

1938

*Present : de Kretser J.*BAKELMAN *v.* DE SILVA.105—*P. C. Dandagamuwa, 1,724.*

*By-law—Prohibiting the exposure of fish outside public market—Validity—
Small Towns Sanitary Ordinance, No. 18 of 1892, s. 9 E (2) (d).*

A by-law made under section 9 E (2) (d) of the Small Towns Sanitary Ordinance, which prohibits the exposure of fish for sale outside a public market without a licence, is not *ultra vires*.

A PPEAL from an acquittal by the Police Magistrate of Dandagamuwa.

E. A. L. Wijeyewardene, K.C., Acting Attorney-General (with him *D. Jansze, Acting C.C.*), for complainant, appellant.

No appearance for accused, respondent.

May 20, 1938. DE KRETSEK J.—

The accused was charged as follows:—

“That he did on or about August 11, 1937, at Kuliypitiya within the limits of the Sanitary Board expose for sale fish outside the public markets without a licence from the Board in breach of by-law 1A (1) of by-laws framed under section 9 E (2) of the Small Towns Sanitary Ordinance, No. 18 of 1892, and published in the *Ceylon Government Gazette* No. 8,283 of July 10, 1936”.

The accused pleaded not guilty and trial was fixed for November 20, 1937.

On that day his Proctor admitted the sale of fish and contended that the by-law was *ultra vires*.

This contention was upheld and accused was acquitted. The Attorney-General appeals from this acquittal.

The accused was not represented nor present at the hearing of the appeal.

The Magistrate had followed the case of *Perera v. Fernando*¹.

The Attorney-General's contention briefly was that that case had no application since the circumstances were different. He also suggested that the decision was erroneous.

With regard to this suggestion all I need say is that I am bound by that decision and that there do appear grounds for having that decision reviewed in a suitable case. It would serve no useful purpose to give my reasons for saying so.

In that case, which was decided in 1914, the by-law now in question, which was framed only in 1936, was not the subject of discussion or decision. That case referred to a by-law relating to private markets, which would come under section 9E (2) (d), and not to the hawking of fish which does not come under that subdivision.

Briefly in that case two out of the three Judges decided that in spite of section 11 (1) (d) of the Interpretation Ordinance it was open to a Court to canvass the question whether the by-law was *ultra vires* or not, and that the evidence in that case showed that the real object of the by-law then in question was not to control or supervise private markets, but to prevent altogether the sale of fish at any place other than the public market established by the Sanitary Board.

The by-law then in question authorized the Chairman of the Sanitary Board to cancel any licence which may have been issued. It therefore gave him the opportunity to use his power in such a way as to stop all sale outside the public market.

The by-law now in question gives him no power to refuse a licence or to cancel one already issued.

Not only therefore are we now concerned with a by-law of quite a different type but there is no evidence that there is any ulterior motive behind it. The accused has not desired to place any evidence before Court and should not be now allowed to do it. The procedure adopted was both irregular and unsatisfactory but the plain meaning of what took place was that the accused would plead guilty if the by-law was found to be valid.

I am of opinion that the decision previously referred to does not affect the decision of this case. It is necessary now to consider the by-law on its own merits.

In doing so it is necessary to bear in mind the difference between by-laws made by responsible local bodies, usually created on a democratic basis and lacking any personal interests, and by-laws made by private bodies like companies. It is also useful to remember that in the former case the Legislature signifies its confidence in the public body in different ways.

Maxwell on the *Interpretation of Statutes* (6th ed., p. 524) says:—"In determining the validity of by-laws made by public representative bodies

¹ 7 N. L. R. 494.

under statutory powers, their consideration is approached from a different standpoint from by-laws of railways or other like companies, which carry on business for their profit, although incidentally for the benefit of the public. Courts of justice are slow to condemn municipal by-laws as invalid, on the supposed ground of unreasonableness, and support them if possible by 'benevolent' interpretation, and credit those who have to administer them with an intention to do so in a reasonable manner. But, on the other hand, if a by-law necessarily involves that which is unreasonable, it is the duty of the Court to declare it to be invalid".

It must also be remembered that with changing conditions, and especially the development of democratic ideas, the Courts have less reason to guard against the use of dictatorial powers and as a result the attitude of the Courts has altered.

In *Cassell v. Jones*¹, Channell J. emphasized this change in attitude and said: "There is no doubt that the views of the Court as to by-laws have altered very considerably during recent years, and it has been pointed out that the by-laws which have been made by a public body as to property to which the public have access—it does not signify whether rightly or not—stand on a very different footing from the by-laws made by other corporations, and which were scrutinised in the most careful fashion by the Courts in olden times. The principle which lies at the root of these by-laws is this, that the local authority must decide local questions—and they are authorised by the Legislature to do so—and if they *bona fide* form the opinion that certain things are, in fact, an annoyance, the local authority must be supported in the assertion of their powers, unless it is quite clear that they have exceeded them".

It must also be borne in mind that the by-law is published by His Excellency's command over the signature of the Minister of Local Administration, which means that it has passed this scrutiny of the Committee of the State Council which deals with that subject and which is composed of the representatives of the people. It is common knowledge that these by-laws are usually passed by the law officers also. There is therefore an abundance of checks on the despotism of local bodies and it is no doubt for that reason that the Legislature was content to enact in the Interpretation Ordinance that by-laws when published in the *Government Gazette* should have as full force as if they had been enacted in the Ordinance itself.

The by-law in question purports to be made under section 9E (2) of the Small Towns Sanitary Ordinance, 1892. Section 9E (2) has many subdivisions and the last of them is wide enough to cover the by-law now in question. I see nothing unreasonable in the by-law and, in my opinion, it is not *ultra vires*.

The acquittal is set aside and the case sent back for the Magistrate to take further proceedings, which I take it will mean nothing more than the passing of sentence.

It is interesting to note that in the by-laws contained in Schedule D of the Ordinance No. 13 of 1898 is a by-law on the same lines as the by-law now in question, viz., by-law 2 in Chapter IV.

Set aside.

¹ 108 *Law Times* 806.