

A **RAM SHANKAR**

v.

REGINAM

[SUPREME COURT, 1965 (Mills-Owens C.J.), 17th September,
B 5th November]

Appellate Jurisdiction

Criminal law—liquor—stored in any part of a shop to which public normally have access—Liquor Ordinance 1962 s.96(1).

C *Criminal law—liquor—adjoining building—meaning of—Liquor Ordinance 1962 s.96(1).*

D The appellant was tenant of a building in which were the appellant's shop, an office and washroom with a doorless opening into the shop, and four flats. Two flats were sublet, one was lived in by the appellant and his family and the fourth was in the appellant's possession. Liquor was found in the shop, the office and washroom, and in the two flats in the possession of the appellant. The appellant was charged under section 96(1) of the Liquor Ordinance with (a) keeping liquor (that found in the shop, office and washroom) in a part of his shop to which the public normally had access and (b) keeping liquor in an adjoining building (the two flats) in a quantity in excess of his own personal requirements. In the Magistrate's Court the appellant was convicted under charge (a) above in relation to the liquor found in the shop and under charge (b) in relation to that found in the two flats.

E *Held:* 1. The word "shop" in section 96(1) of the Liquor Ordinance is used in the broad sense of the whole area which goes to make up the premises in which the business is carried on and accordingly the expression "any branch of such shop to which the public normally have access" is not to be ascertained by the drawing of exact boundaries based on counters and other furnishings, or on particular portions of floor space.

F 2. A room where the shopkeeper functions in the eye of the public as such is a part of the shop to which the public normally has access.

G 3. In the light of the mischief at which the section is aimed and the scheme which the section adopts to prevent evasions the flats in which liquor was found were within the meaning of the expression "adjoining building" in paragraph (b) of section 96(1).

H Cases referred to: *Henaghen v. Rederiet Forangirene* [1936] 2 All E.R. 1426; *Mayor etc. of the Borough of New Plymouth v. Taranaki Electric-Power Board* [1933] A.C.680; 149 L.T.594 P.C.; *Ware U.D.C. v. Gaunt* [1960] 3 All E.R. 778.

Appeal against conviction by Magistrate's Court.

K. C. Ramrakha for the appellant.

B. A. Palmer for the Crown.

The facts sufficiently appear from the judgment.

MILLS-OWENS C.J. : [5th November, 1965]—

The appellant was convicted on two charges under section 96(1) of the Liquor Ordinance 1962, namely (a) keeping liquor in a part of his shop to which the public normally had access; and (b) keeping liquor in an adjoining building in a quantity in excess of his own reasonable personal requirements. Section 96(1) reads as follows —

“96. (1) Any person owning or managing any shop, whether licensed under the Licence Ordinance or not, if the premises are not licensed under this Ordinance —

- (a) shall not store or keep or permit to be stored or kept, any liquor in any part of such shop to which the public normally have access or in any adjoining building to which public normally have access;
- (b) shall not store or keep or permit to be stored or kept, any liquor in excess of his own reasonable personal requirements in any other part of such shop or adjoining building.”

The following is an extract from the judgment of the learned Magistrate, explaining the lay-out of the premises and the places where liquor was found —

“..... the accused rents not only the actual shop but the whole building in which it is situated. This consists of the shop, an office and washroom immediately behind the shop with a doorless opening from the office into the shop, a flat above the shop and three flats behind the shop, one at shop level, one at basement level and one at the same level as the flat over the shop. Between the office and the flat on the level of the shop are stairs leading up to the two flats above. There is a passage from the road to the foot of the stairs. There is a door into the office near the foot of the stairs and also a door into the flat on the level of shop

The basement flat and the upstairs flat at the back are let to tenants. The accused's family lives in the flat on the level of the shop. He admitted that he also uses the flat above the shop to entertain guests to drinks and that his 18-year-old son sleeps in that flat

The shop has a continuous counter running along the two sides and the back of the shop. There are two small gaps at the ends of the side counter near the door. On top of the counter in some parts is a wooden structure serving both as display shelf and fence. The deep-freezer is situated almost at the end of one side near the door. There is a wooden structure on the counter near it. The deep-freezer is behind the counter

If a customer wished to buy goods from the shop he would clearly normally remain outside the counter and would have no apparent cause to go into the office.

