

1938

Present : Wijeyewardene J.

WANIGASEKERE *v.* MUSTAPHA.

215—*P. C. Kurunegala, 56,144.*

Milk—Adulterated milk kept on premises—Proof of exposure for sale—Essential for prosecution—Small Towns Sanitary Ordinance, No. 18 of 1892, s. 9E (2).

Where the accused was charged with exposing for sale or keeping on the premises of his tea boutique adulterated milk in breach of a by-law framed under section 9E (2) of the Small Towns Sanitary Ordinance, which was as follows :—

“No adulterated milk should be sold or offered or exposed for sale or kept on the premises of any eating-house or tea or coffee boutique.

For the purposes of this rule adulterated milk shall mean milk to which water or any other foreign liquid or substance has been added for the purpose of augmenting its quantity or enhancing its apparent quality”.

Held, that the prosecution was bound to prove that the adulterated milk was kept on the premises for purposes of sale.

Wijeyratne v. Abdulla (31 N. L. R. 310) referred to.

A PPEAL against an acquittal with the sanction of the Attorney-General.

F. C. W. VanGeyzel, for complainant, appellant.

Cyril E. S. Perera, for accused, respondent.

Cur. adv. vult.

November 3, 1938. WIJEYWARDENE J.—

This appeal is preferred with the sanction of the Attorney-General against an order of acquittal. The charge against the accused was that “he did expose for sale or keep on the premises of his tea boutique adulterated milk in breach of chapter iv, section D (9) of the

by-laws framed . . . under section 9E (2) and 5A of Ordinance No. 18 of 1892 and published in *Government Gazette* No. 7,142 of November 19, 1920, as amended by deletion No. V 119/31, published in *Government Gazette* No. 7,851 of April 30, 1931 ”.

The by-law as published in the *Government Gazette* No. 7,142 reads :—

“No adulterated milk should be sold or offered or exposed for sale or kept on the premises of any eating-house or tea or coffee boutique.

“For the purposes of this rule adulterated milk shall mean milk to which water or any other foreign liquid or substance has been added for the purpose of augmenting its quantity or enhancing its apparent quality and not for the purpose of preparing tea or coffee or any other beverage for the immediate consumption of customers ”.

The amendment appearing in the *Government Gazette* No. 7,851 deletes the following words at the end of the by-law :—

“and not for the purpose of preparing tea or coffee or any other beverage for the immediate consumption of customers ”.

On a survey of the evidence led by the prosecution and the defence the Magistrate has held the following facts to be proved :—About 8 bottles of unboiled milk were found by the complainant in a pot kept on a table in accused’s tea boutique along with other articles exposed for sale. The accused had bought the milk from a milk vendor. The milk contained 60 per cent. of water. It was used by the accused in the preparation of tea or coffee for customers and was never sold as plain milk.

The Magistrate held that the accused had not committed a breach of the by-law referred to in the charge and acquitted the accused.

The Counsel for the complainant-appellant contends that the accused should have been convicted in view of the finding by the Magistrate—

- (a) that water had been added to the milk, and
- (b) that such milk to which water had been added was kept on the premises of the accused’s tea boutique.

It is desirable that I should examine an earlier decision of this Court before I consider this argument. In *Wijeratne v. Abdulla*¹ Lyall-Grant J. construed the by-law in question as published in the *Gazette* No. 7,142 before it was amended. In that case the prosecution proved that four bottles of milk to which water had been added were found in the accused’s tea boutique. The defence called no evidence and the Magistrate convicted the accused. On an appeal by the accused the learned Crown Counsel appearing for the Attorney-General sought to support the conviction on the ground that when the prosecution proved that water had been added to the milk, the Court was justified in presuming under section 114 of the Evidence Ordinance that such addition had been made for the purpose of augmentation and the burden was shifted to the accused to prove that the addition was made for the purpose of preparing a beverage for the consumption of customers. In support of that argument reference was made to section 105 of the Evidence Ordinance

¹ (1929) 31 N. L. R. 310.

which provides that "when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within . . . any special exception or proviso contained in . . . any law defining the offence is upon him and the Court shall presume the absence of such circumstances". In rejecting this argument Lyall-Grant J. stated :—

"The by-law forbids the sale of adulterated milk and the second part of the by-law consists of a definition of adulterated milk when (*inter alia*) water has been added to it for a certain purpose and not for another purpose. This is not a case of a general rule and an exception, but is a case of two alternatives, and the prosecution must prove that the water was added for the purpose of augmenting the quantity of milk".

The amendment of the by-law appearing in the *Gazette* No. 7,851 was apparently intended to meet the difficult situation created by this decision. The amendment enables a complainant to prove merely that water has been added to the milk and establish by means of presumptions permissible under section 114 of the Evidence Ordinance that the water was added for the purpose of augmenting the quantity of milk. It is no longer necessary for a complainant to prove by direct evidence that the accused added water for such a purpose. The amendment does not however take away from the accused the right to negative such a presumption by leading evidence to show that the purpose of adding water was not the augmentation of a quantity of milk but the preparation of a beverage for his customers. If the Legislature intended to take away such a defence I have no doubt the draftsman would have enlarged the ambit of his amendment by deleting also the words "for the purpose of augmenting its quantity or enhancing its apparent quality". I think the only effect of the amendment is to shift the burden of proof from the complainant to the accused with regard to the purpose for which water or any other liquid or substance is added to the milk and thus to give legislative sanction to the argument put forward unsuccessfully on behalf of the Crown in *Wijeratne v. Abdulla* (*supra*).

Another point that has to be considered in testing the soundness of the argument of the learned Counsel for the complainant-appellant is whether the by-law makes the mere keeping of adulterated milk an offence or whether it requires that the adulterated milk should have been kept for purposes of sale. The passage that has to be construed reads :—"No adulterated milk shall be sold or offered or exposed for sale or kept on the premises". It will be noted that the words "for sale" do not follow the word "kept" and it is on this fact that the learned Counsel bases his argument that the by-law penalizes the mere keeping of adulterated milk. I am unable to accept this argument. If the Legislature intended to penalize a man for keeping on his premises milk to which water is added even though such milk was not kept for sale as milk, I cannot understand why the Legislature should have inserted in the by-law the words "exposed for sale". The words "no adulterated milk shall be sold or offered or kept on the premises" would have been quite sufficient to penalize all the acts which according to the learned Counsel are now made offences

by the by-law. I think the word "kept" in the by-law should be read as "kept for sale". The by-law in question is a penal enactment and where there is a doubt as to its meaning, the meaning beneficial to the accused should be favoured.

In view of the Magistrate's finding on the facts I hold that the accused was entitled to an acquittal and dismiss the appeal.

Appeal dismissed.
