1940 *Present :* **Wijeyewardene J.**

PAKIR SAIBO *v.* NAYAR.

334—M. C. Badulla, 2,741.

Master and servant—Charge of breaking or tampering with electrical apparatus—Charge defective and bad for duplicity—Liability of employer for act of servant.

The accused was charged with, being a consumer of electrical energy supplied by an Urban Council, he did break or tamper with or permit a person other than an employee of the Council to break or tamper with any seal or any part of the Council's apparatus in breach of a by-law framed under the Local Government Ordinance.

The evidence was to the effect that a servant boy employed by the accused had tampered with the electric meter by inserting a wire. The Magistrate held that there was no evidence that the accused tampered with the meter. He, however, found that the accused was aware of what the boy was doing and permitted it, basing his conclusion on the fact that the accused benefited by the act of the servant in inserting the wire and thereby preventing the meter from registering the current used by the accused.

***Held,* that the charge was defective in that it failed to give particulars of the manner in which the alleged offence was committed and that it was open to objection on the ground of duplicity.**

***Held, further,* that before a person could be convicted of permitting an offence it must be shown that either the accused himself or someone to whom he had delegated control either knew or ought to have known or had reasonable ground for suspecting that an offence was being or would be committed.**

APPEAL from a conviction by the Magistrate of Badulla.

E. A. P. Wijeyeratne, for the accused, appellant.

E. F. N. Gratiaen (with him *Hugh Mack*), for complainant, respondent.

Cur. adv. vult.

November 27, 1940. WIJEYEWARDENE J.—

The charge on which the accused-appellant was convicted in the Magistrate's Court, Badulla, reads as follows :—

"You on 15th July, 1940, being a consumer of electrical energy supplied by the U. D. C. of Badulla, break or tamper with or permit a person other than an employee of the Council, to break or tamper with any seal or any part of the Council's apparatus or wires in breach of by-law 4 (3) of the by-laws framed under sections 164 and 168 (14) of of Local Government Ordinance and published in *Gazette* No. 8,553 of 1st December, 1939."

The prosecution was well aware of the facts they were going to lead in proof of the charge. The evidence was to the effect that a Sinhalese servant boy employed by the accused, a Malayali boutique-keeper, had tampered with the electric meter by inserting a wire.

In these circumstances I think the charge should have been framed so as to give some "particulars of the manner in which the alleged offence was committed" (*vide* section 169 of the Criminal Procedure Code). Moreover the charge appears to have been framed on the supposition that it would be quite in order, if all the provisions of the by-law in question were embodied in the charge without regard to the particular facts of the case. The charge is in my opinion open to the objection of dupilicity, as I do not think that the provisions of section 181 of the Criminal Procedure Code are applicable to it (*vide Rex v. Stewart* [1], and *Rex v. Perera* [2]). In *Molloy's case* [3] the accused was indicted and convicted on the count that he either stole certain things or, with intention to steel, he ripped and severed them. Avory J. quashed the conviction and said—

> "This indictment charges, the appellant with two felonies in the alternative—the felony of stealing the pictures or the felony of ripping them with intent to steal. The cases cited . . . . make it clear that where two offences are charged in the same count the indictment is bad for duplicity. The section (under which the appellant was charged) deals with two different acts—not with one act in alternative ways".

The evidence for the prosecution was given by two witnesses, S. T. Wambeek and Ocherz. According to Wambeek he got some information on the day in question from Ocherz that there "was some tampering going on in some boutiques" and thereupon decided to go and inspect the meters. He says that Ocherz "did not tell (him) in this particular case that the current consumption was fluctuating and that he was suspecting". It is difficult to reconcile that evidence with the evidence of Ocherz that before he went with Wambeek that evening he had seen "several times that day" the wire inserted in the meter in the accused's boutique. When they went to the boutique of the accused, they peeped through a window facing Bailley street and saw a piece of wire so inserted as to prevent the current being registered correctly by the meter. Wambeek stood by the window and sent Ocherz to enter the boutique by the front door which opens on Lower street. Wambeek says that, within a few seconds, he "saw one of the employees in the shop rush up and remove the wire". He says he is unable to identify the person, but that the person "appeared to be a Sinhalese boy". Ocherz, on the other hand, says in examination-in-chief that Wambeek "asked him to go round by the front entrance and to remove the piece of wire". It is difficult to understand why Wambeek chose to stand by the window and wait until Ocherz came to remove the wire. Ocherz says he met the accused at the front entrance and told him that he had come in inspect the meter. He delayed talking to the accused for about five minutes and then went to a room at the back of the premises but did not take the

