

1957

Present : H. N. G. Fernando, J.

C. T. RASARATNAM (Inspector of Police), Appellant, and K. H. V. PREMATILLEKE, Respondent

S. C. 176—M. C. Colombo, 35,390

Shop and Office Employees (Regulation of Employment and Remuneration) Act, No. 19 of 1954—“Serving of customers”—Burden of proof—Sections 43 (1), 51, 63 (g).

Where there is proof of delivery, after closing time, of goods purchased before the closing time, in contravention of section 43 (1) of the Shop and Office Employees (Regulation of Employment and Remuneration) Act, the prosecution need not prove that the shop was kept open for the purpose of making the delivery.

Sharufdeen v. Sinnadurai (1955) 57 N. L. R. 214, distinguished.

APPPEAL, with the sanction of the Attorney-General, from a judgment of the Magistrate's Court, Colombo.

V. S. A. Pullenayegum, Crown Counsel, for the complainant-appellant.

S. B. Lekamge, for the accused-respondent.

Cur adv. vult.

May 24, 1957. H. N. G. FERNANDO, J.—

This is an appeal with the sanction of the Attorney-General against the acquittal of the accused by the Magistrate of charges of keeping a shop open for the serving of customers in contravention of a closing order made under Act No. 19 of 1954 and of failing to prevent a customer from entering the shop when the shop was required to be closed. The charges were framed under sections 43 (1) and 43 (2) respectively of the Act, contravention of these provisions being punishable under section 51.

The admitted fact is that on a Sunday, being a day on which the shop should have been closed for customers in terms of the closing order, the Inspector of Labour entered the shop and saw a salesman handing the parcel to a woman. The parcel was found to contain coriander, coffee and cinnamon. According to the accused the articles had been sold to the woman on the previous day and on this Sunday she had come for and obtained delivery of the parcel from the salesman. The learned Magistrate thought that this evidence did not establish the charge of a contravention of section 43 (1) of the Act.

The section provides that “no shop shall be or remain open for the serving of customers in contravention of any Closing Order.” According to the definition of the expression “serving of customers”, that expression includes “the delivery at such shop during any time when such shop is required to be kept closed by any closing order, of goods purchased while such shop is kept open ;”

Clearly what is contemplated in this paragraph is the very act admitted by the accused in this case, namely the delivery during the "closing periods" of goods purchased during "open periods", so that the admitted act constitutes the serving of customers within the meaning of the definition.

It is argued, however, for the defence that, upon the evidence, the accused kept the shop open not with the object of serving customers, but because some repairs had to be done to a wall: that since he had no intention when he kept the shop open that customers should be served, he did not contravene section 43 (1). I do not think, however, that the mere fact that the doors of a shop are left open for an innocent reason can assist a proprietor if in fact a customer is "served" within the meaning of the definition. The intention and effect of the section is to prohibit transactions in a shop with customers during a "closing period". And if a transaction takes place, the shop for that reason is open for the serving of customers and the offence is thereby committed.

In view of an argument adduced to me by Counsel for the accused, I should refer to the following passage in my judgment in *Sharufdeen v. Sinnadurai*¹: "Applying the decision in the unreported case I would say that it is not necessary for the prosecution to prove an actual delivery after closing time of goods purchased before the closing time. But the prosecution must prove that the shop was kept open for the purpose of making or facilitating such a delivery. That being so it was incumbent to prove in the present case that one purpose at least for which the accused kept his shop open was in order that deliveries may be made of goods purchased earlier." It is argued from this passage that the present question for determination is whether the shop was kept open with the object of serving customers, but the facts in that case were different from the present facts in that there, there was no proof of a delivery, and in the absence of such proof I held that the prosecution must prove that the shop was kept open for the purpose of making a delivery. The need to prove the purpose with which the shop is kept open would not, however, arise in a case where a customer is in fact served. Section 43 (1) prohibits a shop being kept open for the serving of customers. The typical instance of a contravention would be the actual serving of the customers, proof of which would suffice by itself for conviction. In addition the section would also apply to cases where actual service of customers cannot be proved but where it can nevertheless be established that the shop was kept open for the purpose or with the object of serving customers. My observations in the judgment referred to should not be construed as being applicable in the typical cases.

In the present case the evidence clearly establishes a contravention of section 43 (1), but in the absence of evidence regarding the entry of the woman into the shop I do not propose to consider the second count. The order of acquittal is set aside. I convict the accused on the first count and sentence him to a fine of Rs. 100, in default two weeks rigorous imprisonment.

Acquittal set aside.