

1902.  
April 25.

DINGIRI MUDIANSÉ v. PINSETUWA.

P. C., Ratnapura, 22,810.

*Arrack Ordinance No. 10 of 1844, ss. 40 and 46—Drawing fermented toddy without license—Precautions against fermentation.*

MONORIFF, A.C.J.—If a person draws without a license toddy from a palm tree and does not take precautions to prevent the same from fermenting, he will be held to have infringed sections 40 and 46 of the Ordinance No. 10 of 1844.

P. C., Negombo, 23,558, 21st July, 1898, disapproved.

THIS was an appeal by the complainant with the sanction of the Attorney-General. The accused was charged "that he did on the 10th February, 1902, at Kirindigala, draw or cause to be drawn fermented toddy without a license, and thereby committed an offence punishable under sections 40 and 46 of Ordinance No. 10 of 1844." The complainant's peon found a pot on a kitul tree. He had it taken down, and found in it 11 gills of fermented toddy. The accused was present at the time, and took no precautions to prevent fermentation. On the footing of this evidence, the Magistrate (Mr. Loftus) issued summons for the 24th February, but on that day he took no evidence, but made the following note: "Complainant has no case (*vide* decision in P. C., Negombo, No. 23,558\*). Case dismissed."

*Bawa* for appellant.—The judgment of Lawrie, J., in the Negombo case\* was not intended to protect unlawful drawing of toddy. Mr. Lawrie expressed his opinion that the offence of drawing toddy is not completed until the pot is brought down from the tree. In the present case it was brought down. His Lordship's view, however, is not warranted by the Ordinance. Justice Clarence, in *Perera v. Charles* (9 S. C. C. 19), draws a clear distinction between encouragement to crime and facilities for defence.

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\* P. C., Negombo, 23,558.

21st July, 1898. LAWRIE, J.—

In my opinion, the offence of drawing toddy is not completed until the pot of toddy is brought down from the tree, and the liquid is found to be fermented and is illegally retained in possession.

If the owner of the tree or the toddy-drawer expected to find it only sweet toddy, and it contained fermented toddy, if the bark had been put in, but it was not sufficient or had not worked, or if by an oversight no bark had been put in, the owner or drawer might throw away the fermented toddy in obedience to the law, or from fear of prosecution.

I cannot presume an offence until it be committed. Until the act of drawing be completed the offence has not been committed. I therefore set aside the conviction and acquit the accused.

The Ordinance does not encourage persons to draw toddy, but if they are charged it makes the fact that the toddy is sweet a good defence, this showing that the intention of the Ordinance is not to get possession of fermented toddy. Here no precautions were taken at all to prevent fermentation. That stage has not been reached when evidence as to whether or not the omission to use the bark was an oversight or deliberately intended may be taken.

1902.  
April 25.

*Cur. adv. vult.*

April 25th, 1902. MONCREIFF, A.C.J.—

The appellant is charged with drawing or causing to be drawn fermented toddy, and with thereby having committed an offence punishable under sections 40 and 46 of Ordinance No. 10 of 1844. The Magistrate in a somewhat brief memorandum says that "the complainant has no case (*vide* decision in P. C., Negombo, No. 23,558\*). Case dismissed." The complainant appealed. The case to which the Magistrate refers is one in which the opinion was expressed that, when toddy is drawn from a palm tree into a pot attached to the tree, there is no drawing within the meaning of the Ordinance until the pot has been severed from the tree and brought down to the ground. I am not quite able to understand why toddy should be the less drawn because the pot into which it is drawn is attached to the tree.

The Magistrate, while citing and following this opinion, did not keep his eyes open to the opinion of Mr. Justice Clarence, which apparently has always been accepted as law: I refer to the case of *Perera v. Charles* (9 S. C. C. 19), in which the Magistrate had come to the conclusion that inasmuch as the Legislature had provided that the restrictions as to the drawing of toddy should not apply to sweet toddy, it was no offence to draw toddy from a tree, because toddy is not fermented until it is drawn. It is obvious that that could not be the meaning of the Legislature. It cannot be supposed that for the pure pleasure of drafting the sections of the Ordinance, the Legislature would go to the trouble of making provisions with no sense in them. Mr. Justice Clarence has, I think, taken the only possible view of the law, which I think is more or less expressed in section 47 of the Ordinance. That section withdraws the restriction from sweet toddy, and goes on to provide that people should not be convicted of drawing toddy without a licence or permit unless the Court is satisfied that in drawing such toddy they have omitted to take ordinary precautions to prevent the same from fermenting, so that, as I understand the matter, if

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\* See note on page 14.

1962.  
April 25.  
MONROE, J.,  
A.C.J.

a person draws toddy from a tree, and does not take precautions for the purpose of preventing fermentation, and fermentation does take place, he will be held to have infringed the provisions of the Ordinance, unless he has obtained a license for the purpose.

In this case a pot of toddy was on a kitul tree. The first witness, who was the renter's peon, found it on the tree and had it taken down, when it was discovered that it contained fermented toddy. I think the Magistrate was mistaken, and that the order of acquittal must be set aside, and the case sent back to the Police Court in order that evidence may be taken in due course.

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