

1968

Present : Alles, J.

G. ASIRWATHAM, Appellant, and A. PREMAWARDENA (Labour Officer), Respondent

*S. C. 354/68 — M. C. Arisawartha. 82248*

*Shop and Office Employees (Regulation of Employment and Remuneration) Act (Cap. 129), as amended by Acts Nos. 60 of 1957, 28 of 1962, 26 of 1966—Sections 43 (1), 43 (2), 51 (3), 60 (1), 65—Closing Order—Charge of contravention thereof by owner of a shop—Liability of owner for acts of his employees—Mode of proving a Closing Order—Evidence Ordinance, s. 57.*

In a prosecution of the registered owner of a shop for having kept open his shop for the serving of customers in contravention of a Closing Order made under the Shop and Office Employees (Regulation of Employment and Remuneration) Act—

*Held*, (i) that production of the Closing Order together with copies of the certified extracts of the *Government Gazette* bearing the legend that they were printed by the Government Printer constituted sufficient evidence to satisfy the requirements of section 65 of the Act.

(ii) that evidence of service of a customer by employees of the owner, even in the absence of the owner, was sufficient to convict the owner, unless the owner discharged his liability in terms of section 60 (1) of the Act.

**A**PPEAL from a judgment of the Magistrate's Court, Avissawella.

*S. C. Crossette-Thambiah*, with *Ralph de Silva*, for the accused-appellant.

*V. S. A. Pullenayegum*, Senior Crown Counsel, with *Priyantha Perera*, Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*

November 25, 1968. ALLES, J.—

The accused, who was the owner of a shop called Asir Stores, Avissawella, was charged and convicted under sections 43 (1) and 43 (2) of the Shop and Office Employees (Regulation of Employment and Remuneration) Act (Cap. 129), (hereafter referred to as the Act), as amended by Acts Nos. 60 of 1957, 28 of 1962 and 26 of 1966, thereby committing offences punishable under section 51 (3) of the amended Act, No 26 of 1966.

There is no dispute with regard to the facts which may be briefly stated :

The accused, as the registered owner of the said shop, employed a cashier called Jayarajah and a salesman called Cyril. On 26.2.67, which happened to be a Sunday and a day on which no business could be transacted according to Closing Order P3, while Labour Officer Premawardena and his assistant Alutge were on patrol duty about 7.35 p.m. along the main road at Avissawella, they saw a customer enter Asir Stores through an open plank of the planked door. They entered the shop and saw Cyril selling a bottle of Quink and a bottle of gingolly oil. The parcel of goods was handed to the customer who then asked for a pound of sugar. Jayarajah, the cashier, was in charge of the boutique. Premawardena then revealed his identity. The accused was not present, having gone to Colombo and returned at 9 p.m. The learned trial Judge on an examination of the evidence has held that the shop had been opened and that the customer was served by the employees. On these facts, the accused was charged under section 43 (1) and 43 (2) of the Act.

Section 43 (1) and (2) of the Act reads as follows :

43. (1) No shop shall be or remain open for the serving of customers in contravention of any provision of any closing order made under this Act.

(2) It shall be the duty of the employer to prevent any customer from entering the shop on any day or at any time when such shop is required by any closing order to be closed for the serving of customers.

Learned Counsel for the appellant raised two questions of law and submitted that the accused could not have been found guilty for a contravention of these two sections. It was his submission, firstly, that

the Closing Order P3 and the copies of the certified extracts of the *Ceylon Government Gazette* produced P1, P2 and P4 did not constitute evidence on which a court can act because in his submission there was no evidence that the extracts containing the closing order were purported to have been printed by the Government Printer as required under section 65 of the Act. The extracts that have been produced bear the legend that they were printed by the Government Printer and having regard to section 57 of the Evidence Act, judicial notice of the *Gazettes* and its contents can be taken. The Divisional Bench case of *Sivasampu v. Juan Appu*<sup>1</sup> has laid down the principle that there would be sufficient compliance with the requirements of the law if in the complaint or report to Court there is a reference to the *Gazette* in which the invoked rule appears. Counsel's first submission therefore fails.

The second submission of learned Counsel for the appellant related to the liability of the employer under section 43 of the Act. The evidence established that the shop remained open for the serving of customers in contravention of the Closing Order P3. In the absence of evidence that the employer had taken steps under section 60 (1) of the Act to prove to the satisfaction of the Court that he had used due diligence to enforce the provisions of the Act and to ensure that his employees did not commit any offences without his knowledge, consent or connivance, the employer must be deemed to have contravened the provisions of section 43 (2). The Act which is meant for the protection of shop employees, provides that the primary obligation for the contravention of its provisions rests on the employer. Learned Crown Counsel has drawn my attention to the unreported judgment of Tambiah, J. in S. C. Case No. 1209-1211/67, M. C. Colombo South No. S1593/B where my brother has held that the conviction of an owner of a shop for a contravention of sections 43 (1) and (2) cannot be sustained in the absence of the owner from the shop at the time when the offences were committed. With respect, I am unable to agree. In the judgment cited, my brother has not considered the provisions of section 60 (1) of the Act in arriving at his conclusions. The primary liability therefore being on the employer, he has not sought to discharge this liability in any way and is therefore guilty of an offence under section 51 (3) of the Amendment Act No. 26 of 1966.

It was also open to the prosecution under section 59 of the Act to proceed against the cashier and the salesman in this case if they are so minded.

I therefore hold that the submissions of Counsel on the law are not entitled to succeed and the appeal is dismissed.

*Appeal dismissed.*

<sup>1</sup> (1937) 38 N. L. R. 369.