[1] *25 N. L. R. 166.* [2] *27 N. L. R. 511.*
[3] *(1921) 2 K. B. 364*

accused with him. When he went in, he saw a servant boy standing near the meter. Wambeek who was still standing on the road, near the window, told him then that the boy removed the wire from the meter. No piece of wire was found with the boy. It is not suggested that, after Wambeek saw the boy removing the wire, the boy went outside, hid the wire and came back again in time to be identified by Ocherz. No attempt has been made by Wambeek or Ocherz to question the boy. Ocherz went back to the front entrance where the accused was and found Wambeek also had come there; Wambeek then questioned the accused about the insertion of the wire. The accused said he knew nothing about it and, in answer to further questions, suggested that the wire might have been placed by the servant boy. It is admitted by the prosecution that the accused was at the entrance to the boutique during the whole period of inspection, and that the meter was in a room at the back where the accused's customers took their meals. The accused himself gave evidence that he was in the garden that evening and entered the premises about two minutes before the arrival of Ocherz.

The evidence for the prosecution is not quite satisfactory, and there are many parts of it which appear to need a deal of explanation. The Magistrate has, however, found on this evidence that a Sinhalese servant boy of the accused removed a piece of wire which had been improperly inserted by him in the meter. I shall proceed to consider this case on the footing that that finding is correct though the evidence does not exclude the possibility of the wire having been introduced by a customer or some other person.

The Magistrate holds that there is no evidence that the accused tampered with the meter but concludes that "the accused was aware of what the boy was doing and permitted it". He bases his conclusion, solely, on the fact that the accused was benefited by the act of the servant in inserting the wire and thereby preventing the meter from registering the current used by the accused. I am unable to draw the same inference as the learned Magistrate especially in view of the denial of the accused that he was aware of any tampering with the meter. There could have been some other reason for the boy's action. If the servant had been found fault with, for excessive consumption of electricity, he might have tried to meet the situation by having recourse to an artifice to get the meter to register less than the amount consumed.

The guilt of the accused depends on the question whether the accused could be said to have permitted the tampering with the meter because a servant boy of his had, as found by the Magistrate, tampered with the meter.

It is a general principle of Criminal Law that a man is not criminally liable for an offence committed by his servants without his knowledge. But the Legislature may create exceptions to this rule by prohibiting an act or enforcing a duty in such terms as to make the prohibition or enforcement absolute. This doctrine of vicarious liability in criminal matters has been considered by the English Court in a number of cases. The earlier cases were often under the Licensing Acts while, in recent times, they have been more often under the Road Traffic Acts.

In *Somerset v. Hart* [1] the accused (Hart) was charged under section 17 of the Licensing Act, 1872, with having suffered gaming on his licensed premises. It was admitted that gaming took place, that Smith, a potman in the service of Hart, who served the gamblers with food and drink, was aware of the gaming, but that he did not report the matter to Hart. In the course of his judgment Lord Coleridge C.J., said :—

> "It is nowhere held that (a licensed victualler) can be said to suffer gaming where what takes place is not within his knowledge, but merely within that of one of his servants, and there is no connivance on his part. I quite agree that the provisions of an Act which is passed in the interests of public morality and order should receive a reasonably liberal construction. I do not say that proof of actual knowledge on the part of the landlord is necessary. Slight evidence might be sufficient to satisfy the Magistrates that the landlord might have known what was taking place if he had pleased, but where no actual knowledge is shewn there must, as it seems to me, be something to shew either that the gaming took place with the knowledge of some person clothed with the landlord's authority, or that there was something like connivance on his part, that he might have known but purposely abstained from knowing."

