

1941

Present : Wijeyewardene J.

RATNAYAKE v. DE SILVA.

401—M. M. C. Galle, 28,784.

Shops—Keeping it open after hours—Serving of customers—Essential ingredient of offence—Shops Regulation Ordinance, No. 66 of 1938, s. 18.

It is an essential ingredient of an offence created by section 18 of the Shops Regulation Ordinance and by paragraph 2 of the closing order published in *Government Gazette* No. 3,642 that the shop must be kept open for the serving of customers. It is not an offence under the section to permit a customer to enter a shop before the hour fixed for the opening of the shop.

A PPEAL from a conviction by the Municipal Magistrate of Galle.

E. B. Wickremanayake (with him *Rajendram*), for accused, appellant.

H. W. R. Weerasuriya, C.C., for complainant, respondent.

Cur. adv. vult.

July 25, 1941. WIJEYWARDENE J.—

This is a case under the Shops Regulation Ordinance, No. 66 of 1938. The charge against the accused reads as follows :—

On Monday the 16th day of November, 1940,——— you, being occupier of a shop —— other than a shop to which the

provisions of paragraphs 3, 5 and 6 of a closing Order _____ published in the *Government Gazette* No. 8,642 of July 26, 1940, _____ in contravention of the provisions of paragraph 2 of the said order, did—

- (a) in a case to which the provisions of section 29 (2) of the Ordinance and of paragraph 4 of the said Order do not apply, keep the said shop open at 7.45 A.M. and did thereby commit an offence punishable under section 23 (1) read with section 18 of the Ordinance.
- (b) in a case to which the provisions of paragraph 4 of the said Order do not apply, permit a customer to enter the said shop before 9 A.M. on _____ and did thereby commit an offence punishable under section 23 (1) read with section 18 of the Ordinance.

The Magistrate convicted the accused and in the course of his order stated—"The second count takes up the first count. I discharge the accused with a warning on the first count and sentence him to pay a fine of Rs. 10 on the second count".

The accused has appealed against that conviction and sentence and has also filed papers in revision.

The closing order referred to in the charge is an Order made under section 15 of the Ordinance. Paragraph 2 of the Order provides *inter alia* that shops other than those mentioned in paragraph 3 "shall be closed for the serving of customers" on Mondays except between the hours of 9 A.M. and 6 P.M. Paragraph 4 provides for the relaxation of the provisions of paragraph 2 during certain periods preceeding the Christmas day, &c., and paragraph 5 empowers the Controller of Labour to relax these provisions during other periods subject to certain conditions.

It is now necessary to examine the counts (a) and (b) in the charge. The material part of the count (a) is that the accused kept open his shop at 7.45 A.M. Neither paragraph 2 of the Order nor section 18 of the Ordinance makes it an offence to keep a shop open (I do not refer to section 23 which is merely the penal section). An essential ingredient of the offence created by them is that the shop must have been kept open "for the serving of customers". Count (a) is therefore clearly defective. Count (b) charges the accused with having permitted a customer to enter his shop before 9 A.M. There is no reference to such an offence in paragraph 2 of the Order and the only reference in section 18 of the Ordinance to a customer entering a shop is as follows:—"No customer shall on any day be permitted to enter any shop after the hours specified in any such order as the hour at and after which that shall be closed on that day". The charge on count (b) must, therefore, necessarily fail.

The evidence for the prosecution was given by an Inspector of Labour and one Madasamy, the alleged customer. The Inspector stated that he saw some poonac on the scales and a salesman standing by the scales while Madasamy was also "near the scales". Madasamy stated that he went that morning to buy two pounds of poonac and two measures of paddy and he was asked by the salesman to wait as "there was time

more". He said that he was standing on the public verandah adjoining the boutique when the Inspector questioned him and he replied that he had come to buy poonac.

I am not prepared to hold on this evidence that the shop was kept open for the serving of customers. There was no sale. The customer was in fact asked by the salesman to wait till 9 A.M.—the hour for opening the shop for sales. Even if there was poonac in the scales—a fact denied by Madasamy—it does not follow that the poonac was being weighed for a sale to Madasamy before 9 A.M. or it was weighed for any sale at all.

I set aside the conviction and acquit the accused.

Set aside.
