Oct. 11, 1911

Present : Wood Renton J.

WEERAKOON *v.* FERNANDO.

630—*P. C. Panadure,* 36,534.

Keeping open licensed premises after hours—Ordinance No. 12 of 1891, s. 39 (1).

In a prosecution for keeping a tavern or premises licensed for the sale of intoxicating liquor open between the hours of 8 P.M. and 5 A.M. contrary to the provisions of section 39 (1) of Ordinance No. 12 of 1891, it would be a good defence if it were shown that the premises had not been opened as licensed premises at all.

A tavern keeper, who was in the habit of sleeping in the tavern took his dinner elsewhere and returned to the tavern, and the door was opened to let him in, and he was standing for a moment on the verandah speaking to a man.

Held, no offence under section 39 (1) of Ordinance No. 12 of 1891 was committed.

THE facts are fully stated in the judgment.

Bawa, for the accused, appellant.—Under the circumstances of this case the opening of the tavern door was no offence. *Perera v. Gomesz*[3] is a case on all fours with the present. [Wood Renton J. referred to *Silva v. Fernando,*[4] *Jeffrey v. Weaver,*[5] *Tassel v. Ovenden.*[6]]

Walter Pereira, K.C., S.-G., for the respondent.—The prohibition is an absolute prohibition. Counsel referred to *Edema v. Soysa.*[7]

October 11, 1911. WOOD RENTON J.—

The accused-appellant was charged in the Police Court of Panadure with having kept open his licensed tavern during prohibited hours in contravention of the provisions of section 30 (1) of

[1] *2 P. & D. 78.*
[2] *1 P. & D. 685.*
[3] *(1909) 12 N. L. R. 210.*
[4] *(1891) 9 S. C. C. 132.*
[5] *(1899) 2 Q. B. D. 449*
[6] *(1877) 2 Q. B. D. 383.*
[7] *(1908) 2 Leader L. R. 63.*

Ordinance No. 12 of 1891. The evidence shows that the door of the tavern in question was during the prohibited hours in fact opened, and perhaps, in a sense, kept open under the following circumstances. The appellant, while he was in the habit of sleeping in the tavern, took his dinner elsewhere, and returned to the tavern thereafter for the night. On the night in question he had followed his usual practice. The tavern door was opened to let him in, and he was standing for a moment on the verandah speaking to a man, who appears to have been his employer's horsekeeper. At that juncture the Station House Officer appeared on the scene and asked the appellant why the door of the tavern was open. The appellant gave the explanation, of which I have just stated the substance, and asked the Station House Officer to smell his hands for the purpose of satisfying himself that he had, in fact, been dining. The Station House Officer did not accept this invitation. He took down the appellant's statement, and the present prosecution was instituted.

Although the learned Police Magistrate was invited by the proctor for the appellant to give a definite ruling on the facts, he declined to do so. In this, I think, he was wrong. The case was one in which there was every prospect of an appeal, and it would have been satisfactory to have had before me the view of the facts taken by the Judge who heard the case. There is nothing, however, in the evidence actually recorded to throw doubt on the *bona fides* of the appellant, and for the purpose of this judgment I propose to accept his version of what happened—a version which is corroborated by the evidence for the prosecution—as correct. The learned Police Magistrate held that section 39 (1) of Ordinance No. 12 of 1891 contains an absolute prohibition of the opening of licensed premises for any purpose whatever during prohibited hours. He accordingly convicted the appellant, and sentenced him to pay a fine of Rs. 25. So far as I am aware, there are only two express decisions on the question that I have to decide in the present case. In *Perera v. Gomesz*[1] I held that, in a prosecution for keeping a tavern or premises licensed for the sale of intoxicating liquor open between the hours of 8 P.M. and 5 A.M. contrary to the provisions of section 39 (1) of Ordinance No. 12 of 1891, it would be a good defence if it were shown that the premises had not been opened as licensed premises at all. In that case the evidence was that the appellant had opened his restaurant only for the purpose of allowing his sister, sister-in-law, and cousin to go out so as to catch an early boat at Negombo. It appeared to me that to convert to an action of this innocent character into an offence against the provisions of the section to which I have just referred would be unreasonable, and accordingly I set aside the conviction and directed an acquittal. In the case of *Edema v. Soysa*,[2] where the side door of a tavern, through which access could be had to the bar, was kept open after

[1] *(1909) 12 N. L. R. 210.*

[2] *(1908) 2 Leader L. R. 63.*

Oct. 11, 1911

WOOD RENTON J.

Weerakoon v. Fernando

8 P.M., and where it was urged for the accused that the door was kept open whilst he was washing his hands before going in to dinner, it was held that section 39 (1) was explicit on the point, and that the intention of the Legislature was clearly to prevent all possibility of a tavern keeper being in a position to sell intoxicating liquor between the hours mentioned in the section, save perhaps under very exceptional circumstances, such as a case of fire or burglary. If section 39 (1) of Ordinance No. 12 of 1891 is to be interpreted, however, in this sense, it makes no provision for exceptional circumstances, and the opening of the tavern or the tavern door during prohibited hours under any circumstances must amount to an offence under the section, unless it can be held to come under one of the general exceptions which are enacted in chapter IV. of the Penal Code.

I have carefully considered the question whether I ought to refer the present case to a Bench of two or more Judges, in view of the conflict between the two cases which I have just mentioned. I have come, however, to the conclusion that I ought to follow my own judgment in the case of *Perera v. Gomesz*.[1] The English cases of *Jeffrey v. Weaver*[2] and *Tassel v. Ovenden*[3] are not directly in point here, inasmuch as in the English enactment under which they were decided the words " for the sale of intoxicating liquors " directly follow the prohibition of the opening or keeping open of the licensed premises. But there is one local decision which seems to me to be in point. Section 13 of Ordinance No. 4 of 1841 provided that keepers of taverns who shall suffer the said taverns to be kept open during certain hours shall be liable to a penalty. It will be observed that in this section there is no such qualifying clause as we find in the English enactment. For the purpose of the decision of the present case, it seems to me to be substantially identical with the provisions of section 39 (1) of Ordinance No. 12 of 1891. In *De Silva v. Fernando*[4] it was held by Burnside C.J. that it would be a good defence to a charge laid under this enactment to show that the door of the tavern was opened for a lawful purpose. That decision seems to me to bear directly on the construction of section 39 (1), and I think that it is a reasonable one. It is quite easy to imagine cases which could not possibly be brought under any of the exceptions contained in chapter IV. of the Penal Code, but in which it would be highly inequitable that a person who had opened the door of licensed premises during prohibited hours should be held to have committed a criminal offence. It is no doubt true, as the learned Police Magistrate points out, that the application of the law in the sense in which I am interpreting it may give rise to difficulty in particular cases in arriving at a correct judgment on the facts. But the construction of section 39 (1) of Ordinance No. 12 of 1891—a section, by the way, which is very badly drafted—pressed upon me by the learned

[1] *(1909) 12 N. L. R. 210.*
[2] *(1899) 2 Q. B. D. 449.*
[3] *(1877) 2 Q. B. D. 383.*
[4] *(1891) 9 S. C. C. 132.*

Solicitor-General in the present case, appears to me to be one that is not entitled to judicial recognition so long as the Legislature permits the owner or occupier of licensed premises to use such premises as a residence ; and after having taken steps to consider whether the present appeal should be referred to a Bench of two or more Judges, I have come to the conclusion that there is no need for this to be done in view both of the language of the section itself and of the decision of Burnside C.J. in the case to which I have referred above.

I set aside the conviction and the fine, and direct the acquittal of the accused-appellant.

Appeal allowed.