In *Somerset v. Wade* [2], Wade was charged under section 13 of the Licensing Act, 1872, with having permitted drunkenness on his premises. The evidence showed that a constable found a woman drinking beer on the premises in question, the beer having been served by the accused. The constable had previously ordered the woman out of some other licensed premises on the ground that she was drunk. The Court accepted the constable's evidence that the woman was in fact drunk but also believed the accused's evidence that he was ignorant of her state when he served her with beer. The Judges expressed the view that there was no difference in meaning between the words "suffering" and "permitting" and one of the Judges, Collin J., said :—

> "Without knowledge, or connivance, or privity between the landlord and the agent, who might have known of the offence being committed there could be no "permitting" . . . . *Bond v. Evans* [3] is not in conflict with the decision in *Somerset v. Hart* (*supra*) at all. The Court in *Bond v. Evans* simply says that, given no delegation of authority to the person who commits or assists in the commission of the offences, they agree that there can be no "suffering" such an offence to be committed without knowledge of its commission, and therefore it is equally an authority with *Somerset v. Hart* that a person cannot "permit" or "suffer" the commission of any of these licensing offences in section 13 without 'knowing' of their commission."

In the *Commissioners of Police v. Cartman* [4], which was a case under section 13 of the Licensing Act, 1872, Lord Russel C.J. discussed the liability of licensees who delegate the actual direct control to other persons and said :—

> "Are the licensees in these cases to be liable under this section for the acts of others? In my opinion they are, subject to this

[1] (1884) 12 Q. B. D. 360.
[2] (1894) 1 Q. B. 574.
[3] 21 Q. B. D. 249.
[4] (1896) L. R. 1 Q. B. D. 655.

qualification that the acts of the servant must be within the scope of his employment. The manager's authority, in my view receives its limitation from the scope of his employment ; authority is given him to do all acts within the scope of his employment. It makes no difference for the purposes of this section that the licensee has given private orders to his manager not to sell to drunken persons."

The case of *Collman v. Mills*[1] illustrates the legal principles worked out in the previous cases, though, at first sight, it may appear to be in conflict with them. The accused in that case was convicted for the breach of a by-law which provided that "an occupier of a slaughter-house (*a*) shall not slaughter or permit to be slaughtered any animal in any pound, pen . . . . or any part of the premises except the slaughter-house ; (*c*) shall not slaughter or permit to be slaughtered any animal within public view or within the view of any other animal". The accused was the occupier of a licensed slaughter-house. Brigdon, the foreman and slaughter man in the employ of the accused, slaughtered a sheep in the pound and in view of some live sheep. The accused was absent from the premises at the time and had forbidden his servants to do the acts complained of. In convicting the accused Wills J. said :—

"In businesses of this kind, which often are carried on upon an extensive scale and necessitate the employment of numerous servants legislation would be useless if the master were not to be liable to penalties for his servants' acts as well as the servant himself. The business of a slaughter-house may be carried on on a very extensive scale : the proprietor may employ a dozen or more servants and the slaughtering may be done by any of the servants or by himself."

