1944 *Present:* **Soertsz J.**

ROCHE *et al.*, Appellants, *and* IYER (Inspector of Police), Respondent.

575-6—M. C. Colombo, 14,909.

Master and Servant—Liability of master for act of servant—Defence (Control of Prices) Supplementary Provisions—Regulation 5.

A master is not liable under regulation 5 of the Defence (Control of Prices) Supplementary Provisions for the act or default of a servant employed in the course of business where the master proves that he had no knowledge of the act or default and had taken such precautions as a business man may reasonably be expected to take.

But in the case of a prosecution under regulation 8 the default of a salesman employee involves the master in unqualified liability.

APPEAL from a conviction by the Magistrate of Colombo.

H. V. Perera, K.C. (with him *Nihal Gunasekera*), for the appellant.

Walter Jayawardene, C.C., for the respondent.

Cur. adv. vult.

February 25, 1944. SOERTSZ J.—

These are appeals by the proprietor of a wholesale business in groceries and condensed milk, and by a servant employed by him as a "butter-cutter". The first appellant occupies 89, Maliban street, as his place of business. He stores the greater part of his stock in a building on the opposite side bearing No. 108, Maliban street.

The charge preferred against the appellants was that on April 5, 1943, they refused to sell to one Thowfeek a case of condensed milk when he requested them to do so at 89, Maliban street. The charge was laid under certain regulations of the Defence (Control of Prices) (Supplementary Provisions) which had been duly published in the *Government Gazette* No. 9,019 of October 8, 1942.

The Magistrate convicted both the appellants and sentenced the first to pay a fine of Rs. 5,000 and to undergo rigorous imprisonment for a period of two weeks; and the second to pay a fine of Rs. 150.

The facts as found by the Magistrate which I accept as the facts upon which the appeals before me should be considered are these. At about noon on this day Thowfeek went to 89, Maliban street. He found the second appellant the sole occupant of the room on the ground floor. The others appear to have been at lunch at the time. He asked the second appellant for condensed milk. The second appellant said "No milk". Thowfeek went to the Office of the Price Controller, made a complaint and came with Control Inspector, Fitch. The second appellant was still in that room. There were two or three others as well at that time. Thowfeek repeated his request and the second gave the same reply. Inspector Fitch himself then demanded a case of milk and the second appellant said "there is not a single tin of milk". Fitch then signalled to a Police Sergeant who had accompanied them and had stood outside. Just then the first appellant probably attracted by the commotion that must have been created by these parleys came down the stairs. He said he had about 200 cases in stock at 108, Maliban street. A visit to the stores showed that there were 394 cases in stock. It is conceded that there was no milk at all at 89, but it is contended that when the second accused declared that there was no milk at all for sale, although he was speaking at No. 89, it amounted to a refusal to sell inasmuch as the customer could have been directed to No. 108 where there was milk.

A number of questions arise upon this contention. When the second appellant said there was no milk for sale did he know there was milk at No. 108 ? If he did was he within the law nevertheless because there was no milk in 89 itself ? If he was not within the law for that reason is he exculpated for the reason that Thowfeek addressed his request to a servant who was only a butter-cutter and had nothing to do with sales ? If the second appellant did not so exculpate himself is the first appellant also liable as the master, the proprietor of the business ?

The Magistrate has answered the first question in the affirmative. I will now consider what the consequences of that answer are in regard to the first appellant. The relevant regulation is that numbered 5. It runs as follows:—

> "Any person who acts in contravention of any orders . . . . shall be guilty of an offence . . . . If any person carrying on

business . . . . has in his possession for the purposes of trade a stock of such article (that is controlled article) and that person or any person employed by him in the course of the business, when asked at those premises . . . . to sell any quantity of such article or when asked whether he or his employer has such article for sale, refuses to sell . . . . or denies that his employer has the article . . . . the person carrying on the business . . . . shall be guilty of an offence . . . . . unless he proves that the act or default in respect of which he is charged was committed by some other person without his knowledge and that he had exercised all due diligence to prevent the commission of the act or default ".

Although the grammatical structure of this section is extremely involved, the meaning is sufficiently clear. The master is made liable for the act of default of a servant employed in the course of the business unless he proves that he had no knowledge of the act or default and had taken proper precautions to prevent it.

In my opinion, the second appellant answers to the description of one employed in the course of the business carried on at No. 89. The words are wide and cover all employees in the business carried on regardless of the kind of work they actually perform.

There appeared to me, at first glance, to be some difficulty in view of regulation 8 which says—

> " Where any person who is employed . . . . to sell articles in the course of any business . . . . is by reason of anything done or omitted to be done at those premises convicted of the offence of contravening any provision . . . . the employer . . . . shall also be guilty of that offence . . . . ".

The question suggested itself to me whether in regulation 5 also it was not an employee who was a salesman that was contemplated, but after consideration I am of opinion that the two regulations serve different purposes. Regulation 5 makes the employer liable if any employee does contravene the order by refusing to sell or by saying or indicating that the article is not available or by offering to sell on certain conditions, but so far as other contraventions are concerned only employees employed to sell can involve the employer in criminal responsibility.

I am, however, of the opinion that the kind of work a particular servant performs may have a bearing on the question of *scienter* and due diligence so far as the master is concerned. I am also of opinion that the second appellant by his answer intended to make Thowfeek understand that his employer had no milk. I am not, however, satisfied on the evidence in the case that the second appellant was acting on instructions when he gave that reply. He probably chose to give that reply as the one that would result in the least trouble to him. It saved him the trouble of going to fetch his employer or a salesman or going to inform them that a customer was at the door. It would also save him the trouble of getting the milk across the road from the store. Admittedly the first appellant was not present and did not know that the second appellant had given the reply he did give Thowfeek. The first appellant was at his lunch

upstairs. There was hardly any occasion for him to anticipate as probable the arrival of a customer, during the luncheon interval, when according to him, the doors giving entrance to the place of business were partially closed, and at a time when the only occupant of the room on the ground floor would be the butter-cutter, in order to make him take the precaution of informing the butter-cutter that if there were any inquiries for milk he or a salesman should be informed, or the customer directed to the stores.

I am also inclined to the opinion, that the second accused took the view that, as there was no milk actually at No. 89, he was entitled to say there was no milk. That is of course not a correct view but one can well understand a man in the position of the second accused taking that view.

In all the circumstances of this case, I am not satisfied that the charge against the first appellant has been established beyond reasonable doubt. I would set aside the conviction and acquit him. In all the circumstances, I think the first appellant has made out a sufficient case to show that he had no knowledge and had taken such precautions as a businessman may reasonably be expected to take.

In regard to the second appellant, he is guilty according to the letter of the law, but there are extenuating circumstances as I have already indicated. I would reduce his fine to Rs. 100 in default two weeks' rigorous imprisonment.

Conviction of 1st appellant set aside.
Sentence on 2nd appellant reduced.