

1946

*Present : Dias J.*

MARIKAR, Appellant, and PONNUDURAI (INSPECTOR OF POLICE), Respondent.

966—*M. C. Colombo, 16,979.*

*Defence (Control of Textiles) Regulations, 1945, Regulation 51—Master and servant—Liability of master for act of servant—Mens rea.*

By Regulation 51 of the Defence (Control of Textiles) Regulations, 1945, "where any servant or agent of a dealer does or omits to do any act or thing which, if done or omitted to be done by such dealer, would constitute a contravention of any provision of these regulations, the dealer shall be deemed to have acted in contravention of these provisions."

*Held*, that under Regulation 51 before a master can be made criminally responsible for an act or omission of his servant, the prosecution, in addition to proving the ingredients of the offence charged, must go further and establish beyond all reasonable doubt that (a) at the time the offence was committed, the actual offender was acting as the servant or agent of the master, and (b) if the offence had been done or omitted by the master such act or omission would constitute an offence under the Regulations.

**A** PPEAL against a conviction from the Magistrate's Court, Colombo.

*L. A. Rajapakse, K.C.* (with him *Seyed Ahamed*), for the 1st accused, appellant.

*A. C. M. Ameer, C.C.*, for the respondent.

*Cur. adv. vult.*

October 28, 1946. DIAS J.—

The appellant (the master) and one Abdul Cader (the servant) were jointly charged that on May 4, 1946, (a) they sold to one Jayasundera two yards of poplin at Rs. 4 per yard when the controlled price was Re. 1·37 per yard in breach of Regulation 22 (1) of the Defence (Control of Textiles) Regulations published in the *Government Gazette* No. 9,388 dated March 28, 1945 ; (b) they being dealers sold the said two yards to Jayasundera without the appropriate number of coupons being surrendered in breach of Regulation 40 (1), and (c) being licensed dealers in textiles failing to give Jayasundera a receipt or invoice in breach of Regulation 31 (1). Abdul Cader has been acquitted, while the appellant was convicted on all three charges and sentenced in the aggregate to a fine of Rs. 1,500 or in default to undergo three months' rigorous imprisonment.

The facts establish that the appellant is the owner of a boutique at Welikada, where he carries on trade as a licensed dealer in textiles. Abdul Cader at the material date was his servant. On May 1, 1946, the appellant left his boutique and went to his village at Beruwala and was absent from Colombo until May 8, 1946. It will be recalled that the alleged offence was committed on May 4, 1946. *i.e.*, in the absence of the appellant.

On information received Police Sergeant Salih of the Welikada Police together with Fonseka, a Textile Control Inspector, decided to raid the appellant's boutique at about 12.30 p.m. after shop hours. They sent the decoy Jayasundera with a ten-rupee note, the number of which had been noted with instructions to buy cloth and to insist on being given a receipt.

There is no reason to doubt that the 2nd accused Abdul Cader who was in the shop which was closed, except for two planks which were open, sold two yards of poplin to Jayasundera. The rest of the roll was on the counter with the controlled price of Re. 1·37 per yard marked on it. The decoy had Rs. 2 in his hand while the ten-rupee note P1 was taken out of a card board box by the 2nd accused and handed to the inspector. No receipt was given to Jayasundera, and there was no entry of this transaction in the bill book or any other book of the shop.

It is common ground that the Regulations as framed contain no provision under which the 2nd accused could be convicted. He was therefore acquitted. The appellant is sought vicariously to be made criminally liable under section 51 of the Regulations which reads as follows :—

“ Where any servant or agent of a dealer does or omits to do any act or thing which, if done or omitted to be done by such dealer, would constitute a contravention of any provision of these Regulations, the dealer shall be deemed to have acted in contravention of those provisions.”

Under that Regulation before a master can be made criminally responsible for an act or omission of his servant, the prosecution in addition to proving the ingredients of the offence charged, must go further and

establish beyond all reasonable doubt that (a) at the time the offence was committed, the actual offender was acting as the servant or agent of the master, and (b) if the offence had been done or omitted by the master such act or omission would constitute an offence under the Regulations.

What evidence is there that at the time of this sale by the 2nd accused, he was acting as the servant or agent of the absent appellant? The appellant gave evidence on his own behalf stating that when he left for Beruwala, the roll of poplin was not in his boutique; that while his other textiles are entered in his books this roll is not, that he did not direct or authorize his servant to buy and sell this cloth in his boutique, and that he was no party to this transaction. As corroboration of the evidence of the appellant, Mr. Rajapakse has pointed to the following circumstances proved by the prosecution—that the ten-rupee note was taken from a card board box which has not been proved to be the appellant's till, that the appellant was admittedly absent from the shop which had been closed and shuttered and that no entry of the transaction appears in any of the books of the appellant. It is submitted that Abdul Cader in the absence of the appellant procured this roll of cloth and sold part of it not for the benefit of the appellant, or as the appellant's servant, but for his own personal gain.

It is submitted that this inference fairly flows from the facts of the case for the prosecution, and that in the absence of proof that the appellant had any *mens rea*, or knowledge of what his servant was up to, his conviction cannot stand.

In *Herft v. Northway*<sup>1</sup> it was held that "A man may be *civilly* responsible for a misfeasance of his servant done in the course of his employment; but to render the master *criminally* responsible you must show the *mens rea* on his part, unless the Legislature has thought proper to enact that the master shall be criminally responsible even without *mens rea*."

In the present case Regulation 51 does provide for such a vicarious criminal liability; but its provisions must be construed strictly. In my opinion, the facts established do not prove beyond reasonable doubt that Abdul Cader was acting as the servant or agent of the appellant at the time he sold this cloth.

The Magistrate has failed to grasp that although Abdul Cader was the servant of the appellant, it was incumbent on the prosecution to establish beyond reasonable doubt that at the time of this sale Abdul Cader was acting as the servant of the appellant, and not for his own personal benefit. The judgment of the Magistrate also may have been clouded by the fact that under these Regulations the salesman cannot be held liable; but that is no reason why the law should find a victim, or that a penal regulation should not be strictly construed.

I hold that although there may be elements of suspicion against the appellant, the proof falls short of that standard which is required for establishing the guilt of the appellant. I therefore allow the appeal and acquit him.

*Appeal allowed.*

<sup>1</sup> (1890) *I Cey. Law Reports* 27; 9 *S.C.C.* 142.