SHANMUGAM AND OTHERS

v.

ALERIC ICE CREAM MANUFACTURERS AND OTHERS

COURT OF APPEAL,
C.A. 342/83,
L.T. 13/9366 TO 9370/81,
PALAKIDNAR, J.,
NOVEMBER 21, 1989.

Industrial Dispute - Termination on unproven charges - Requirement of consideration of explanation - Arbitrary action by employer.

On returning from the Gamudawa Festival after selling ice cream at the Aleric Ice Cream Stall the appellants were found by the employer to have made a detour and drinking sweet toddy. Their services were terminated on ground of —

(*a*) drunkenness;
(*b*) diverting to a different route to drink liquor;

(c) spending extra petrol, and time;
(d) using vehicle for private purposes.

Held :

There was no proof of drunkenness or that the diversion of route was for drinking liquor. No opportunity for explanation was given and the employer was not prepared to accept whatever explanation was given. This is arbitrary action by the employer. Hence the termination of employment was not justified.

APPEAL from judgment of President, Labour Tribunal.

L.V.P. Wettasinghe for appellant.

R.C. Gunaratne for respondent.

Cur. adv. vult.

January 15, 1990.

PALAKIDNAR, J.

The three appellants were manning the Aleric Ice Cream stall at the Gamudawa Festival at Tissamaharama in June 1981. At the conclusion of the festival they were entrusted with equipment valued at Rs. 40,000 and were required to take the lorry in which it was loaded to Colombo.

The appellants with two other employees were met by the employer and his wife on the Tanamalwila Road a short distance from the festival site drinking sweet toddy. The employer took a serious view of the matter and terminated their services on the charges -

(a) of being found drunk on Tanamalwila Road;
(b) not going along the Matara Road but diverting to drink liquor;
(c) spending extra petrol and extra time;
(d) using the vehicle for private purpose.

It was submitted by counsel for the appellants that the evidence did not support the more serious charge of being found drunk. It was submitted further that the other charges were not serious enough to warrant a dismissal from employment.

These two legal grounds were urged.

(a) There was a misdirection in the assessment of the facts which amounted to an error of law;

(*b*) The punishment was excessive and not sustainable under Industrial Law.

The facts as outlined at the inquiry may be briefly set out thus. The three appellants with two others against whom the charges were not pursued had at the end of the festival gone to collect items of clothing belonging to one of them at a place close by on the Tanamalwila Road. They had met a cyclist carrying a pot of sweet toddy and being drawn into temptation had sat on the roadside and partaken of the drink. At this stage the employer and his wife were driving along that road and met the employees and proceeded to take disciplinary steps on the charges set out above.

Counsel for the appellants drew specific attention to the evidence of the employer Victor Wimalaratne. In the course of his evidence before the tribunal he admits that the charge of going on another road to drink cannot be established. In his own words he says ' I do not say that the applicants went on Tanamalwila Road to drink' and hence that charge too is wrong. He further states that it may be possible that the three of them could have discussed the matter, but he did not find out whether it was true or false. He has stated to the tribunal that whatever explanation the employer gave he was not prepared to accept.

Counsel for the appellant states that these statements clearly show that the employer had acted arbitrarily and further submits that no opportunity was given to the employees to explain their position at a domestic inquiry. The employer himself has said that there was no need for him to know what explanation they had to give. I would agree that this is capricious conduct having regard to proper employer-employee relationship.

With regard to charge one- viz. found drunk on Tanamalwila Road in the context of taking a lorry load of equipment to Colombo from Tissamaharama one would expect such a charge to be supported by some proof of drunkenness to a degree which would impair the ability to carry out their duty without risk of damaging the equipment. It was not contested that what they were consuming was sweet toddy. Nor was it established that any one of them was in such a state of inebriation as to be unable to drive the vehicle or protect the equipment. It was further shown in evidence that the equipment was safely brought to Colombo as required by the employers.

The employer had overreacted to a situation which in his view was a serious matter. But the learned President in the exercise of his equitable jurisdiction and arbitral powers has in my view erred in holding that termination of services in the circumstances was justifiable.

I would therefore set aside the order of the learned President and order reinstatement with back wages till the date of the order of the labour tribunal and the employer may reimburse himself by way of a fine the vehicle hire for the distance covered from Tissamaharama to the house of the relative whom the employee visited to obtain his clothes. There will be no costs of this appeal.

Appeal allowed.