A
I find as fact therefore that in a room in the flat above the shop there were found 5 half-bottles of whisky, 1 bottle of gin, 20 half-bottles of rum and 1 bottle of brandy; that in the office and washroom at the back of the shop there were found 24 bottles of beer, 53 half-bottles of beer, 23 cans of beer, 4 bottles of whisky, 2 half-bottles of whisky, 4 bottles of gin and 6 half-bottles of gin, 12 bottles of rum and 6 half-bottles of rum; that in the flat on the same level as the shop there were found 35 bottles of beer and 84 cans of beer, 20 bottles of stout and 5 half-bottles of rum; and that in the shop itself 12 bottles of beer were found in the deep-freezer and 10 bottles of beer, 4 half-bottles of beer and 1 bottle of stout, all cold from refrigeration, in cartons on the floor near the deep-freezer. Of the liquor found in the flat on the level of the shop 35 bottles of beer, four bottles of stout and 36 cans of beer were in a refrigerator. I find as fact that the liquor was found in these quantities and places.”

D The Magistrate held that the office and washroom were not parts of the shop to which the public normally had access. With regard to the aggregate quantity of 22 bottles of beer, 4 half-bottles of beer and 1 bottle of stout found in and near the deep-freezer behind the counter in the shop itself he concluded that it was unlikely that any member of the public could have laid his hands on them except through the medium of the appellant or one of his servants. He continued —

E
“However, that would be the case also if bottles of liquor were prominently displayed with other goods on shelves along the back wall of a shop well behind the counter; I have no doubt at all, however, that those shelves would be a part of the shop to which the public normally has access. If it were not so, it would mean that virtually all shops but self-service shops could display quantities of liquor with impunity provided that they were out of the direct physical reach of the customers. In my view if an article is in a part of the shop where goods for sale over the counter are normally kept and particularly if they can be seen by customers it is in a part of the shop to which members of the public normally have access.

G In this case the liquor in the cartons was on the floor behind the counter. The Court viewed the scene and I am satisfied that, if a customer leaned over the counter and looked down, he could see the floor behind the counter; that in the deep-freezer might also have been seen when the deep-freezer was opened to serve customers with other goods from it

H The liquor on the floor and in the deep-freezer was therefore in a part of the shop where goods for sale over the counter are normally kept.”

With regard to the charge which I have referred to above as charge (b) the learned Magistrate dealt with a submission that the flat above the shop was not an "adjoining building", and came to the conclusion that, as the flats were part of the same premises and occupied in conjunction with the shop, they did adjoin it. To hold otherwise, he considered, would be to defeat the clear intention of the Legislature.

