

1946

Present : Dias J.

ROSALIN NONA *et al.*, Appellants, and PERERA (S. I. POLICE),
Respondent.

1,133—M. M. C. Colombo, 80,639.

Evidence—Charge of assisting in management of brothel—Meaning of “assisting”—Evidence of similar facts showing state of mind of accused—Admissibility—Brothels Ordinance (Cap. 25), s. 2 (a)—Evidence Ordinance (cap. 11), s. 14—Evidence in rebuttal at a summary trial.

Where the accused was charged under section 2 (a) of the Brothels Ordinance with assisting in the management of a brothel and the prosecution led evidence to show that on a previous occasion the accused had accosted a person and taken him to the brothel and that on two other occasions he had been seen in front of the brothel speaking to the person who managed the brothel—

Held that “assisting in the management of a brothel” involves the proof of a state of mind and that, therefore, the evidence was admissible under section 14 of the Evidence Ordinance to prove such state of mind, and also to rebut the defence set up by the accused.

Held further, that evidence in rebuttal cannot be led at a summary trial before a Magistrate.

A PPEAL against two convictions from the Municipal Magistrate’s Court, Colombo.

S. C. E. Rodrigo, for the first and third accused, appellants.

J. G. T. Weeraratne, C.C., for the Crown.

Cur. adv. vult.

November 8, 1946. DIAS J.—

There is ample evidence to support the conviction of the first accused of the offence of managing a brothel on June 15, 1946, in contravention of section 2 (a) of the Brothels Ordinance (Chap. 25). When the raid took place she ran out of the house and was arrested. In her possession was found a large quantity of money, including the marked currency note as well as English currency notes. She is the wife or the mistress of the second accused who has absconded. No doubt he was the chief manager of this house of ill-fame ; but on the night in question he was absent, and the first accused in his absence was managing the place. The defence does not contest that this was a brothel. The evidence against her is overwhelming and the defence raised by her has been rightly held to be false. I cannot say that the sentence imposed on her is excessive. The conviction and sentence of the first accused are therefore affirmed.

The third accused is the cousin of the first accused. It appears that the police acted on two independent sources of information. S. H. M. Mohideen, the manager of the Free Arabic School in Panchikawatta road, observed that men of the armed forces, European and non-European,

were being taken into house No. 109 opposite the Mosque and School. He rightly surmised that the place was being used for immoral purposes, and he, therefore, communicated with the police. Anthonipillai, a soldier, was found to be suffering from venereal disease. On information given by him, the military police communicated with the civil police. A raid was then arranged and on the night in question Mr. R. C. Perera, Chief Inspector of Police, Flight Sergeant Brown, Gunner Barrett, Corporal Bowman of the military police and other constables went to the spot. Brown was given a marked ten-rupee note. He and Barrett were instructed to go to the house, while the rest of the raiding party watched.

Barret says he saw the third accused take two other Europeans into the house. After that the 3rd accused came to them and enquired whether they wanted girls and took Brown inside requesting Barrett to wait near the door while he took Brown in. Chief Inspector Perera saw the third accused in the room in which Brown and a prostitute in a state of nudity were. Corporal Bowman also saw the third accused in the house. Constable Badoordeen saw the third accused speaking to Barrett and Brown and taking Brown in while Barret stood at the door. The defence of the third accused was that on the night in question he had merely gone to No. 109, Panchikawatte road, to borrow Rs. 5 from the first accused. Then the police came and took him to the police station. The Magistrate convicted the third accused under count 3 of the charge of assisting in the management of the brothel on the night in question.

Counsel argues that the conviction of the third accused cannot stand because the Magistrate allowed the prosecution to lead inadmissible evidence against him. The evidence objected to is to the following effect :—

- (a) Anthonypillai stated that on June 1, 1946, *i.e.* fourteen days previous to the commission of the offence charged, the third accused accosted him on the road and took him to this brothel where he contracted venereal disease. When the authorities questioned him, he took them to the place and pointed out the house.
- (b) Constable Sirisena said that he watched this house on March 1 and March 12, 1946. This evidence was necessary to establish that the house was a brothel; but he also stated "On both days I saw third accused on the pavement in front of the house I saw third accused speaking to second accused."

