

Present: Ennis J.

1913.

ELIATAMBY v. DAPADADU.

92—P. C. Chilaw, 36,717.

Keeping open licensed premises after hours—Ordinance No. 12 of 1891, s. 39.

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.

(*Dubitante*) The accused might be able to show that the tavern was open for some lawful purpose, and take himself out of the operation of the section.

In any event it would be incumbent on the defence to show a clear necessity to open the tavern even for a lawful purpose.

THE accused in this case were charged under section 39 of Ordinance No. 10 of 1844, as amended by No. 12 of 1891, with having kept open a tavern within the prohibited hours. The learned Magistrate acquitted the accused relying on *Perera v. Gomez*.¹

The Attorney-General appealed.

Garvin, Acting S.-G., for the Attorney-General.—The case relied on by the Magistrate was explained by the same Judge in *Cooray v. Fernando*.² The section is clear, and it is no defence for the accused to say that he opened the tavern for some purpose other than the selling of arrack.

No appearance for the respondent.

¹ (1909) 12 N. L. R. 210.

² (1912) 15 N. L. R. R. 175.

1913.

March 28, 1913. ENNIS J.—

*Eliatamby
v. Dapadadu*

In this case the accused were charged under section 39 of Ordinance No. 12 of 1891 with keeping open licensed premises within prohibited hours. The Court below, although holding that the premises had been kept open within prohibited hours, considered it the duty of the prosecution to prove that it had been kept open for the sale of liquor. The offence under the section, however, 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. It is possible, however, that the accused might be able to show that the tavern was open for some lawful purpose, and take themselves out of the operation of the section. I have, however, some doubt as to this position, and do not wish to decide it. But, in any event, I consider it would be incumbent on the defence to show a clear necessity to open the tavern even for a lawful purpose. In the present case the Magistrate believed that the tavern had been open under circumstances which gave rise to a suspicion that it was open for the sale of liquor. I therefore think that he should have convicted the first, second, and fourth accused on the evidence led by the prosecution. As regards the third accused, the appeal is not pressed against him. I accordingly convict the first, second, and fourth accused of the offence with which they were charged, and fine the first and second, who call themselves tavern-keepers, Rs. 10, and the fourth accused, who is said to be a watcher, Rs. 5.

Set aside.