1969 *Present :* de Kretser, J.

M. MUTHULINGAM, Appellant, *and* INSPECTOR OF POLICE, CHUNNAKAM, Respondent

S. C. 771/67—M. C. Mallakam, 19888

Prevention of Social Disabilities Act, No. 21 of 1957—Sections 2 and 3 (a) (vi)—Charge thereunder—Form—Burden of proof.

In a prosecution under section 2, read with section 3 (*a*) (vi), of the Prevention of Social Disabilities Act for the offence of imposing a social disability on a person by reason of his caste, by preventing him from obtaining the service provided at a public hair-dressing saloon, it is an essential requirement that the charge should specify that the hair-dressing saloon in question was a public one. Thereafter, the burden is on the complainant to prove that fact.

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

G. E. Chitty, Q.C., with *P. Navaratnarajah, Q.C.*, *R. Rajasingham* and *M. Mansoor*, for the Accused-Appellant.

V. S. A. Pullenayegum, Crown Counsel, with *Ranjit Gunatilleke*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

[1] (1940) *41 N. L. R. 510.*

February 18, 1969. DE KRETSER, J.—

The following sections of the Prevention of Social Disabilities Act No. 21 of 1957 are relevant for the purposes of this order :

(2) Any person who imposes any social disability on any other person by reason of such other person's caste shall be guilty of an offence and shall on conviction after summary trial before a Magistrate, be liable to imprisonment of either description for a term not exceeding six months or to a fine not exceeding one hundred rupees.

(3) For the purpose of section 2, a person shall be deemed to impose a social disability on any other person—

(*a*) if he prevents or obstructs such other person from or in (vi) entering, or obtaining the service provided at, a *public* hair-dressing saloon or laundry.

The charge against the accused was framed as follows : " That you did ..... wilfully obstruct Sebamalai Pankirasa of Tellipallai from obtaining the services provided at a *hair-dressing saloon*, to wit : hair-cut in breach of section 3 (*a*) (vi) of the Prevention of Social Disabilities Act 21 of 57 and thereby committed an offence punishable under section 2 of the said Act 21 of 1957." The accused pleaded I am not guilty to the charge, and the trial took place. The following facts appear from the evidence, viz., that on the 14th December at about 8.00 a.m. Sebamalai Pankirasa a clerk in the Agrarian Services in Colombo, a Ceylon Tamil of the Paraya caste and Nagamuttu Pulendram a bus-conductor of the Ceylon Transport Board, a Ceylon Tamil of the Palla caste had gone to the Barber's Saloon run by M. Muthulingam the accused a Ceylon Tamil of the Barber caste. At that time only the accused and one of his employees were in the saloon. The five chairs used by customers were unoccupied. Pankirasa and Pulendram having entered the saloon Pankirasa wanted Muthulingam to cut his hair. Muthulingam refused to do so on the grounds that Pankirasa was a Paraya and ordered both Pankirasa and Pulendram out of the saloon. They went and complained to the Chunnakam Police and this case is the sequel. These facts are not contested by the accused, nor were the facts that Muthulingam is a Barber by caste and profession and renders service at this saloon ever since it was started 12 years ago only to the Vellala caste people and that the depressed classes had their own saloon and own barbers contested by the prosecution.

It will be observed that there is no evidence that this is a public saloon. An affidavit has been filed that the accused's evidence given under cross-examination that the licence of his saloon was to cater to all people has been wrongly recorded. He has filed an affidavit that the only condition in the licence related to sanitation and has submitted a copy of the printed form issued in respect of such saloons by the Village Committee

Office for he says his own licence is not in existence now. In these circumstances I do not propose to make use of the accused's answer as recorded under cross-examination for the purposes of this case.

It was only when he came to write his judgment that the Magistrate (Mr. D. S. Nethasinghe) realised that all was not well with the charge it was his responsibility in terms of the Cr. P. C. to frame, which responsibility he had quite evidently left in other hands.

" It seems to me," he said, " that the charge is bad for section 3 is only a defining section. What constitutes the offence is the imposition of a Social Disability on another by a reason of another's caste. The offence is in section 2." He then set out the charge as he considered it should have read : " That you did, by reason of the caste of Sebamalai Pankirasa impose on the said Pankirasa a Social Disability by ordering him out of a *public* hair-dressing saloon and denying him the service provided therein saying he was of the Paraya caste in breach of section 2 read with section 3 (*a*) (vi) of Act 21 of 1957 and that you thereby did commit an offence punishable under section 2 of the said Act." Whatever may be said in regard to the elegance of the drafting, the charge now contained all that the charge need have contained. The Magistrate gave his mind as to whether he should not amend the charge in terms of section 172 (1) of the Cr. P. C. read with the other relevant sections but decided against that course and made up his mind to " proceed to a verdict on *the charge as it stands*." because—

(1) the relevant sections are set out in the charge.

(2) the facts which give rise to the offence are for the *most part* set out.

(3) the accused was not misled.

He thereupon examined the evidence before him and the legal submissions made in regard to that evidence on the basis of what he considered the correct charge and then convicted the accused of the charge *as it stood!* It appears to me that the Magistrate entirely misdirected himself.

If he paused to consider that the defence could well have been different if the charge was framed as he decided it should have been I think he would have seen that the accused could have well been misled by the charge as it was. I need only point to the fact that in the charge as it should have been the prosecution would have had to prove that the hair-dressing saloon in question was a *public* one. On the evidence as it stood that fact was not proved and so the accused could have taken the position that the prosecution had not proved that fact and not given evidence at all for the defence. As the charge stood he could not take up the position that his saloon set up 12 years ago to cater for Vellalas only would not come in under the description of a *public* hair-dressing saloon which connoted a saloon set up for service to the *public as a whole.*

The word being used as it is used when one speaks of a public cemetery, a public latrine, a public eating-house or a public library. There was no need for him as the charge stood to submit that in catering for a section of the public he committed no offence which a saloon catering for women who also are not the public but a section of it does not commit. I do not wish to be understood as saying anything on the merits of such a defence. I am only pointing out that the accused by reason of not having the proper charge framed against him could have been prejudiced. Again if the Magistrate had paused to consider when he said the facts which give rise to the offence are for the most part set out, that the charge omitted the most vital particular that it was a public hair-dressing saloon he might have realised the difficulties that beset the path he was pursuing in going on without amending the charge. I need hardly point out that mention of the correct sections in the wrong context does not justify the course he took. The fact remains that there has been a trial on a charge not known to the law and a conviction on that charge. That is an illegality. I do not think I should encourage careless prosecutions on slip-shod charges, by ordering a re-trial. The appeal of the accused is allowed and his conviction and sentence set aside.

Appeal allowed.