—Pearl oysters—Exposing for sale pearl oysters in public market—Allowing such sale.

Pearl oysters are " fish " under section 1, sub-section 8, of Ordinance No. 15 of 1862.

In a charge of " allowing " pearl oysters to be exposed for sale,—

Held, that a person can be said to allow a thing to be done only where he has control over the acts of the person who does it, and where he can at his will prevent the thing being done.

Where the lessee of a Municipal fish market permitted a person to bring within its precincts pearl oysters and expose them for sale there, though they were giving out a noxious smell, and refused to stop the sale at the request of the Municipal Inspector, and where at the trial the accused did not choose to explain his conduct by entering the witness-box,—

Held, that there was sufficient evidence to show that the accused " allowed " pearl oysters to be exposed for sale.

THE accused was convicted under section 1, sub-section (8), of Ordinance No. 15 of 1862, and sentenced to a fine of Rs. 25, in that he, being the lessee of St. John's fish market, did expose or allow to be exposed for sale in the public fish mart, a portion of the said market, pearl oysters unfit for the food of man.

It was proved that pearl oysters are not eaten; that the oysters exposed for sale in the Municipal market were smelling badly; and that when the accused was ordered by Mr. Inspector Casie Chitty to " stop " the sale, he refused to do so.

The Magistrate held as follows:—" The facts of the case are not disputed, but it is contended that the section of the Ordinance was not intended to apply to anything that is not ordinarily used as the food of man.....It says nothing about being ' intended ' for the food of man. It makes it an offence to sell any animal, meat, fish, &c., which is unfit for the food of man. ' Fish ' in this section is a generic term, including shell-fish, and is used in contradistinction to flesh and fowl. The accused has clearly infringed the section "

The accused appealed.

The case was argued on 10th May, 1904.

Walter Pereira, for accused, appellant.

Van Langenberg, for complainant, respondent.

Cur. adv. vult.

13th May, 1904. SAMPAYO, A.J.—

The accused has been convicted on the charge that he, being lessee of St. John's Fish Market, did, on the 31st March, 1904, expose or allow to be exposed for sale in the public fish mart.

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a portion of the said market, pearl oysters which were unfit for the food of man, in breach of section 1, sub-section (8), of the Ordinance No. 15 of 1862. The charge in the alternative form is bad. Moreover, there is no legal evidence that the accused himself exposed or even caused to be exposed for sale the pearl oysters. The complainant did indeed say that the accused exposed the oysters for sale, but that is not evidence, but the charge itself. The witness should, if he could, have deposed to acts from which it was for the Court to infer that the accused in fact exposed oysters for sale. The conviction, so far as the first alternative in the charge is concerned, cannot be sustained.

I shall deal with the case as though the conviction was for allowing the oysters, which were rotten and unfit for human consumption, to be exposed for sale in the fish mart.

Counsel argued that pearl oysters were not under any circumstances an article of food, and unless they were so their sale did not come within the purview of the sub-section in question. This point has been already decided adversely to the appellant's contention by Layard, C. J., in *M. C., Colombo, 1,640*, on 12th April, 1904, and I agree with that decision.

It was further argued that the sale should be as food, which was here not the case. But under sub-section (8) the article exposed for sale need not be intended for food of man, and that case is provided for in sub-section (9).

The appeal really turns on the next point argued, viz., that the accused could not upon the evidence in the case be held to have "allowed" the pearl oysters to be exposed for sale in the fish mart. The word "allow" no doubt implies the right or power to disallow, or, in other words, a person can be said to allow a thing to be done only where he has control over the acts of the person who does it and where he can at his will prevent the thing being done. As was said in *Hobson v. Middleton* (6 B. C. 295), "the words 'permitting and suffering' do not bear the same meaning as 'knowing of and being privy to;' the meaning of them is that the defendant should not concur in any act over which he had a control.

The question is whether in this case the accused allowed the oysters to be exposed for sale in the above sense. It is proved that the accused was lessee of the Municipal market at St. John's road. The market consists of three portions: a vegetable market, a fish market, and what is called the fish mart. It is in this last portion that the oysters were exposed for sale. It appears that in the course of business fish is brought in the first instance to the fish mart, where it is sold wholesale (I believe by auction) to retail dealers, who then remove the fish to the fish market and retail it

there. In the vegetable market and the fish market the vendors occupy separate spaces or stalls and pay rent to the lessee, and it may be that in the case of these two portions of the public market the accused has not such control over the conduct of the retail dealers as to make him responsible for their acts. But the case of the fish mart, where the oysters were exposed for sale, seems to me somewhat different. So far as appears, it is used only for the sale of fish wholesale, and in the absence of anything to the contrary I should say that the accused as lessee must be supposed to have sufficient control so as to prevent anything unusual being done there. Further, the accused was personally on the premises, and when asked by the Inspector to stop the sale of oysters, refused to do so. The accused himself did not choose to give evidence, and that being the case I think the evidence, though it might be clearer, is sufficient for the Court to hold that the accused allowed the oysters to be exposed for sale in the fish mart. Besides, this was not his defence in the Court below and is not alluded to even in the petition of appeal, the only point depended on by him being that pearl oysters were not an article of food. Under the circumstances, I affirm the conviction and sentence on the charge for allowing the pearl oysters to be exposed for sale.

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