Present: Garvin A.C.J., Lyall Grant J., and Jayewardene A.J. 1926.

DISSANAIKE *v.* SIRIMALA.

364—P. C. Gampola, 13,362.

Excise Ordinance—Manufacture of toddy—Ordinance No. 8 of 1912, s. 43 (b).

A person who draws toddy and allowes it to be ferment may be said to manufacture fermented toddy—an excisable article, within the meaning of section 14 (*a*) of Ordinance No. 8 of 1912.

AN appeal from an acquittal. The charge laid against the accused was that he had manufactured fermented toddy without a licence and that he was in unlawful possession of an excisable article—offences punishable under sections 43 (*b*) and 44 of the Excise Ordinance. At the trial reliance was placed on a previous ruling [1] of the Supreme Court that the term " manufacture " was not applicable to toddy. Thereupon the accused was acquitted and discharged. The Attorney-General's appeal, questioning the soundness of the authority cited, came up for hearing before the Acting Chief Justice, who referred it to a Bench composed of three Judges.

Grenier, Acting Deputy S.-G., for Crown, appellant.

Navaratnam, for accused, respondent.

July 22, 1926. GARVIN A.C.J.—

When this case first came before me I felt unable, having regard to the comprehensive meaning attached to the word " manufacture " in this Ordinance, the general scheme of the Ordinance, and the specific use of the expression " manufacture of toddy " in several of its provisions, to assent to the view expressed by Sir Thomas de Sampayo in case No. 7,469, P. C. Kandy. The question is one of great practical importance, and I thought it desirable, therefore, that the matter should be referred to a Bench of three Judges for final decision of the question.

Having had the advantage of reading the judgments of my brothers Grant and Jayewardene, I do not think it is necessary to add anything to what has already been said on the question of the meaning of the term " manufacture." I entirely agree that the term is applicable to, and may be correctly used with reference to, toddy. I desire, however, to add a few words as to the general

[1] *S. C. Min., Feb. 27, 1922—P. C. Kandy, 7,469.*

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scheme of the Ordinance in so far as it relates to the manufacture of excisable articles. The purpose of the Ordinance is to consolidate and amend the law relating *inter alia* to the manufacture of intoxicating liquor and intoxicating drugs. The manufacture of an excisable article is prohibited, except where such manufacture has been authorized by licence (*vide* section 14). In order to make the prohibition effective the Legislature has thought fit to go further and to prohibit and penalize the doing of a number of acts, the tendency of which is to lead to the production of excisable articles. Accordingly the section proceeds to prohibit the cultivation and collection of the hemp plant or cacao plant, and to enact that (*c*) no toddy tree shall be tapped, (*d*) no toddy shall be drawn from any tree, (*e*) no distillery or brewery or warehouse shall be worked except under and in accordance with the terms of a licence. It will be seen, therefore, that the mere act of tapping a toddy-producing tree is both prohibited and penalized, so also is the act of drawing toddy from any tree. Toddy means the fermented or unfermented juice from any coconut, palmyra, or kitul, or other kind of palm tree. " To tap " includes every part of any process by which the spathe or flower of any toddy-producing tree is prepared for the drawing of toddy. When the flower of a toddy-producing tree has been subjected to tapping as defined above and as a result toddy is obtained, that toddy has been manufactured; and in such a case, in the absence of a licence, the person who did the acts may rightly be charged with having manufactured an excisable article, to wit, toddy. Where the natural process of fermentation has been permitted to continue unchecked, and as a result the toddy so manufactured is found to be fermented, a charge of manufacturing an excisable article, which in this instance would be fermented toddy, would be in accordance with the provisions of the Ordinance. It is conceivable that one person may manufacture unfermented toddy, and that another into whose possession such toddy comes may be charged in appropriate circumstances with the manufacture of fermented toddy where the natural process has been permitted to continue unchecked resulting in the conversion of unfermented toddy into fermented toddy.

