

1955

Present : Fernando, J.

SHARUFDEEN, Appellant, and SINNADURAI, Respondent

S. C. 942 of 1955—M. C. Matara, 40,052

Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954—Closing order—Contravention thereof—Serving of customers—Necessary ingredient—Sections 43 (1), 62 (2), 65.

The presence of customers in a shop after closing time does not conclusively establish that the shop was kept open for the purpose of serving of customers. Section 62 (2) of the Shop and Office Employees (Regulation of Employment and Remuneration) Act does not raise any presumption that the presence of a customer presupposes that the shop was kept open for serving him.

The accused was charged with keeping his shop open for the serving of customers in contravention of a closing order. There was evidence of the presence of certain persons who had come to take away goods from the shop on behalf of a man who had purchased the goods earlier.

Held, that the evidence was not by itself conclusive proof of "serving of customers" within the meaning of sections 43 (1) and 62 of the Shop and Office Employees (Regulation of Employment and Remuneration) Act.

APPPEAL from a judgment of the Magistrate's Court, Matara.

M. M. Kumarakulasingham, for the accused appellant.

George Candappa, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 6, 1955. FERNANDO, J.—

In this case under the Shops and Office Employees Act 19 of 1954, the accused has been convicted on two charges of (1) keeping his shop open for the serving of customers in contravention of a closing order, and (2) of not preventing a customer from entering the shop at a time when the shop is required by a closing order to be closed for the serving of customers.

The Inspector of Labour stated that on the 5th of March, 1955 (which was a Saturday, a day on which the accused's shop should have been closed at 2 p.m. for the serving of customers) he saw the door of the shop open at 2.40 p.m. and a number of people inside. He found in the shop eight people of whom one was the accused and three were his employees. The employees were writing out some bills. As to the other four persons, there was only the defence evidence to indicate who they

were. A witness Charles Silva stated that he was a lorry owner and that he had come to the shop at 2.30 p.m. together with his lorry driver and cleaner, having been instructed by one Cassim, a trader of Tangalle to remove certain goods which had been ordered from the accused's shop. The witness said that when he asked for the goods the accused told him to come on Monday stating that it was not possible to give the goods after 2 p.m. that day. Cassim confirmed that he had given these instructions to Charles Silva. The prosecution were unable to contradict Charles Silva's evidence as to the purpose for which he and his driver and cleaner had come to the shop that day, and in view of Cassim's evidence it has to be accepted as proved that they did come for this stated purpose. That being so there is no doubt that those three persons were customers in the sense that they had come to take away goods on behalf of a purchaser. But that does not dispose of the question whether the prosecution has proved that the shop was kept open that afternoon for the purpose of serving customers. I have been referred to an unreported decision of my brother de Silva in M. C. Mitara 37, 174, S. C. 1, 409 of 10.2.55. It was there held that "it was not incumbent on the prosecution to prove that a sale had in fact taken place" to maintain a charge under section 43 (1) of the Shops and Office Employees Act. With respect I entirely agree, but I consider that there must be evidence to show that the accused kept his shop open for the purpose of serving customers. Such evidence was present in the case just mentioned, for there the accused was seen weighing some sugar and handing it over to a boy who tendered a five-rupee note.

In the present case the relevant paragraph in the definition of "serving of customers" would be (g) "the delivery at such shop . . . of goods purchased while such shop is kept open". Applying the decision in the unreported case I would say that it is not necessary for the prosecution to prove an actual delivery after closing time of goods purchased before the closing time. But the prosecution must prove that the shop was kept open for the purpose of making or facilitating such a delivery. That being so it was incumbent to prove in the present case that one purpose at least for which the accused kept his shop open was in order that deliveries may be made of goods purchased earlier. The Magistrate has not found, and indeed on the whole evidence he could only have found with difficulty, that the existence of this purpose had been proved. He has misdirected himself as to the effect of section 62 (2) of the Act. That section provides that any person found in a shop within the hours prohibited by a closing order shall be presumed, until the contrary is proved, to have been a customer. So that undoubtedly, even without the evidence of Charles Silva, there was a presumption that he and the other three persons (not being employees) were customers. But the section does not, as the Magistrate thinks, raise any presumption that the presence of a customer presupposes that the shop was kept open for serving him. In my opinion the presence of customers in a shop after closing time does not conclusively establish that the shop was kept open in order to serve them any more than the mere absence of customers would disprove the existence of a purpose of serving customers if such purpose can be proved *aliter*.

I would hold that the first charge (under section 43 (1) of the Act) must fail because, although a customer may have been present, there was no evidence to establish that the shop was kept open to serve customers.

The second charge was that the accused did not prevent customers from entering his shop during the prohibited hours. The defence did not lead any evidence which could assist them on this charge. But neither the prosecution nor the Magistrate appear to have realised that it was indeed a charge distinct from the first one. In the circumstances I think it quite sufficient to set aside the conviction on both charges and to order the accused to be discharged after admonition under section 325 of the Criminal Procedure Code. I find that the accused has already paid the fine of Rs. 500 . That sum must be returned to him.

Convictions set aside.