In *Mousell Brothers, Limited v. London and North-Western Railway Company*[2], the manager of Mousell Brothers, whose duty it was to fill up or direct the filling up of the consignment notes from his principals to the Railway Company, wrongfully described the goods with intent to avoid the payment of the rates payable upon a right classification of the goods. Mousell Brothers were charged under sections 98 and 99 of the Railway Claims Consolidation Act, 1845, and convicted. Section 98 of the Act imposes upon every person being the owner or having the care of goods the obligation to give an exact account in writing of the number or quantity of goods to each of the tolls. Section 99 provides that "if any such owner or any such person fail to give such account . . . . or if he gives a false account . . . . with intent to avoid the payment of any tolls . . . ." he shall be liable to a penalty. The Judges expressed the view that the words "person having the care or carriage of goods" in section 98 were used to refer to a bailee entrusted with the goods for carriage and would not include a person who occupied the position of manager. The Court then considered the criminal liability of the owner and held he was liable. Lord Reading C.J. said :—

"The legislature must be taken to have known that the forbidden acts were of a kind which, even in the year 1845 would in most cases be done by servants . . . . I think looking at the language and

[1] *(1897) 1 Q. B. 396.*

[2] *(1917) 2 K. B. D. 836.*

the purpose of this Act, that the legislature intended to fix responsibility for this quasi-criminal act upon the principal if the forbidden acts were done by his servant within the scope of his employment."

In *Goldsmith v. Deakin*[1], the accused owned a motor coach licensed to use as a contract carriage and not as a stage carriage. A club which was organizing a dance open to the public hired it to convey persons between the dance hall and the club's headquarters. The accused received a lump sum for the use of the coach which was driven by his servant. It was arranged that the driver should collect tickets from passengers in order to exclude unauthorized persons. Tickets were in fact sold by the club officials entitling the holders to travel in the coach which on the return journey set them down, if desired, at intermediate points. The tickets, which gave no indication of price, were collected by the driver but no money was paid by the passengers either to him or the accused. The accused was convicted on a charge of permitting his vehicle to be used as a stage carriage in breach of section 67 of the Road Traffic Act, 1930, The Court held that though the accused was in fact unaware of the fact that the motor coach was used as a stage coach, he ought to have known that it would probably be so used, since he agreed that his servant the driver should collect the tickets from the passengers and knew that either the price was included in that of the dance ticket or that a separate charge would be made for the coach tickets.

In the later case of *Evans v. Dell*[2], the owner of a motor coach was acquitted on a somewhat similar charge in circumstances which were slightly different from those in the earlier case. The accused was charged with permitting his motor coach to be used without a road service licence in breach of section 72 of the Road Traffic Act, 1930. An organizer of a dance hired the coach for a lump sum. The accused supplied the driver but gave no order to the driver and placed him at the disposal of the hirer. The organizers of the dance informed the public that after the dance there would be an omnibus to take them home. At the dance the dancers were informed that they could buy the tickets for the use of the bus at the door of the hall. There was no fixed charge for a ticket and the tickets were issued by the dance committee. The tickets were collected by a member of the committee at the door of the coach, who stood in such a position that the driver could not see what he was doing. Neither the accused nor the driver knew about the sale of the tickets. Goddard J. rejected the idea that in cases of this kind the prohibition is absolute and proof of *mens rea* need not be tendered.

The legal position resulting from the decisions I have mentioned is, that before a person could be convicted of "permitting" an offence it must be shown that either the accused himself or some one to whom he had delegated control either knew or ought to have known or had reasonable ground for suspecting that an offence was being or would be committed.

In the case under consideration, there was no evidence of actual knowledge on the part of the accused. Nor are there any circumstances from which it may be inferred that the accused had reasonable grounds for any suspicion. Even if one considered the fluctuations in the readings

[1] *(1933) 50 Times Law Reports 73.*

[2] *156 L. T. Rep. 240.*

of the meter over a long period, these fluctuations were not so marked as to give room for suspicion. Moreover there is the admission by the witnesses for the prosecution that some months before the day in question, it was found necessary to remove another meter as owing to some defect it did not register the current correctly. The Sinhalese servant boy mentioned by the prosecution is not a person to whom the accused had delegated the control over the premises. Nor could it be said that it was within his scope of employment as such servant to attend to the electric apparatus. I think the word "permit" has been used in the by-law to make a consumer liable for the act of a contractor or some workman whom he employs for the purpose of attending to the Council's apparatus or wires.

I allow the appeal and acquit the accused.

Set aside.