

1909.
July 6.

Present : Mr. Justice Wood Renton.

PERERA v. GOMESZ.

P. C., Negombo, 12,118.

Keeping open licensed premises after hours—Intention—Evidence of sale—Ordinance No. 12 of 1891, s. 39, sub.-sec. (1).

In a prosecution for keeping a tavern or premises licensed for the sale of intoxicating liquor open between the hours of 8 p.m. and 5 a.m., contrary to the provisions of sub-section (1) of section 39 of Ordinance No. 12 of 1891, it must be shown that such tavern or premises were kept open for the sale of intoxicating liquor.

A PPEAL from a conviction by the Magistrate (V. P. Redlich, Esq.) under sub-section (1) of section 39 of Ordinance No. 12 of 1891.

H. A. Jaywardene, for the accused, appellant.

No appearance for the respondent.

July 6, 1909. WOOD RENTON J.—

In this case the appellant has been convicted, under section 39 of Ordinance No. 12 of 1891, of having kept open certain premises licensed for the sale of intoxicating liquors, called the “ Restaurant

¹ (1909) 12 N. L. R. 206.

² (1907) 17 Madras Law Journal 545.

Bar," between 4.15 A.M. and 5 A.M. On the appellant's behalf Mr. Jayewardene argued, first, that as the premises in question are licensed as a Restaurant, there was nothing [see section 39 (2)] to prevent the appellant from keeping the premises open, provided always—a circumstance of which there is no proof—that he did not sell intoxicating liquor during prohibited hours; and, in the second place, that, even if the appellant's premises should be regarded as a mere licensed tavern and not as a restaurant or an hotel, he could not properly be convicted under sub-section (1) of the section in question, unless it was shown that the premises were kept open for the sale which the Ordinance prohibits. I am very much disposed to agree with Mr. Jayewardene's argument in support of his first point; but I do not think it necessary to decide that question expressly now, since I am of opinion that, on the evidence before the learned Police Magistrate, the appellant ought not to have been convicted under sub-section (1), which deals with licensed taverns. There was nothing to show that any sale of intoxicating liquor had in fact taken place on the occasion in question. In his evidence the appellant expressly stated that he had opened his premises merely for the purpose of allowing his sister, sister-in-law, and his cousin to go out so as to catch an early boat at Negombo. So far as I can see, there is no suggestion that this evidence is false. On the contrary, the appellant appears to be a perfectly respectable man, and I think, under the circumstances I have stated, he ought not to have been convicted. I do not propose to go through the cases cited in the course of the argument, but I desire to refer simply to the following authorities which, I think, support the view of the law I have now taken: *Murphy v. Mayilvaganam*,¹ *Van Houten v. Gauder*,² and the unreported decision of Withers J. in P. C., Chilaw, No. 8,992.³

On these grounds stated the conviction is set aside and the appellant is acquitted.

Appeal allowed.

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WOOD
RENTON J.

¹ *Ram. (1872-1876) 228.*

² (1894) 3 S. C. R. 28.

³ *S. C. Min. December 4, 1895.*