

1926.

*Present: Maartensz A.J.*

SILVA *v.* DE VAS GUNAWARDENE.

427—*P. C. Kalutara, 15,567.*

*Excise Ordinance—Keeping a tavern open after prohibited hours—Sale of toddy—Duty of prosecution—Ordinance No. 8 of 1912, s. 45 (c).*

Where a person is charged with keeping a tavern open after prohibited hours, the prosecution need not prove that a sale of liquor took place within those hours.

**A** PPEAL by the Attorney-General from an acquittal. The accused was charged with keeping his tavern open at 6.55 P.M., in breach of General Condition No. 6 of Excise Notification No. 145. The learned Police Magistrate held that a breach of the conditions was not committed unless a tavern is kept open for the purpose of selling toddy, and in the absence of evidence of such a sale he acquitted the accused.

*Navaratnam, C. C.* (for Crown), appellant.

*Goonetilleke*, for accused, respondent.

September 17, 1926. MAARTENSZ A.J.—

The accused in this case was charged with keeping his tavern open at 6.55 P.M., in breach of General Condition No. 6 of Excise Notification No. 145 published in the *Government Gazette* No. 7,476 of July 31, 1925, and thereby committing an offence under section 45 (c) of the Excise Ordinance, No. 8 of 1912.

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The learned Magistrate held that breach of the condition is not committed unless the tavern is kept open for purposes of selling toddy, and acquitted the accused on the ground that there was no evidence of a sale.

The Attorney-General appeals from this acquittal. It was contended in appeal that the condition prohibits a tavern being kept open as well as the sale of toddy after hours.

The condition runs as follows:—

“ The rules regarding the hours of opening and closing places licensed for the sale of liquor are as follows:—

“ *Toddy Taverns.*—Toddy taverns shall remain open between the hours of 8 A.M. and 6.30 P.M., and shall be kept closed at all other hours. The Government Agent may, after consulting the Advisory Committee, fix the opening hour of toddy taverns as early as 7 A.M., where local circumstances are found to require it, and may extend the hour of closing any taverns in towns, and for special reasons outside towns, to such hour as he may fix, not being later than the closing hour of arrack taverns in the same area, and shall enter such hours of opening and closing in the licence. No sale shall take place between the time at which the tavern is required to be closed at night and the time fixed for opening.”

The repealed Licensing Ordinance, No. 12 of 1891, had in section 39 a similar provision. The most recent decision under that section was the case of *Eliatamby v. Dalpadadu*,<sup>1</sup> where it was held that the offence under section 39 of Ordinance No. 12 of 1891 (keeping open licensed premises) is constituted by the mere opening of the tavern within prohibited hours, and no further duty would be cast upon the prosecution than to show that the tavern was open during these hours.

I am of opinion that the *ratio decidendi* of that case is applicable to the condition under consideration, and am of opinion that the condition prohibits (a) a tavern being kept open between the hours of 6.30 P.M. and 8 A.M., and (b) the sale of toddy between these hours. I am unable to agree with the view taken by the Magistrate that the condition only prohibits a tavern being kept open for the purpose of the sale of toddy, and that a sale must be proved in addition to proof that the tavern was kept open during the prohibited hours.

I am, however, not disposed to set aside the acquittal and remit the case for further adjudication as the evidence that the tavern was kept open after 6.30 P.M. is by no means conclusive.

<sup>1</sup> (1913) 16 N. L. R. 209.

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The Inspector of Police says he saw the tavern open about 6.50 P.M., he had no timepiece on him at the time, and fixes that time because on going to the Police station 200 yards away the station clock pointed to 7 P.M. There is no evidence that the time by the station clock was correct.

I accordingly dismiss the appeal.

*Appeal dismissed.*

