

The order of the learned District Judge cannot be sustained and is accordingly set aside. The appellant's appeal is allowed with costs and the petitioner's petition will stand dismissed with costs.

In order to remove any doubt, I wish to state that the petitioners or any other persons qualified to make an application under sections 15 and 16 of the Ordinance in respect of the place of worship known as Meera Pallivasal are not precluded by this judgment from making a properly constituted application thereunder.

GRATIEN J.—I agree.

Appeal allowed.

1950 *Present* : Nagalingam J.

ANNAMALAI, Appellant, and GURUSWAMY (S. I. Police),
Respondent

S. C. 1,148—M. C. Colombo, 6,265

Pawnbrokers Ordinance, No. 13 of 1942—Sections 37, 40, 41—Offence committed by servant of pawnbroker—Proper charge—Burden of proof—Proviso to Section 40—Effect of a proviso.

The accused-appellant was the servant of a pawnbroker. The charge against him was that he being a servant of a pawnbroker had acted in contravention of two provisions of the Pawnbrokers Ordinance, No. 13 of 1942, and thereby had committed offences punishable under Section 41. The charge contained no reference to the pawnbroker having been absent from the shop or premises at the time the appellant was alleged to have committed the offences. Nor was any evidence given with regard to the whereabouts of the pawnbroker.

Held, that, under section 40 of the Pawnbrokers Ordinance, unless the prosecution satisfied the Court that the pawnbroker himself was absent from the premises the servant could not be held to have committed an offence. The charges were therefore defective and the case itself was not established against the accused.

APPEAL from a judgment of the Magistrate's Court, Colombo.

K. C. Nadarajah, with *M. Markhani* and *D. R. P. Goonetilleka*, for accused appellant.

A. C. Alles, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 31, 1950. NAGALINGAM J.—

This appeal raises an interesting question under the Pawnbrokers Ordinance, No. 13 of 1942. Section 40 of that Ordinance renders a pawnbroker liable to vicarious punishment for anything done or omitted to be done by his servant in relation to the business. On the heels of this enactment follows a proviso rendering the servant liable in the absence of the pawnbroker from the shop or place of business to punishment for any act done or omitted to be done in contravention of any provision of the Ordinance.

Admittedly, the appellant was the servant of a pawnbroker. The charge that was laid against him was that he being a servant of a pawnbroker had acted in contravention of two provisions of the Ordinance and thereby had committed offences punishable under section 41 of the Ordinance. The point taken on behalf of the appellant is that not only does the charge fail to disclose any offence but that even the evidence falls far short of the proof required of the essentials constituting the offence. The charges contain no reference to the pawnbroker having been absent from the shop or premises at the time the appellant is alleged to have committed the offences, nor was any evidence given with regard to the whereabouts of the pawnbroker. It has been contended on behalf of the accused that unless the prosecution satisfies the Court that the pawnbroker himself was absent from the premises the servant cannot be held to have committed an offence.

Section 37 of the Ordinance enumerates a number of acts all of which it declares to be offences and for which the pawnbroker is made liable. Section 40 of the Ordinance runs as follows :—

40. Anything done or omitted to be done by the servant or agent of a pawnbroker in the course of or in relation to the business of a pawnbroker shall be deemed to be done or omitted, as the case may be, by the pawnbroker :

Provided that where, in the absence of a pawnbroker from his shop or place of business, anything is done or omitted to be done by any servant or agent of the pawnbroker in contravention of any provision of this Ordinance such servant or agent shall also be guilty of an offence and shall be liable on conviction to the penalty prescribed for that offence by this Ordinance.

It will be noticed that in the main provision of the section a pawnbroker is made liable for the act or omission of his servant; the proviso does not create an exception in regard to the liability of the pawnbroker himself. As was said by Lord Macmillan in the case of *Madras and Southern Mahratta Railway Company, Limited v. Bezvada Municipality*¹,

“The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case.”

Had the proviso been worded thus : “Provided that where in the absence of a pawnbroker from his shop or place of business anything is done or omitted to be done by the servant or agent of the pawnbroker in contravention of any provision of this Ordinance the pawnbroker shall not be guilty of an offence”, then the provision would have been a true proviso and in the language of Lord Abinger C. B. in *Thibault v. Gibson*² :

“Where it (the exception) comes by way of proviso in a subsequent part of the act, it is not necessary to notice it in the declaration or information but it is a matter which the defendant must allege as a ground of defence”

and the contention of learned Crown Counsel that it is not necessary for the prosecution to prove the absence of the pawnbroker would be

¹ A. I. R. (1944) P. C. 71.

² 12 M. & W. 88 at 94.

correct. But here, although the second part of section 40 is prefaced by the words "Provided that" it does not create an exception to the main provision. In fact the words "Provided that" have been loosely used by the draftsman without appreciating its legal significance. Not only would the second part of that section stand without suffering in its meaning but it would also bring out the intention of the Legislature more correctly if the words "provided that" were omitted therefrom, because this second part of the section deals with an entirely different category of liability of persons unconnected with the class dealt with in the main provision.

Learned Crown Counsel relied on the cases of *King v. Turner*¹ and *King v. James and Johnson*², but these cases only serve to emphasise the position that given a true proviso the burden of establishing that a party is entitled to the benefit created by the proviso is on the party claiming the benefit of it. But these cases certainly cannot be regarded as authority for the proposition that where there are independent enactments or where by the mere use of the words "provided that" a pseudo proviso is enacted then the principle of those cases applies. To constitute the offence created by this proviso the prosecution must establish not only that the servant did or fail to do some act in contravention of some provision of that Ordinance but also that it was done by him at a time when the pawnbroker was absent from the shop or place of business. If the phrase "in the absence of a pawnbroker from a shop or place of business" is regarded as an exception and, as contended for by learned Crown Counsel, the burden is thrown on the accused to prove this exception, the curious result would follow that the accused would then have to prove facts to establish his own guilt, for by proving that the pawnbroker was absent the accused forges the last link in the proof of the elements necessary to constitute the offence.

On the other hand it cannot be contended that the servant must prove the presence of the pawnbroker in the shop or place of business in order to exculpate himself, for there are no words anywhere either in the main provision or in the pseudo proviso under which it could be argued that the law has created an exception to the liability of the servant by enacting that no liability should attach to him if he establishes that the pawnbroker was present.

It seems to me, therefore, that in order to constitute the offence the prosecution must establish that the act or omission of the servant constituting the offence was committed by him at a time when his employer, the pawnbroker, was absent from the premises. I therefore hold that the charges are defective against the accused and that the case itself has not been established against him.

I set aside the conviction and acquit the accused.

Appeal allowed.

¹ 105 E. R. 1026.

² L. R. (1902) 1 Q. B. D. 540.