A

B

C

D

E

F

G

H

Counsel for the appellant contended that the area of the shop behind the counter could not, as a matter of law, be said to be a part of the shop to which the public normally have access; "(to) have access" to any area means that there must be no let or hindrance to its accessibility (see *Henaghen v. Rederiet Forangirene* [1936] 2 All E.R. 1426, 1433); on the evidence, also, the counter was an obstacle deliberately placed to exclude the public from the area to the rear of it; the Magistrate was in error in treating the 'shop', in which the counter was, as comprising the whole room — if the Legislature had intended that construction it would have been easy to provide that no liquor should be kept 'in any shop'; the Magistrate's reasoning would equally apply to liquor kept locked under the counter. On the second ground of appeal counsel for the appellant contended that the learned Magistrate treated the flats as if the section had referred to 'adjoining rooms or premises' rather than to "an adjoining building"; here there was but one building, comprising the shop and the flats; this was a penal statute, giving rise to offences of strict liability, and it must be construed strictly. Crown Counsel adopted the judgment of the learned Magistrate on the first ground of appeal. As to the second ground of appeal, also, Crown Counsel adopted the judgment; "adjoining" was a word having the primary meaning of 'attached' or 'joined together', but with a secondary meaning of 'neighbouring' or 'near to' (see *Mayor etc. of the Borough of New Plymouth v. Taranaki Electric-Power Board* [1933] A.C. 680, 682, and *Ware U.D.C. v. Gaunt and others* [1960] 3 All E.R. 778); the object of the section was to prevent storage of liquor in the vicinity of a shop; it would be an artificial construction to read the section as permitting storage in a flat above a shop; the section deals with a 'shop' simpliciter, not a 'shop in a building' although obviously a shop must be in, or form part of, a building; for the purposes of the section a building may be regarded as divided, both horizontally and vertically, into a number of "adjoining buildings" — thus, for example, each of a pair of semi-detached houses would be an adjoining building although physically they form part of a single, composite, entity; the section uses the word "adjoining" in its primary sense; this construction was borne out by the distinction made in the section itself between one part of a shop (to which the public have access) and the other part (to which the public do not have access).

Manifestly, in my view, a main purpose of the section is to preclude means of evasion of the restrictions placed on shopkeepers. Clearly it was in mind that illicit transactions might take place either on the shop premises or on adjoining premises. Clearly, also, it was in mind that "shop" is an equivocal word which might be construed narrowly as referring to the actual selling area or widely as including other portions of the premises. Further, in point of fact — in country districts in particular — it might be difficult to say whether a particular portion of premises in the occupation of a shopkeeper was part

of his shop or part of his living quarters. The mischief aimed at is the prevention of the sale of liquor to the public by persons who are in a favourable position to make illicit sales, namely shopkeepers. So far as the 'adjoining building' is concerned, it must be a building over which the shopkeeper has control, as the section, in terms, is laying down a prohibition on the shopkeeper himself. The section recognises that shop premises may embrace both a part or parts to which the public usually come to be served, and private portions such as offices, storerooms or living quarters. Liquor and the public are to be kept apart, according to the scheme of the section. If liquor were to be allowed to be kept in the public portion of shop premises it would go a long way to defeat the purpose of the legislation. Illicit sales would be rendered most difficult of detection; a bottle could pass from the shopkeeper into the pocket of a purchaser in a fraction of time. The same applies to any adjoining premises of the shopkeeper to which the public have access. It is recognised, however, that the shopkeeper is entitled to keep liquor for his own consumption. The object of the section, as it appears to me, is in the first place artificially to extend the area of prohibition, or, as the case may be, restriction, by taking in not only the shop premises but also any adjoining premises in the shopkeeper's control, and then to draw a dividing line between areas to which the public will come and areas to which they will not have access. In the public portions no liquor may be kept; in the non-public portions no excess liquor may be kept. There is no necessity to legislate for buildings which are in the occupation of the shopkeeper but are at a distance from the shop; the opportunity of observation being made upon what might be carried to the shop premises affords a safeguard in itself. In my view, therefore, the distinction that is made between the public portions and the non-public portions, of the shop or adjoining building as the case may be, is a broad distinction based upon the need to prevent transactions which the presence of the public would render easy to carry out but difficult to detect. 'Shop' is used in the broad sense of the whole area which goes to make up the premises in which the business is carried on. Accordingly the expression "any part of such shop to which the public normally have access" is not to be ascertained by the drawing of exact boundaries based on counters, showcases, or other furnishings, or on particular portions of floor space; a room where the shopkeeper functions in the eye of the public as such is a part of the shop to which the public normally have access. With regard to the expression "adjoining building" the difficulty that arises is not so much as to the meaning of the adjective "adjoining". That word, it is clear, has the primary meaning of "conterminous"; "having a common boundary". The difficulty is whether a flat under the same roof as the shop may be said to be an "adjoining building". Such a flat would be adjoining "premises" or "attached premises"; but one would not normally speak of two next-door flats situate in the same block of flats or some other single building as "adjoining buildings". The expression is, however, in my view to be construed in the context of the mischief which the section is aimed at and the scheme which the section adopts in order to prevent evasions. I take this view notwithstanding an evident discrepancy in the wording of the section. Paragraph (a) of the section refers to liquor kept "in any adjoining building", in contrast to the

