Present : Wood Renton J. June 15, 1911

ATTORNEY-GENERAL v. MIRANDA et al.

334—P. C. Batticaloa, 31,217.

Ordinance No. 12 of 1891, s. 13—Selling intoxicating liquor without a license—Assignment of stock by licensee to a third person—Power of attorney executed by licensee in favour of the third person—Sale of liquor by third person—Abetment.

It is an offence for an unlicensed person to sell his own liquor on licensed premises under the cloak of another licensed person.

The assignee of a licensee cannot carry on the sale of his own liquor under the license of his assignor, except in the specific cases contemplated by section 14 of Ordinance No. 12 of 1891.

Where intoxicating liquor is sold by retail by an agent on behalf of an unlicensed owner, the sale is, for the purpose of section 3 of the Licensing Act, 1872, which is almost identical in terms with section 13, sub-section (1), of Ordinance No. 12 of 1891, a sale by the owner and not the agent, and the fact that the agent who conducted the sale was licensed affords the owner no defence.

IN this case, the facts of which are fully stated in the judgment of Wood Renton J., the first accused was charged with the offence of selling or exposing for sale intoxicating liquor without a licence, in breach of section 13 of Ordinance No. 12 of 1891 ; and the second accused was charged with having abetted the first in the commission of that offence. The learned Magistrate acquitted the accused.

The Attorney-General appealed.

Walter Pereira, K.C., S.-G., for the appellant.—The Police Magistrate has acquitted the accused on the ground that the sale was not effected by the first accused himself, but by his agent. Even if an agent had sold the liquor on behalf of the first accused, the accused would be guilty under section 13, sub-section (1), of Ordinance No. 12 of 1891. Counsel relied on P. C. Matara, 30,847[1].

Van Langenberg, for the respondents.—The first accused did not himself sell the liquor. He could not therefore be convicted under section 13 of Ordinance No. 12 of 1891. The law does not prohibit the assignment of a business. Section 11 of Ordinance No. 12 of 1891 enacts that a licence shall not be assignable or transferable. The Ordinance, however, contemplates the assignment of the business ; section 14 speaks of assigns. The first accused is an assignee of the second accused's business. He holds a power of

[1] *S. C. Min., Sept. 8, 1910.*

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attorney from the second accused. The deed of assignment and the power of attorney were intended to amount to an irrevocable power of attorney. The first accused consulted a notary, and acted quite *bona fide* throughout. Counsel cited *Encyclopoedia of the Laws of England, vol. XII.*, p. 212. *Mens rea* has not been proved in the case of the second accused.

Cur. adv. vult.

June 15, 1911. WOOD RENTON J.—

This is an appeal by the Attorney-General against the acquittal of the accused-respondents, who were charged in the Police Court of Batticaloa, the first accused-respondent with the offence of selling or exposing for sale intoxicating liquor without a license in premises No. 8 in Central road, Puliyantivu, in breach of section 13 of Ordinance No. 12 of 1891 ; and the second accused-respondent with having abetted the first in the commission of that offence. So far as it is necessary to state them at present, the material facts lie within narrow compass. The second accused-respondent had a license to sell intoxicating liquor on the premises in question. On January 28, 1911, by deed No. 1,625, he made an out-and-out assignment of his stock on the premises in question to the first accused-respondent. By deed No. 1,626 of the same day he executed a perpetual power of attorney in the first accused-respondent's favour. In that power of attorney the deed of assignment is referred to. But the power of attorney is inaccurate, where it states that what the second accused-respondent had done was to give over the management of the premises to the first. The assignment, as I have said, divests the second accused-respondent absolutely of all his interest in the stock. In addition to that, he undertakes in the deed of assignment to do or cause to be done every act necessary to be done as an agent, to obtain a renewal of his license in favour of his assignee. In these circumstances, the question of law (and it is one of great importance to all who are engaged in the licensing trade) arises as to whether or not an offence has been committed against the provisions of section 13, sub-section (1), of Ordinance No. 12 of 1891. That sub-section makes it an offence for any person to sell or expose for sale any intoxicating liquor which he is not licensed to sell. There can be no doubt but that the first-accused-respondent was not, as a fact, licensed to sell intoxicating liquor at the premises here in question. It appears that, subsequent to the execution of the assignment and the power of attorney, an application was made to the Government Agent for a transfer of the license of the second accused-respondent in favour of the first. But that application was refused. At the trial in the Police Court, the evidence was solely directed to showing that there had been a personal sale of intoxicating liquor on the premises above mentioned by, or in the presence of, the first accused-respondent himself. Evidence was,