The expression " drawing toddy " has been the subject of discussion, particularly with reference to fermented toddy in several cases under the repealed Arrack Ordinance. It has been held to refer both to the act of extracting toddy from the flower as well as to the act of bringing away the toddy collected in the pot attached to the flower. The acts of tapping the flower and collecting toddy are penalized under the Excise Ordinance as being the manufacture of an excisable article. It is therefore open to question whether section 14 (*d*) includes, not only the act of bringing away from the tree the toddy already collected as a result of the

tapping of the flower, but the whole process of extracting toddy from the flower. It seems improbable that the act of extracting toddy is penalized both under the head " manufacture " and also under the clause relating to the drawing of toddy.

The scheme of the Ordinance is complete in the view that by drawing is meant bringing away from the tree—the word being used in a sense similar to its use in the expression "drawing water."

The result of this examination of the Ordinance is as follows:—

To tap a toddy-producing tree even though no toddy has in fact been produced thereby is an offence.

To tap a tree and extract toddy is to manufacture an excisable article.

To draw toddy from a tree though the toddy may have been produced by the acts of another is an offence.

To convert toddy though it has been produced by the acts of another into fermented toddy is to manufacture an excisable article.

The order of acquittal is set aside, and the case sent back for trial and determination in due course.

LYALL GRANT J.—

We are asked to review a judgment in which Mr. Justice de Sampayo held that the expression " manufactured " as used in the Excise Ordinance, No. 8 of 1912, does not apply to the process of getting toddy. He further holds that the expression is not applicable to toddy at all, but applies only to arrack and other liquors.

With great respect to the learned Judge I am not inclined to agree with this interpretation of the Ordinance. Toddy is clearly an excisable article under the Ordinance.

Section 3 contains the following definitions: "Excisable articles" means and includes any liquor or intoxicating drug as defined by this Ordinance (sub-section (13)).

Sub-section (8) defines liquor as including spirits of wine, spirit, wine, toddy, &c. . . . . Toddy is defined as the fermented or unfermented juice drawn from any coconut, palmyra, kitul or other kind of palm tree.

Sub-section (17) defines " manufacture " as including every process, whether natural or artificial, by which any excisable article is produced or prepared.

Section 18 of the Ordinance provides for the Governor granting the exclusive privilege to any person for manufacturing . . . . any country liquor.

Country liquor is defined in section 3, sub-section (9), as meaning any liquor manufactured in Ceylon on which excisable duty is not leviable at rates levied on imported liquor.

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That toddy is intended to be included in the expression "country liquor" is clear, not only from this definition, but also from section 19, which refers to the privilege of manufacturing and selling toddy under section 18.

Again, section 17 (1) refers to a person being licensed to manufacture and sell toddy.

Section 14 (*a*) prohibits the manufacture of excisable articles except under licence.

These sections in combination make it quite clear to my mind that Government intended to prohibit every process in the preparation of toddy except under licence, that is, that it included every such process under the term "manufacture."

The difficulty the learned Police Magistrate seems to have experienced in applying this term "manufacture" to toddy appears in part at any rate in the provisions of section 14 (*c*) and (*d*), which respectively make it an offence for a toddy-producing tree to be tapped and for toddy to be drawn from any tree.

It is conceivable, however, that circumstances might arise under which the Crown might find it easier to obtain a conviction under one or other of these sub-sections rather than under sub-head (*a*), and I cannot see that the addition of these sub-sections to the Ordinance can affect the interpretation of sub-section (*a*), which is quite clear in itself.

I agree that this appeal should be allowed.

JAYEWARDENE A.J.—

This case has been referred to a Bench of three Judges by my Lord the Acting Chief Justice in view of an unreported ruling of this Court in P. C. Kandy, 7,469 (Supreme Court Minutes of February 27, 1922), in which it has been held that the expression "manufacture" as used in the Excise Ordinance of 1912 is not applicable to toddy but has reference only to such articles as arrack and liquors.

