Present: Wood Renton J.

1912.

PERIES *v.* PERERA.

856—P. C. Negombo, 16,097.

Master's liability for act of servant—Illegal drawing of toddy by servant—Master's liability—Ordinance No. 10 of 1844, s. 40.

The illegal drawing of toddy by a servant was held to be a drawing of the toddy by the master within the meaning of section 40 of Ordinance No. 10 of 1844.

WOOD RENTON J.—A master is generally not criminally liable for the act of his servant; but such a liability may be imposed by the Legislature.

HE facts appear sufficiently from the judgment.

Savundranayagam, for the accused, appellant.

Bawa, K.C. (with him *J. W. de Silva*), for the complainant, respondent.

January 12, 1912, WOOD RENTON J.—

The appellant, her son John, and her servant Isaac Nadan were charged before the Police Court of Negombo with having respectively caused toddy to be drawn, and drawn toddy, from a land of which the appellant is admittedly the owner, in contravention of the provisions of section 40 of Ordinance No. 10 of 1844. John, the second accused, was acquitted. The servant, Isaac Nadan, was convicted on his own plea, under section 46 of Ordinance No. 10 of 1844, of having drawn the toddy, and sentenced to pay a fine of Rs. 5. The appellant was convicted under the same section of having caused the toddy to be drawn, and fined Rs. 35. She appeals against that conviction. The main point urged by her counsel in support of the appeal is that there is no evidence of guilty knowledge and that as the word " causing " in section 40 of the Ordinance involves an act of the will, which in its term presupposes knowledge prior to the act, the conviction cannot stand. In reply to this contention, Mr. Bawa argued, in the first place, that there is *primâ facie* evidence of guilty knowledge, which the appellant had not rebutted, inasmuch as she neither gave evidence nor called any witnesses on her behalf at the trial in the Police Court; and in the next place, that even if the conviction for " causing " toddy to be drawn could not be upheld, the appellant would be liable, as the employer of Isaac Nadan, for his criminal act, and that the toddy drawn by him would be drawn by her in the eye of the law. In my opinion both

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these answers to the argument of the appellant's counsel are sound. The evidence shows that Isaac Nadan was the servant of the appellant for the purpose of the drawing of toddy from the trees on the land in question, of which she was the owner. Her own counsel elicited in cross-examination the fact that she had previously been convicted of an offence under the Licensing Ordinance.

There were simple precautions which she might have taken, but did not take, for the purpose of preventing the illegal drawing of toddy by her servant (see *Dingiri Mudiyanse v. Pinsetuwa*[1]). These circumstances are, I think, sufficient to make out a *primâ facie* case against her, and to throw upon her the burden of explaining her conduct. The failure of an accused person to give evidence is a circumstance of which Courts are entitled to take account. "It is right," said Darling J. in *Rex v. Bernard*,[2] "that juries should know, and if necessary be told, to draw their own conclusions from the absence of explanations by the prisoner." That observation applies, *mutatis mutandis*, to Judges sitting alone.

But apart from that, I agree with Mr. Bawa that the illegal drawing of the toddy by Isaac Nadan was a drawing of the toddy within the meaning of section 40 of Ordinanace No. 10 of 1844 by the appellant herself. Various decisions were cited to me in the argument upon this point. There is no doubt but that a master is generally not criminally liable for the acts of his servant (see No. 51,049, P. C. Galle,[3] *Herft v. Northway*,[4] and the numerous English decisions there cited). But such a liability may be imposed by the Legislature, and has been held to have been imposed in many cases, particularly by statutes dealing with matters affecting public health (see *Houghton v. Mundy*,[5] *Brown v. Foot*[6]) and morality (see *Redgate v. Haynes*[7]) (gaming on licensed premises).

In the case of *Commissioners of Police v. Cartman*,[8] where the respondent, a licensed person, had given orders to his servants that no drunken persons were to be served, but during his absence one of his servants sold intoxicating liquor to a drunken person, it was held that the respondent was rightly convicted under section 13 of the Licensing Act, 1872—which makes it an offence for any licensed person to sell any intoxicating liquor to any drunken person—for he was liable for the act of his servant, that act having been done by the servant within the general scope of his employment, although contrary to the orders of his master. In the present case the drawing—although, of course, not the illegal drawing—of toddy was an act within the scope of the servant's employment. I may refer to the language of Lord Alverston C.J. in the more recent case of *Emary v. Nolloth*[9]: "Under ordinary circumstances an offence

[1] *(1902) 6 N. L. R. 14.*
[2] *(1908) 1 Cr. App. R. 219.*
[3] *(1865) Beling and Vanderstraaten 81.*
[4] *(1890) 1 C. L. R. 27.*
[5] *(1910) 103 Law Times R. 60.*
[6] *(1892) 66 Law Times R. 649.*
[7] *(1876) 1 Q. B. D. 89.*
[8] *(1896) 1 Q. B. D. 655.*
[9] *(1903) 2 K. B. 269.*

implies a *mens rea*. But there are exceptions ..... if the offence is prohibited in itself, knowledge on the part of the licensee is immaterial; this principle was acted upon quite recently in *Brooks v. Mason*,[1] where intoxicating liquor had been sold in a bottle not in fact sufficiently corked, but believed to be so, and knowledge was held to be immaterial. Similarly, where there is an absolute prohibition against selling, it is unnecessary to prove knowledge. "

In my opinion the principle of that decision applies to section 40 of Ordinance No. 10 of 1844, which provides that " it shall not be lawful for any person to draw ..... any toddy " in the manner in which toddy in this case was drawn.

The appeal must be dismissed.

Appeal dismissed.