1956 *Present :* Weerasooriya, J. and H. N. G. Fernando, J.

DAVID, Appellant, *and* MUNICIPAL SANITARY INSPECTOR Respondent

S. C. 1,627—M. M. C. Colombo, 80,882

Municipal Councils Ordinance, No. 29 of 1947—Section 148 (1) and (3)—Offensive and dangerous trade or business—Meaning of word "business".

If a person keeps a stall or yard for cows and the purpose of doing so is to obtain milk for the business of his dairy, whether that stall or yard is in the same premises as the dairy or elsewhere, the keeping of such a stall or yard constitutes a business within the meaning of section 148 (1) of the Municipal Councils Ordinance No. 29 of 1947.

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

Neville Samarakoon, with *J. C. Thurairatnam*, for accused-appellant.

H. V. Perera, Q.C., with *G. F. Sethukavaler*, for complainant-respondent.

Cur. adv. vult.

March 28, 1956. WEERASOORIYA, J.—

The accused-appellant is the occupier of Premises No. 133, Kollupitiya Lane, within the limits of the Colombo Municipal Council. According to the evidence of the Sanitary Inspector who had visited these premises on the 28th April, 1955, he found there a milk room and stall containing about seventeen she-buffaloes and cows; also empty milk bottles and other utensils indicating the existence of a dairy. It is, indeed, not disputed that on this date, as well as prior to it, the accused was running a dairy at the premises. Since 1948 the accused has been registered under the Municipal Dairies and Laundries Ordinance (Cap. 184) as a dairyman running the business of a dairy at these premises.

By-laws have been framed by the Colombo Municipal Council under the provisions of Section 148 (1) of the Municipal Councils Ordinance, No. 29 of 1947, declaring, *inter alia*, the trade or business of keeping a stall or yard for cattle an offensive trade or business ; and the effect of these by-laws is to prohibit the use of any premises within the limits of the Colombo Municipal Council for such a trade or business except on the authority of an annual licence issued by the Council on payment of the appropriate fee prescribed under Section 304 (1) of the Ordinance. These by-laws were published in the Government Gazette No. 10,697 dated the 30th July, 1954. The business of a dairy has, however, not been declared a dangerous or offensive business under these by-laws.

The accused was charged with the commission of an offence under Section 148 (3) of the Municipal Councils Ordinance No. 29 of 1947 in that he did, in contravention of the by-laws referred to, on the 28th April, 1955, use the aforesaid premises for the trade or business of a stall or yard for cattle without a licence in that behalf. After trial he was convicted of the offence by the Municipal Magistrate and sentenced to pay a fine of Rs. 300 and a further fine of Rs. 10 per day as for a continuing offence from the 5th November, 1955. From this conviction and sentence the accused has filed the present appeal.

The main contention of Mr. Samarakoon, who appeared for the accused, is that what is prohibited under the by-laws is the use of any premises *for the trade or business* of keeping a stall or yard for cattle and that even though, admittedly, the accused was keeping a stall for his cows in connection with the business of a dairy which he ran at the premises in question, no evidence had been adduced by the prosecution that the keeping of the stall *per se* constituted a trade or business. In support of this contention Mr. Samarakoon cited the case of *Gunasekera v. The Municipal Revenue Inspector* [1]. The accused in that case carried on the business of a licensed auctioneer at certain premises within the limits of the Municipality of Colombo and it was his practice to use a part of the premises for displaying the furniture that had been given to him by his customers for sale by public auction, which took place periodically. No charge was, however, levied from his customers for the use of the premises for displaying the furniture. In that case too under certain by-laws the trade or business of storing furniture had been declared a dangerous or offensive trade or business and the use of premises for such a trade or business was prohibited except under the authority of a licence. The accused was charged with having, without a licence, used the premises "for storing furniture which had been declared an offensive trade or business" under the relevant by-laws. The accused was convicted of the charge but in appeal two objections taken on his behalf, firstly, that the charge framed was defective because it did not allege that the accused was carrying on the business of storing furniture and, secondly, that there was in any event no evidence from which it could be inferred that the accused was in fact carrying on such a business, were upheld by Gratiaen J. and the conviction was set aside. In upholding the second objection he expressed the view that the term "business of storing furniture" involves

the idea of an establishment maintained for keeping in deposit, for an agreed remuneration, a customer's furniture in a store or warehouse for safe keeping. By analogy Mr. Samarakoon contended that the business or trade of keeping a stall for cattle means a stall as, for example, a *gala* where cattle belonging to others could be kept for a specified period and for which a charge would be levied by the stall-holder.