In the present case the accused was charged with having manufactured an excisable article, to wit, fermented toddy, without a permit from the Assistant Government Agent, in breach of section 14 (*a*) of he Excise Ordinance, and also with possessing an illicitly manufactured excisable article, to wit, toddy, in breach of section 44 of the same Ordinance—offences punishable under sections 43 (*b*) and 44 of the Ordinance. At the trial the Proctor for the accused took the preliminary objection that the charges did not disclose the commission of an offence known to the law, and cited the judgment of this Court in the Kandy case referred to above in support of his contention. The learned Police Magistrate rightly

upheld the contention, in view of the judgment cited to him, and acquitted the accused. He said—

> Before any evidence was led in this case, Mr. van Langenberg brought to my notice a judgment of the Supreme Court, in Kandy case No. 7,469, in which Mr. Justice de Sampayo holds that "the expression 'manufacture' in the Excise Ordinance does not mean any part of the process of getting toddy." The judgment continues—the fact appears to be that the expression is not applicable to toddy at all, but has reference to such articles as arrack and other liquors.
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> Section 19 of Ordinance No. 8 of 1912 was pleaded in support of a contrary interpretation of the Ordinance, and the fact that fermentation is artificially stimulated. But in view of the Supreme Court judgment the consideration of that pleading lies outside my purview, and I dismiss this case on the point of law—on the second charge no less than the first—for if toddy cannot be manufactured it is evident that illicitly manufactured toddy cannot be possessed.

The Attorney-General appeals against the Magistrate's judgment of acquittal, and challenges the correctness of the ruling in the Kandy case. The question presented for our decision is: Whether the judgment of this Court in the Kandy case is right? For the purpose of answering that question we have to decide whether fermented toddy is a manufactured article or not. The expression "manufacture" according to the interpretation section (No. 3) of the Excise Ordinance—

> "Includes every process, whether natural or artificial, by which any excisable article is produced or prepared, and also re-distillation, and every process for the rectification, flavouring, blending, or colouring of liquor."

The essence of "manufacture" therefore is, that it is a "process." The term "process" is not defined in the Ordinance, but according to the Oxford Dictionary means "a continuous and regular action or succession of actions taking place or carried on in a definite manner and leading to the accomplishment of some result; a continuous operation or series of operations; a particular method of operation in any manufacture." The Imperial Dictionary defines it as "a series of motions or changes going on in growth, decay, &c., in physical bodies, as the process of vegetation or mineralisation; the process of decomposition," and I may add, the process of fermentation. The process may be either *natural* or *artificial* according to our statutory definition. Learned Counsel for the respondent very frankly admitted that the juice of the palm tree becomes fermented by a natural process, and that to prevent

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fermentation setting in, the pot into which the juice flows has to be limed or have some *hal* bark placed in it. If so, it becomes impossible to resist the conclusion that fermented toddy is "manufactured" according to the meaning attached to the expression " manufacture " as used in the Excise Ordinance. Ordinarily, it sounds strange to speak of manufacturing toddy or fermented toddy. We speak of tapping trees and drawing toddy, but we overlook the natural process the juice undergoes in the receptacle before it becomes fermented toddy. The Ordinance, no doubt, as pointed out by De Sampayo J. in that case, speaks of " tapping trees for, and drawing toddy "; and there are separate provisions with regard to them. See sub-heads (*c*) and (*d*) of section 14 and sub-heads (*d*) and (*e*) of section 43. "To tap," as defined in the Ordinance (section 3), " includes every part of any process by which the spathe or flower of any toddy-producing tree is prepared for the drawing of toddy," and "toddy" means "fermented or unfermented juice drawn from any coconut, palmyra, kitul, or other kind of palm tree." The term " drawing toddy " is not defined in the Ordinance and some difficulty has been caused by the use of this expression in connection with fermented toddy. The repealed " Arrack, Rum, and Toddy Ordinance, No. 10 of 1844," did not refer specifically to " tapping " or " manufacture " of toddy, but only to " drawing " toddy (see section 46); and in *Perera v. Charles*,[1] where the accused was charged with drawing fermented toddy, and the Magistrate had acquitted the accused as the offence of drawing fermented toddy which the Ordinance had penalized was a physical impossibility, Clarence J. reversing the decision said:—