It is submitted that this evidence is inadmissible in that it is evidence prejudicial to the character of the third accused. It is further argued that the third accused having been charged with a specific offence committed on a certain day, the fact that he may have committed similar offences on two days in March and on one day in June is inadmissible to prove that he committed the offence with which he is charged. Clearly, that evidence would be inadmissible unless it is admissible under some provision of the Evidence Ordinance. The evidence of Anthonipillai is admissible as part of the narrative as he had come to point out the house. It would not be evidence against the third accused unless it is admissible for that purpose under some other section of the Evidence Ordinance.

The third accused was charged with assisting in the management of this brothel. What is "assisting"? The word is not defined in the Ordinance. The ordinary meaning of the word is "to help", "to take part", or "to aid". A person who having bought the bank at an "unlawful game", acts as banker when the game is played, is "assisting in the conduct of a gaming house"—*Derby v. Bloomfield*¹. "To assist in the management of a brothel" involves a state of mind in the person assisting. "To assist in an undertaking" or "to assist a person with money", or "to assist at a wedding"—all these acts involve a consenting mind on the part of the person assisting. It involves the mental element that the person giving the aid brings a willing mind to bear on the matter. One may, of course, "assist" indirectly without a willing mind, as where a householder by leaving his house for the night "assists" the burglars who break into the premises; but the context in which that word is used in section 2 (a) of the Brothels Ordinance connotes that the person assisting does so willingly, voluntarily or with the intention of aiding the brothel-keeper, e.g. by acting as a pimp.

If that is so, then under section 14 of the Evidence Ordinance, the evidence which is objected to would be admissible. Section 14 provides that "facts showing the existence of any state of mind,—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person—are relevant, when the existence of any such state of mind . . . is in issue or relevant." *Explanations* to section 14 states that "a fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question". That is to say the prosecution cannot show that the third accused was generally earning his living by acting as a pimp, but can show that he was assisting this particular brothel by assisting its management by pimping for it. Such evidence, would in my opinion, be both relevant and admissible. This is made clear by the *illustration (p)* appended to section 14. It reads "A is tried for a crime. The fact that he said something indicating an intention to commit that particular crime is relevant. The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant."

The construction of section 14 of the Evidence Ordinance came before a Divisional Bench in *R. v. Seneviratne*². It was held that it is not open to the prosecution to lead evidence to show that the person charged has committed other similar offences for the purpose of showing that he is a kind of person who would commit the crime with which he is charged, or of creating a bad impression against him as regards his character or conduct. The evidence of other acts must be relevant to the charge before the Court, for example to show his guilty mind or dishonest intention in the offence with which he is charged, when the existence of such state of mind is relevant or in issue. The fact that the admission of such evidence shows that the accused has committed other crimes does not then make it inadmissible. An example of the working of this rule

¹ 91 L. T. 99, 20 *Times Rep.* 549.

² (1925) 27 N. L. R. 100—See *R. v. Mendris* (1941) 42 N. L. R. at p. 250.

is furnished by *R. v. Wickremasinghe* ¹ where in a charge of committing an unnatural offence, it was held that evidence of similar acts was tendered not to show a guilty passion between the accused and any of the boys or to rebut the suggestion of innocent association, but merely to show that the accused was likely to have committed the offence with which he was charged—such evidence is inadmissible. Similarly, in *Herat v. Ran Menika* ² where the charge was of keeping a brothel, evidence that the accused had been leading immoral lives at a house other than that which formed the subject of the charge was held to be inadmissible.

This evidence would also be admissible to rebut a defence which would otherwise be open to the third accused, and which he did in fact raise, namely that he innocently blundered into this transaction—*R. v. Peiris* ³; *Wickremasuriya v. Seryhamy* ⁴. In a summary trial before a Magistrate the prosecution cannot lead rebutting evidence—*Welipenna Police v. Pinessa* ⁵. Therefore the only opportunity which the prosecution had of leading this evidence was while the case for the prosecution was proceeding; but, of course, great care and caution must be exercised when such evidence is sought to be led. In cases of doubt, in a Magistrate's Court, it is best to reject such evidence altogether. In the other Courts the evidence can be led in rebuttal unless it is clearly admissible as part of the case for the Crown. In this case no harm has been done, because the defence raised by the third accused makes this evidence also admissible in order to rebut that defence.

The evidence which was objected to was therefore admissible both as proving the state of mind of the third accused under section 14 of the Evidence Ordinance as well as to rebut the defence set up by him at the trial.

I affirm his conviction and sentence and dismiss both appeals.

Appeals dismissed.