however, led for the defence, which, in the opinion of the learned Police Magistrate, threw doubt on the question as to whether there had been a personal sale, and he held, therefore, that the sale had taken place only on behalf of the first accused-respondent and that that was not sufficient to satisfy the provisions of section 13, sub-section (1), of Ordinance No. 12 of 1891. He accordingly acquitted the first accused-respondent, on the ground that in all that had happened he was acting merely as the attorney of the real licensee.

It is obvious that on that finding the second accused-respondent was equally entitled to an acquittal, and the Police Magistrate in fact acquitted him. It is quite clear, however, that if, in fact and in law, the first accused-respondent was not acting as the attorney of the second, he is liable to be convicted under section 13, sub-section (1), of Ordinance No. 12 of 1891, if the sale of the intoxicating liquor was effected by an agent on his behalf. That results from the case of *Dunning v. Owen*,[1] and see P. C. Matara, 30,847.[2] It was there held that, where intoxicating liquor is sold by retail by an agent on behalf of an unlicensed owner, the sale is, for the purpose of section 3 of the Licensing Act, 1872, which is almost identical in terms with section 13, sub-section (1), of Ordinance No. 12 of 1891, a sale by the owner and not the agent, and that the fact that the agent who conducted the sale was licensed affords the owner no defence. The real question, therefore, comes to be whether in law and in fact the first accused-respondent can be regarded as having sold, if he did sell, the intoxicating liquor, which forms the basis of the present charge, as the attorney of the second. So far as the first accused-respondent is concerned, even if he acted *bona fide*, the fact would not, in my opinion, offer a defence to a charge under section 13, sub-section (1), of Ordinance No. 12 of 1891, an enactment which prohibits absolutely the sale or exposure for sale of intoxicating liquor, except under a license. At the argument before me yesterday, Mr. van Langenberg called my attention to a strong body of evidence, which would point to the conclusion that the first accused-respondent had acted *bona fide* in the present case. It is proved that he took the advice of a notary. The power of attorney, as I have mentioned already, itself recites the assignment, although I think it is incorrect when it says that all that the second accused-respondent had done was to hand over the management of the shop to the first ; and in addition to that, Father Heinburger, who was called as a witness for the defence, has given the first accused-respondent a good character.

I have thought it right to assign some prominence to these considerations in the present case. I come, therefore, to decide the question of law as to whether, on the facts, the first accused-respondent can be regarded as having been merely the attorney of the second. In support of an affirmative answer to this question, Mr. van Langenberg directed my attention to sections 14 and 43

[1] *(1907) 2 K. B. 237.*

[2] *S. C. Min., Sept. 8, 1910.*

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of Ordinance No. 12 of 1891. The former of these sections provides that the penalty, which is enacted by section 13, shall not attach (I am quoting only the material words of the Ordinance) to the assignee of any licensed person who dies before the expiration of his license, provided that the sale of intoxicating liquor by the assignee is not continued beyond the unexpired term of the license. It was argued with great force by Mr. van Langenberg that that section showed that the legislature had drawn a distinction between the license, on the one hand, and the stock or the goodwill of the business, on the other. That I am quite prepared to admit. But I am unable to take the further step which Mr. van Langenberg suggested, and to hold that it results, even inferentially, from section 14 of Ordinance No. 12 of 1891, that, except in the specific cases contemplated by that section, the assignee of a licensee can carry on the sale of his own liquor under the license of his assignor. Section 43 provides, in effect, that a person who has been deprived of his license is not to be employed by a licensee as his partner, or to be allowed to participate in the profits of such licensed premises, or to have any interest therein. I do not think that an out-and-out assignment of the stock or the goodwill of the business of a licensee can be held to come within any of the interests contemplated by that section. The provisions of our own Licensing Ordinance are substantially identical with those of the English Licensing Act, 1872. The case of *Peckover v. Defries*,[1] which was decided under the English Act, seems to me to have an important bearing on the question to be decided here. In that case a man named Newton, being duly licensed, resided on the licensed premises, which he held as tenant to a Mrs. Defries. He took no part in the conduct of the business of selling the liquor, which was wholly conducted by Mrs. Defries and her husband, of whom neither was licensed. There was some evidence that the Defries supplied the capital, and that the business and liquor belonged to them. The Defries were charged with selling liquor without a license, and Newton with abetting them in so doing. It was held upon the above facts that the Magistrate was not justified in dismissing the information solely because there was a licensed person residing on the premises, for that it is an offence for an unlicensed person to sell his own liquor on licensed premises under the cloak of another licensed person. That case was cited and discussed in *Dunning v. Owen*,[2] and Mr. Justice Phillimore made the following observations upon it : " The case of *Peckover v. Defries*[1] says that you cannot avoid the provisions of the Licensing Act by keeping on the premises a licensed person as a sort of tame animal." It appears to me that that principle applies to the present case. The effect of the assignment was to divest the second accused-respondent of all interest in the liquor ; he could not by the subsequent execution of a power of attorney, perpetual or otherwise,