> " If by ' drawing toddy ' the Ordinance is to be understood as intending the mere extraction or expression of the juice from the cut flower stem of the palm, then no doubt the juice cannot be so drawn in a fermented state. But as I understand the native usage in this matter (and upon this point I have availed myself of the assistance of my brother Dias) the toddy ferments in the pots as they hang suspended in the tree, and when it is desired to check that fermentation *hal bark* is placed in the pots. If toddy is allowed to ferment in the pots as they hang on the tree and is then in its fermented state brought away from the tree—that is what, as I conceive, the Ordinance intended by ' drawing ' fermented toddy."

The same question arose in *Dingiri Mudianse v. Pinsetuwa*,[2] and this Court upheld the view taken by Clarence J. And Moncrieff A.C.J. said that he was not quite able to understand why toddy should not be the less drawn because the pot into which it is drawn

[1] *(1889) 9 S. C. C. 19.*

[2] *(1902) 6. N. L. R. 14.*

is attached to the tree. The same phraseology had been continued under the present Excise Ordinance, although tapping a tree for toddy, and drawing toddy, are treated as distinct operations for which separate licences are required and are classified as distinct offences under section 43. Thus licences are issued by the authorities under the Excise Ordinance for " drawing fermented toddy " and in the official notifications these licences are referred to as " licence for drawing fermented toddy. " The use of this expression was criticised by Dalton J. in his judgment in *Lockhart v. Learis* ,[1] where he said that—

> " The phrase ' to tap for fermented toddy ' is strictly speaking a misapplied term, although it appears to be in common and official use. "

He adopted the view taken by Clarence J. in *Perera v. Charles* (*supra*), although the provisions of the Excise Ordinance differ from those of the repealed Ordinance of 1844.

The Ordinance itself uses the expression " manufacture " in connection with toddy. Thus, under section 17: " No excisable article . . . . shall be sold without a licence from the Government Agent; provided that—

> " (1) A person having the right to the toddy drawn from any tree may sell the same without a licence to a person licensed to *manufacture and sell toddy* under this Ordinance . . . . . "

and again under section 19—

> " When any exclusive privilege of *manufacturing and selling* toddy has been granted under section 18, the Governor may declare that the written permission of the grantee to draw toddy shall have the same force and effect as a licence from the Government Agent for that purpose under section 14. "

The use of this expression in connection with toddy cannot be ignored, and must be given a meaning if possible. Fermented toddy is, in my opinion, obtained by three operations: first, by tapping the tree; second, by drawing the juice or sweet toddy: third, by allowing the toddy drawn to ferment. The last operation can be described as the " manufacture " of toddy. If these district operations, which are specifically referred to in the Excise Ordinance are borne in mind, the phraseological difficulties which arose in the cases I have referred to need no longer arise. In fact, each of these operations or processes may be regarded as a stage in the manufacture of fermented toddy.

In view of these considerations it seems to me impossible to say that the word " manufacture " is not applicable to toddy. In my opinion, any person who allows the juice of a palm tree to remain in a

[1] *(1925) 6 Law Rec. Rep. 133.*

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pot or other receptacle long enough to become fermented "manufactures" fermented toddy, and his action would fall within the provisions of the Ordinance, which prohibit and penalize the manufacture of an excisable article in certain circumstances.

With all deference to the eminent Judge who decided the Kandy case, I do not think the decision on that case can be regarded as sound. I would, therefore, set aside the order of acquittal, and remit the case for trial in due course.

Set aside.