reference to liquor kept "in any part of (the) shop". Paragraph (b) refers to "any other part of such shop or adjoining building", and therefore suggests that paragraph (a) refers to a part of an adjoining building equally as it in fact refers to a part of the shop. The only way to make sense of paragraph (b), as it seems to me, is to read it as intended to refer to liquor kept in any adjoining building to which the public do not normally have access, thus drawing the same distinction between parts of an adjoining building as is drawn between parts of the shop. Otherwise paragraph (b) has no effect. I therefore hold that the first and second ground of appeal fail.

A further ground of appeal was based on the fact that the learned Magistrate expressly gave the appellant the benefit of the doubt on his evidence that, with regard to the liquor found in the private portions of the premises, he intended to hold a party. Counsel for the appellant submitted that the test to be applied in determining whether excess liquor was kept was a subjective test; in other words, as I understand the argument, that what was "reasonable" depended on the status and tastes or idiosyncracies of the appellant and his guests. Crown Counsel was prepared to assume for the purposes of this case, without asking me to decide the point, that the expression "his own reasonable personal requirements" extended to include the requirements of some social obligation of the shopkeeper, but contended that the question of what was "reasonable" must be decided on an objective view; this, he contended, did no more than place an evidentiary burden on the shopkeeper; here the quantity of liquor said to be required for a party was patently excessive. On this point I have no doubt that the word "reasonable" is deliberately employed to set a limit, to be arrived at objectively, to the quantity of liquor which a shopkeeper may keep for his own personal requirements, and that on the evidence the quantity of liquor actually kept was, as Crown Counsel said, patently excessive.

The appeal was brought also in respect of sentence, namely a fine of £40 on each charge and £5 costs. The appellant has two previous convictions, in 1955, for supplying liquor. As the learned Magistrate pointed out, he had given evidence that he was "well-to-do"; and a licence to sell liquor in Suva would have cost him £60. Such offences are difficult to detect and not infrequent. No possible case is made out in my view for reducing the sentence imposed.

It was further ordered by the learned Magistrate that 'all the liquor found in the shop' was to be forfeited, and that out of the liquor found elsewhere 90 bottles of beer and 8 bottles of spirits, or their equivalents in cans or half-bottles, were to be returned to the appellant, the remainder being forfeited. It was contended by counsel for the appellant that the liquor comprised in an alternative charge in respect of which the appellant was acquitted must necessarily be returned to the appellant by reason of the acquittal. It is in fact impossible on the record, as counsel agree, to reconcile the evidence as to the quantities of liquor found in the various places with the quantities stated in the charges. The position appears to be that the liquor found in the office and washroom was charged as kept in a part of the shop to which the public have access, which areas the Magistrate held were not public. The appellant is therefore, as it

A appears to me, entitled to the return of such liquor as the evidence disclosed to have been found in those rooms. This liquor consisted of 12 bottles and 6 half-bottles of rum, 4 bottles and 2 half-bottles of whisky, 24 bottles and 48 half-bottles and 23 cans of beer, 5 bottles and 6 half-bottles of gin, and 1 bottle of brandy. These figures are less, in some respects, than those stated in the charge but I must be guided by the uncontradicted evidence. The 5 bottles and 6 half-bottles of gin and 1 bottle of brandy appear to figure again in the third charge of keeping excess liquor in an adjoining building on which the appellant was convicted but this charge was not an alternative charge.

B In the result the appeal against conviction and sentence is dismissed but it is ordered that the quantity of liquor specified above as found in the office and washroom be returned to the appellant. This is in addition to the Magistrate's order for the return of 90 bottles of beer and 8 bottles of spirits.

Appeal dismissed.