[1] *(1906) 23 Times Law Reports 20.* [2] *(1907) 2 K. B. 237.*

enable his unlicensed assignee to sell that assignee's own stock under the shelter of the assignor's license.

There remains only to be considered the question of the position of the second accused-respondent. He is charged with abetment, and I agree with the argument of Mr. van Langenberg that he could not be convicted of that offence, unless it was shown at least—for I will not put the case higher at present—that he intentionally aided the first accused-respondent in the commission of an offence under section 13, sub-section (1), of Ordinance No. 12 of 1891. That very point was incidentally considered by the Queen's Bench Division in the case of *Williamson v. Norris.*[1] In that case a servant of the House of Commons sold liquor, the property of the house, at a bar within the precincts of the house. The purchaser of the liquor was not a member of either House of Parliament, and the place where it was sold was not licensed for the sale of liquor. On a case stated on information charging the respondent with unlawfully selling liquor which he was not licensed to sell, contrary to section 3 of the Licensing Act, 1872 it was held by Lord Russell of Killowen, L.C.J. in the course of his judgment, that, if the respondent had acted, knowingly, he might be liable to conviction for abetment. I am inclined to think that the principle of that decision might be applied to the present case.

On the grounds I have stated I set aside the acquittals against which the Attorney-General appeals, and send the case back for further inquiry and adjudication in the Police Court. I have had considerable doubt as to whether the appellant ought not to be restricted to a charge of having sold intoxicating liquor, contrary to the Ordinance, or exposed it for sale at the hands of an agent, in view of the finding of the learned Police Magistrate on the question of a personal sale on the evidence as it now stands. But there is strong and direct evidence of sale by, or in the presence of, the first accused-respondent himself. The learned Police Magistrate has not stated expressly that he disbelieves that evidence, and although the evidence of Father Heinburger is, I have no doubt, worthy of the entire credence which the learned Police Magistrate assigns to it, it does not go so far as to show that the first accused-respondent on the day in question might not have been present in the shop where the intoxicating liquor was being sold contrary to the Ordinance. I think, therefore, that it should be open to either side to adduce further evidence on the charge of a personal sale on which the case has so far been tried, and that the learned Police Magistrate should adjudicate further on that evidence. In addition to that, it will be open to the Attorney-General, as appellant, to lead evidence to establish a sale, or exposure for sale, of intoxicating liquor contrary to the Ordinance on the first accused-respondent's behalf, although not in his presence, by an agent.

[1] *(1889) 1 Q. B. 7.*

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While I have set out as strongly as I can all the points which bear on the question of the good faith of the first accused-respondent and while I have no doubt that the learned Police Magistrate will carefully consider those points, and any further evidence relative to the same issue that may be brought before him, I think that the prosecution should have an opportunity of making out, if it is able to do so, its charge of abetment against the second accused-respondent. As the learned Police Magistrate has taken by no means an unfavourable view of the case as regards both respondents, there is no reason why there should be a new trial before another Judge. If both parties agree, the evidence already recorded may stand, subject to the right of either side to recall any witness or witnesses for further examination or cross-examination.

Set aside.