

1941

*Present : Keuneman J.*  
**BULTJENS v. HENDRICK APPU.**  
 32—*M. C. Matara, 32,017.*

*Betel—Sale within market area—Prohibition under Local Boards Ordinance—Prohibition conflicts with Urban Councils Ordinance, No. 61 of 1939, s. 165.*

A by-law, made under section 56, sub-section (5) of the Local Boards Ordinance, No. 13 of 1898, which prohibits the sale of betel within a specified market area, is not conserved by section 248 of the Urban Councils Ordinance, No. 61 of 1939, and is invalid, if it conflicts with the provisions of section 165 of the Urban Councils Ordinance.

**A** PPEAL from a conviction by the Magistrate of Matara.

A. H. C. de Silva, for accused, appellant.

S. W. Jayasuriya, for complainant, respondent.

*Cur. adv. vult.*

11, 1941. KEUNEMAN J.—

The present appellant was originally charged under by-law 16 (1) of the by-laws made by the Urban Council under sections 164 and 168 of the Local Government Ordinance which enacts that "within any market area no person should sell or expose for sale any . . . . . vegetables except at a public market". The offence charged was that the accused exposed for sale betel at a place other than a public market. In view however of the decision in appeal in a connected case that betel cannot be included in the term "vegetable" used in the by-law (*vide Buultjens v. Samitchiappu*<sup>1</sup>), the plaint was amended and the appellant was charged for breach of by-law No. 1 made under the provisions of sub-section (5) of section 56 of Ordinance 13 of 1898 and published in *Government Gazette* No. 6,262 of September 25, 1908.

The by-law is as follows:—

No person shall, within the limits of the Local Board without a licence granted by the Board, publicly sell or expose for sale betel leaves, tobacco, arecanut or any articles of food or drink on any public

ground or on any roadside, or at or near any roadway or pathway, unless the same shall be sold or exposed for sale in any private house, boutique or garden.

It may be noted that sub-section (5) of section 56, under which the by-law is stated to be made, gave power to the local authority to make by-laws—

“For the establishment and regulation of its own markets and levy of rents and fees therein, and for supervision and control of private markets . . . .”

The Urban Council contends that although Ordinance No. 13 of 1893 has now been repealed, the by-laws made thereunder are conserved under the Local Government Ordinance, Chapter 195, section 246 and the Urban Councils Ordinance, No. 61 of 1939, section 248. It is however to be noted that under each of the last mentioned Ordinances, the by-laws are conserved “so far as they are not in conflict with the provisions of this Ordinance”. The appellant contends that the by-law which is now relied on is in conflict with these Ordinances.

It is necessary for the purposes of this case to examine only Ordinance No. 61 of 1939. As a matter of fact the other Ordinance, Chapter 195, in the material sections uses similar phraseology.

Under Ordinance No. 61 of 1939, power is conferred by section 166 on the Urban Council to make such by-laws, not inconsistent with the provisions of the Ordinance, as may be authorised or required by the Ordinance, or may appear to the Council to be necessary for the purposes of the exercise of its powers and the discharge of its duties under the Ordinance.

Under section 170, without prejudice to the generality of the powers conferred, the Urban Council is empowered to make by-laws for and with respect to, *inter alia* :—

(11) Markets and fairs, public and private, including—

(a) their establishment, maintenance and improvement ;

(b) their regulation, supervision, inspection, and control . . . . ;

(n) in the case of public markets, the declaration of a market area, and the licensing, restriction, or prohibition of sales within such area, in accordance with section 165.

Section 165, referred to under (n) states that in any town in which a public market is established under the control of the Urban Council, the Council may by by-laws assign an area to such market, and may prohibit, the sale, except under licence, of “meat, poultry, fish, fruit or vegetables” within such area. It is to be noted that sections 170 (11) (n) and 165 definitely confer on the Council the power to declare a market area, and to prohibit sale within that area, but at the same time, the section limits the prohibition to certain articles, viz., “meat, poultry, fish, fruit or, vegetables”.

It is clear that betel does not come within the list of articles the sale of which can be prohibited.

I incline to the opinion that any by-law which seeks to prohibit the sale of betel, within any specified market area, is a by-law which is in conflict with the provisions of the Ordinance, in particular the positive

requirements of section 165. Further, the by-law now in question has no relation to "a market area", but applies throughout "the limits of the Local Board".

I may add that Counsel for the respondent referred me to section 170 (16), as follows:—"All other purposes, whether of the same nature as those above enumerated or otherwise, for which by-laws may be necessary for the protection or promotion of the local public interests, conveniences and amenities", but, as at present advised I do not see how this sub-section has any application to the present case.

I may add that under section 56 (21) of Ordinance No. 13 of 1898 by-laws could be made "for every other purpose which may be necessary or expedient for . . . the promotion of the comfort and convenience of the people thereof". But the by-law now in question was stated to be made not under sub-section (21) but under sub-section (5).

I hold that the by-law now in question has not been conserved under Ordinance No. 61 of 1939. The conviction and sentence are set aside and the accused is acquitted.

Set aside.