Mr. Perera, who appeared for the respondent, relied on the case of *Jayasekera v. Silva*[1] where certain premises were used as a carpentry yard, by which I understand a yard where furniture was manufactured. In a portion of the same yard there was also carried on the sawing of timber, by means of steam-saws, for the purposes of the manufacture of the furniture. By-laws made under the Municipal Councils Ordinance, No. 6 of 1910, declared the business of sawing of timber by the employment of steam power a dangerous or offensive business and prohibited the use of premises for such a business except under the authority of a licence. In affirming the conviction of the accused on a charge of having contravened the by-laws in that he had without a licence used the premises referred to for the business of sawing of timber by the employment of steam power, being a business declared a dangerous or offensive business, Bertram A.C.J. rejected the argument that the sawing of timber, which was merely an incidental adjunct to the carpentry business, could not be regarded as a business in itself. He expressed the view that the word "business" has a wider signification than "trade" and includes any systematic enterprise of a commercial character and that it is immaterial whether any particular business is the main business carried on upon the premises or is only a subsidiary business. There is a reference to this case in the judgment of Gratiaen J. in *Gunasekera v. The Municipal Revenue Inspector* (supra) but only in another connection. In the case of *Smith v. Anderson*[2] the question that had to be decided was whether an association of persons could be regarded as carrying on a business (other than banking) within the meaning of the Companies Act, 1862. The judgment of Jessel M. R. answering that question in the affirmative, though reversed in appeal, contains certain observations as to the meaning, generally, of the word "business" which may be regarded as relevant to the present case. According to him, "business" is a word of large and indefinite import, it has a more extensive signification than trade and means anything which occupies the time, attention and labour of a man for the purpose of profit. From these observations and the *ratio decidendi* in the case of *Jayasekera v. Silva* (supra) it may be concluded that if a person keeps a stall or yard for cows and the purpose of doing so is to obtain milk for the business of his dairy, whether that stall or yard is in the same premises as the dairy or elsewhere, the keeping of such a stall or yard constitutes a business. In the present case it would be reasonable to assume, in the absence of evidence to the contrary, that all expenses incurred by the accused in keeping this stall are met from the income accruing from the sale of milk. In the circumstances it cannot be said that the keeping of the stall is otherwise than on a profit-making basis.

[1] *(1918) 5 C. W. R. 255.*

[2] *L. R. (1880) 15 Ch. D. 247 at 258.*

Evidence was also led by the prosecution that the accused had applied for and been issued licences in respect of the premises for the years 1948 to 1954, but no licence was issued to him for 1955, apparently in view of a resolution of the Council that dairies should no longer be permitted within the city of Colombo. Although under Section 272 (24) of the Municipal Councils Ordinance, No. 29 of 1947, power is given to a Municipal Council to make by-laws providing, *inter alia*, for the licensing of dairies, no such by-laws appear to have been made by the Colombo Municipal Council, and in the circumstances the authorities of the Colombo Municipality seem to have taken the view that one way in which the aforesaid resolution might be given effect to was to withhold the issue of licences from 1955 onwards for the use of premises for the business of a stall or yard for cattle, such a business having been declared a dangerous or offensive business under the by-laws made by the Council under Section 148 (1) of the same Ordinance. Mr. Samarakoon stated from the Bar that the licences issued to the accused for the years 1948 to 1954 of which evidence was led by the prosecution were in fact licences for the use of the premises for the dairy business. He was unable, however, to refer us to any by-laws made by the Colombo Municipal Council for the licensing of dairies and, as I have already observed, no such by-laws appear to have been made. The register (P8) containing a record of the issue of these licences, though termed as register of licences for dairies, shows that they have been issued under Sections 148 (1) and 304 (1) of the Municipal Councils Ordinance, No. 29 of 1947, and the accused appears to have applied for and obtained these licences on the basis that he was using the premises for the business of keeping a stall or yard for cattle.

On the facts of this case and on a consideration of the relevant provisions of law I would, therefore, hold that the accused used the premises for the business of keeping a stall or yard for cattle and that the charge against him has been fully made out.

Mr. Samarakoon also submitted on the authority of *Jansen v. Sanitary Inspector, Dehiwela-Mount Lavinia* [1] that since the only condition imposed for the issue of a licence authorising the use of premises for the business of a stall or yard for cattle is the payment of a fee as prescribed under Section 304 (1) of the Municipal Councils Ordinance, No. 29 of 1947, it was incumbent on the Colombo Municipality to have issued to the accused a licence for the year 1955 seeing that he was always ready to pay the prescribed fee. But even conceding that the accused was illegally refused a licence for 1955 his remedy lay elsewhere and such refusal is no defence to the present charge. In the case relied on by Mr. Samarakoon the relevant by-laws, which had been made under Section 168 (10) (*k*) of the Local Government Ordinance (Cap. 195), required the issue of a licence to all persons complying with the conditions prescribed for the issue of such licence. The point decided in that case was that since no conditions had been prescribed in the by-laws which had to be complied with before a licence was issued in respect of the particular trade or business which formed the subject matter of the charge, the by-laws were not applicable to that trade or business. Section 148 (1) of the Municipal Councils Ordinance, No. 29 of 1947, on the other hand, expressly states that the

[1] *(1954) 56 N. L. R. 445.*

issue of licences under any by-laws framed under that section shall be in the discretion of the Council. There is nothing in the by-laws themselves to indicate that the Council had divested itself of such a discretion.

The appeal against the conviction and sentence is dismissed. Although this is a criminal case, in my opinion it is an appropriate one in which, an order should be made for the payment of the respondent's costs which but for such an order, will be charged to the Council's revenue. The accused will therefore pay to the respondent the sum of Rs 255 as the costs of this appeal.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.