1929

Present: Lyall Grant J.

WIJEYRATNE *v.* ABDULLA.

686—P. C. Kandy, 29,375.

Milk—Possession of adulterated milk—Owner of tea kiosk—Burden of proof—Small Towns Sanitary Ordinance, No. 18 of 1892, Chapter 4, by-law 9.

Where milk was found mixed with water in the possession of the owner of a tea kiosk who was charged with a breach of by-law 9 of Chapter 4 of the by-laws framed under the Small Towns Sanitary Ordinance,—

Held, that there must be affirmative proof that the milk was adulterated for the purpose of augmenting its quantity within the meaning of the by-law.

APPEAL from a conviction by the Police Magistrate of Kandy.

E. H. T. Gunasekere, for appellant.

Ilangakoon, C.C., for the Attorney-General.

December 13, 1929. LYALL GRANT J.—

This is an appeal against the conviction of the keeper of a tea kiosk and eating-house for keeping adulterated milk on the premises of his tea kiosk and eating-house. The evidence against the accused was that of a Sub-Inspector and a police officer who made a raid on some tea boutiques one morning.

The Sub-Inspector said that about 7 A.M. when passing the boutique of the accused he saw a bottle of milk on the counter. This was before any licensed vendor had brought milk to the town. He went into the boutique and examined the bottle of milk and he saw another tin containing about four bottles of milk on the counter. He asked the accused where he got the milk from and the accused refused to give him the name of his vendor. The Sub-Inspector then took a sample and handed a sample to the accused. He sent the sample to the Government Analyst, whose report he produces, and he charges the accused with keeping adulterated milk in the boutique.

This evidence was corroborated by the police officer. No evidence was called for the defence. The Analyst's report showed that the milk was grossly adulterated and contained about 50 per cent. of water.

The argument urged in appeal against the conviction was that no breach of by-law 9 of Chapter 4 of the by-laws made under the Small Towns Sanitary Ordinance, No. 18 of 1892, as amended by Ordinance No. 30 of 1923, published in the *Government Gazette* of July 22, 1921, had been proved. In other words, that there was no evdience that the milk was adulterated milk in the sense of that by-law. Reference was made to a judgment of mine in the case of *Wijeratne v. Mamoo.*[1] In that case there was an appearance for the accused-appellant only, whose argument I accepted. The argument was based on the terms of the proviso in by-law 9, which reads as follows:—

> "No adulterated milk shall be sold or offered or exposed for sale or kept on the premises of any eating house or tea or coffee boutique. For the purpose of this rule adulterated milk shall mean milk to which water or any other liquid or substance has been added for the purpose of augmenting its quantity or enhancing its apparent quality and not for the purpose of preparing tea or coffee or any other beverage for the immediate consumption of customers."

The argument was that as the Sanitary Inspector admitted that tea was sold in the boutique to customers there was a reasonable presumption that a small quantity of milk arriving in the morning was intended for the preparation of tea or coffee, and that if this were the case, then the terms of the proviso make it clear that this milk was not adulterated milk within the meaning of by-law 9.

I then said that I thought this argument was reasonable and that the proviso did not, as it might have done, create any presumption that watered milk found in a tea or coffee boutique is watered for the purpose of augmenting its quantity, that two alternative purposes or intents were mentioned and only if the first of these were present would the milk be adulterated milk, that it was impossible on the evidence to say with which of these purposes or intents the milk was watered, and that in these circumstances the prosecution had failed to prove beyond a reasonable doubt that the milk was adulterated milk within the meaning of by-law 9.

As the question has come up again and seems to be one of some importance I have notified the Attorney-General and Crown Counsel has appeared in support of the present conviction. He argued first that the view of the by-law taken in the previous case did not give sufficient weight to the words "for the immediate

[1] *S. C. 539 of 1929. P. C. Kandy, 29,374.*

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consumption of customers." Secondly, that the second alternative in the proviso was one the burden of proving which lay upon the accused, and he referred to sections 105 and 106 of the Evidence Ordinance. Thirdly, that the facts in this case were different from those of the former case inasmuch as here a much larger quantity of milk had been found, viz., about five bottles.

It seems to me that the words used in the by-law are not sufficiently definite to compel the meaning that the addition of water to the milk must take place immediately before consumption. The words can quite reasonably be read as meaning milk to which water has been added at any time for the purpose of preparing tea or coffee, the tea or coffee to be for the immediate consumption of customers; that is to say, the word "immediate" refers to the consumption of the tea or coffee after the milk has been added to it. I have given this by-law a great deal of attention and I am bound to say that I have considerable difficulty in understanding exactly what it means. It might, I think, be read as covering milk which was watered at any time, so long as that milk was intended for the purpose of preparing tea or coffee for the consumption of customers on the premises.

As regards the second argument, section 105 of the Evidence Ordinance provides that when a person is accused of any offence the burden of proving the existence of circumstances bringing the accused within . . . . . any special exception or proviso contained in . . . . . any law defining the offence is upon him and the Court shall presume the absence of any such circumstances, and section 106 provides that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. I am doubtful whether section 105 can apply to the present case.

The by-law forbids the sale of adulterated milk, and the second part of the by-law consists of a definition of adulterated milk as being milk when (*inter alia*) water has been added to it for a certain purpose and not for another purpose.

This is not a case of a general rule and an exception, but is a case of two alternatives, and the prosecution must prove that the water was added for the purpose of augmenting the quantity of the milk.

It may be argued that where water is added to milk, it must have the effect of augmenting its quantity and that consequently it is for the accused to show that this augmentation was for the purpose of preparing tea or coffee, that is to say, that the burden of proof is necessarily upon the accused. There seems to be considerable force in this argument, but it is subject to the presumption created by section 114, to which I shall presently refer.

I do not think section 106 is applicable to the facts of this case. The effect of the evidence is that the milk was adulterated before it came to the boutique and it was seized shortly afterwards. There is no proof that the fact of the adulteration was specially within the knowledge of the accused.

On behalf of the accused, reference was made to the presumption created by section 114 of the Evidence Ordinance, which provides that the Court may presume the existence of any facts which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case. It was argued that in all probability the presence of milk in a tea boutique was for the purpose of preparing tea, and that therefore the presumption arises that this milk was intended for that purpose. In this argument too there seems to be considerable force, more especially as there is no evidence that milk is separately consumed or sold in the boutique.

I do not think that this is a case in which one can give a benevolent or extended interpretation to the by-law. It is a penal and restrictive enactment, and according to the ordinary rules of construction it must receive a restrictive interpretation, that is to say, where there is a doubt as to its meaning, the accused must have that doubt resolved in his favour. The meaning of the by-law, as I have already said, is by no means clear, and it is open to the authorities, if the intention is to throw the onus of proof on the defence that any milk containing water found in a tea or coffee boutique is there for any other purpose than that of preparing tea or coffee, to say so in clear language.

I have not been convinced that the conclusion I came to in the previous case was wrong.

It was further argued for the Crown that the facts in this case were different from those of the former case inasmuch as a much larger quantity of milk was found in the boutique, in this case about five bottles.

We are, however, not told how much trade was usually done in the boutique during the day, and in the absence of evidence on the subject, I am not prepared to hod that five bottles of milk were more than would be required during the day for the preparation of tea.

The appeal is allowed and the conviction quashed.

Appeal allowed.