1961 *Present :* **Sansoni, J.**

L. W. S. NANDASENA, Appellant, *and* INSPECTOR OF POLICE, RAGALA, Respondent

S. C. 751/60—M. C. Nuwara Eliya, 17,137

Criminal procedure—Charge under wrong Section—Effect of error when it has not occasioned a failure of justice—Criminal Procedure Code, s. 425.

Thoroughfares Ordinance (Cap. 148)—Sections 68 (8), 71 (11), 73—Encroachment on thoroughfare by making a building—Meaning of "building"—Exposing goods or wares by means of temporary supports or otherwise—Meaning of words "or otherwise".

(i) In a prosecution for an offence under Section 68 (8) of the Thoroughfares Ordinance the charge referred to Section 69 (8) and not to Section 68 (8).

Held, that the error in the charge did not occasion a failure of justice and was curable under Section 425 of the Criminal Procedure Code.

(ii) Where a cart was converted into a boutique encroaching on a thoroughfare—

Held, that the structure was a building within the meaning of Section 71 (11) of the Thoroughfares Ordinance.

(iii) In a prosecution under Section 68 (8) of the Thoroughfares Ordinance for exposing goods or wares over a public road by means of temporary supports or otherwise—

Held, that the words "or otherwise" in the Section meant "in any other way", for there is no limited genus which would control or restrict the meaning of the phrase.

APPEAL from a judgment of the Magistrate's Court, Nuwara Eliya.

J. C. Thurairatnam, for Accused-Appellant.

M. Hussain, Crown Counsel, for Attorney-General.

Cur. adv. vult.

February 1, 1961. SANSONI, J.—

The accused-appellant was charged from a summons with two offences under the Thoroughfares Ordinance (Cap. 148). The first offence alleged was that he encroached on a thoroughfare by making, or causing to be made, a building, i.e., a boutique, on the P. W. D. road, High Forest Division 3, Kandapola, and thereby committed an offence punishable under section 71 (11) of the Ordinance. The second offence was that he, by means of temporary supports or otherwise, exposed goods or wares over the public road and thereby committed an offence punishable under section 69 (8) of the Ordinance.

There is an obvious error in respect of the section charged, for the section should be section 68 (8) and not 69 (8), but that error is one which I am satisfied, has not occasioned a failure of justice. Applying section 425 of the Criminal Procedure Code I hold that the accused is not entitled to claim an acquittal on that account.

The facts, as found by the learned Magistrate, were that the accused was occupying and carrying on the business of selling goods in a building which the prosecution has called a boutique, but which the defence described as a cart. The dimensions of this structure were 4′ 10″ in width, and between 5 and 6 ft. in length. It had walls made with planks, and a zinc roof. Underneath it were four wheels and two axles, but at the time in question the wheels had sunk to such an extent that the floor was resting on the ground. According to the prosecution witnesses this structure had never been shifted from its original position, so that it was lying there, to all intents and purposes, permanently. It occupied more than half the sandy verge adjoining the tarred surface, the latter being only 10′ 6″ in width.

The word ' thoroughfare ' in the interpretation section 73 is defined as meaning " any public road, canal or river ", and the word " road ", as defined in that section, includes "(*b*) all land adjoining any road which has been reserved for its protection or benefit ", and "(*d*) all waste land which, not being private property, lies within a distance of 33 feet of the centre of public carriageways and cartways, and 10 feet of the centre of public pathways, the burden of proving that such waste land is private property lying on the person asserting the same ". There can be no question that the accused encroached on the thoroughfare with this structure, which was undoubtedly put there by him, but it has been urged that since the accused had obtained a cart licence for this object, it could not be said to be a building. There is no definition of the word "building" in this Ordinance, unlike the Housing and Town Improvement Ordinance (Cap. 199), and I do not intend to attempt to define what the legislature has chosen to leave indefinite ; but one safe guide to ascertaining whether there was in this case a building or not, is to ascertain the object of the particular provision and to examine the context in which the word appears. The object is clearly to prevent obstruction of the thoroughfare by encroachments which according to section 71 (11) may consist of anything from a building to a hedge or a ditch. The structure in question was high enough to enable the accused to conduct his business while inside it. Although the four wheels may have functioned when this building was first brought to this spot, what may have originally been a cart had certainly ceased to be that at the date specified in the charge, and had become a building. I do not think that the mere obtaining of a cart licence issued by a Village Committee in respect of this structure will enable the accused to circumvent the provisions of section 71 (11). The licence was given to the accused to enable him to use a cart as a cart and not as a building.

On the second count, the gist of the offence is exposing goods or wares over any portion of a road by means of temporary supports or otherwise. The words " or otherwise " mean in this context " in any other way ", for there is no limited genus which would control or restrict the meaning of the phrase. The evidence showed that the accused was exposing goods in this building, and he was therefore guilty.

The appeal is dismissed.

Appeal dismissed.