[IN REVISION.]

1932

Present : **Dalton J.**

OSSEN *v.* EXCISE INSPECTOR PONNIAH.

P. C. Puttalam, 15,206.

Revision—Appeal not sanctioned by Attorney-General—Powers of Supreme Court—Miscarriage of justice—Excise Ordinance, 1912, ss. 33, 34, 36—Powers of search—Reasonable cause to suspect.

Where the Attorney-General has refused to sanction an appeal, the Supreme Court will hear the case in revision, if the applicant makes out a strong case, amounting to a positive miscarriage of justice, in regard to either the law or the Judge's appreciation of the facts.

APPLICATION to revise an order of acquittal by the Police Magistrate of Puttalam.

H. V. Perera (with him *Gnanaprakasam* and *Marikar*), for appellant.

N. E. Weerasooriya, for respondents.

[1] *3 Leader Law Reports, p. 7.*

May 4, 1932. DALTON J.—

This is an application in revision. The applicant is the complainant, the respondents being an Excise Inspector and two of his servants. The latter were charged by the complainant in the following words:—

> "That you did on the 7th day of September, 1931, at Sellankandel within the division aforesaid obstruct the free passage of the car of the Head Moorman by damaging the tyre of the car by putting some prickly spears on the road, and criminally restrain M. Ahamado Ossen and two others of Puttalam"

thereby committing offences punishable under sections 276 and 332 of the Penal Code.

The accused were acquitted, and the complainant applied to the Attorney-General for leave to appeal. That leave being refused, he applied to this Court in revision that the order of acquittal be set aside, and for such other order as this Court shall think fit.

The facts disclosed show that the first accused, the Excise Inspector, received information that arrack was going to be transported in a car numbered R 129 along the road from Puttalam to Anuradhapura. He accordingly made arrangements to watch for it, going on the night in question about 9 P.M. to a point near the 6th milepost. He took with him the other two accused and also an instrument in the form of a small inverted harrow, two frames toothed with spikes, which had been made in accordance with the instructions of the Excise Commissioner for the purpose of puncturing tyres. There were further instructions as to how and when it was to be used. The Inspector stood near the 6th milepost, and he sent the other two men some one hundred yards further up the road near a culvert with instructions to spread this frame of spikes across the road, if they received a signal from him. This signal was to be given by displaying a red light.

The complainant came driving along the road in his master's car, R 181. It was drizzling slightly at the time. The Inspector says he held his light up to stop him. So vague seem to have been the instructions given by the Inspector that his assistants may well have taken this as the signal to put the spikes across the road. Further, no precautions seem to have been taken to protect any traffic coming from the opposite direction. The driver of the car is then said by the Inspector to have slowed down, but when he approached the car to have speeded up again and passed him.

The complainant states he knew all the accused before, but at the time his driver received the signal to stop the Inspector was not in uniform and he was alone. There was nothing to show who he was or what he was doing there at that time of night. A red light by the roadside need not necessarily mean a signal to stop at all, although it would be approached with caution, whilst any driver whether it be in England or Ceylon or anywhere else may, as experience has shown, reasonably be suspicious, when a solitary man seeks to get him to stop on a dark night on a lonely road. There is a difference between the complainant and the Inspector as to what exactly happened after the red light was held up,

but the Magistrate prefers to believe the Inspector. Taking his evidence as correct when complainant drove on, the Inspector says he waved his lamp to his assistants and the result was that complainant's car ran on to the spikes with one wheel, the tyre being punctured, and the car being successfully stopped. It seems clear he could not have been going very fast, otherwise a bad accident would probably have resulted, especially as a place near a culvert was selected for this dangerous experiment.

The Inspector admits that when the car slowed down, he saw it was not car R 129 for which he was on the lookout; but he is frank enough to admit he would have stopped every car going from Puttalam to Anuradhapura that night in this way. The reason he gives for this is that false numbers are used and sometimes the arrack is brought in other cars.

The complainant, it is admitted, had no arrack in his car. He was using the road, as he was entitled to do, on a perfectly innocent errand, in the course of his work taking foodstuffs in the car for some carters in his master's employment on the road. He admitted he saw the obstruction when he was about a fathom from it, but of course there was no time to stop before the car was on it. In the dark the obstruction is stated by the driver to have " looked like a crocodile ".

On the evidence the Magistrate finds the Inspector had reasonable cause to suspect the transport of arrack in car R 129. He further finds it was necessary to stop cars to ascertain their number. Although the Inspector found that the car to which he signalled was not the car he suspected, as his signal to stop was not obeyed, and as " he had ample reason to suspect this car to be carrying arrack ", he was entitled to stop it by the method he used. The Magistrate in my opinion has clearly read into the Inspector's evidence considerably more than the witness states or the evidence justifies. He has given no reasonable ground for any suspicion against this car at all. All he says is that false numbers are used, that suspected articles are sometimes brought in other cars and he was prepared to stop every car that came along the road that night. The statement that he knew the owner of the car R 181 and suspected him also is, I have no doubt an afterthought, as he had to admit he had never recorded any information he was alleged to have received about this owner and then went on to justify his act by saying he would stop every car that came along. It seems to me, he has entirely failed to show he had any reasonable suspicion against the complainant and his act was entirely unjustified. The facts further do not justify a finding that complainant had any idea anyone was seeking to arrest him.

It was urged that this Court should not deal with a matter in revision, when leave to appeal had been refused by the Attorney-General. The nature of the onus that rests upon the applicant who comes before this Court for the purpose of inviting it in effect to override the deliberate refusal of the Attorney-General to sanction an appeal is referred to by Wood Renton J. in *King v. Noordeen*[1]. If, however, he makes out a strong case amounting to a positive miscarriage of justice in regard to either the law or to the Judge's appreciation of the facts, this Court will deal with the matter. He has clearly made out such a case here, for the reasons I have set out above. Why leave to appeal was refused I do not

[1] *13 N. L. R. 115.*

know, and, therefore, I make no comment on that refusal. The respondent's case was not argued before me by Crown Counsel, as one might have expected under the circumstances, but his case has not suffered on that ground, for he had the benefit of experienced counsel appearing on his behalf, who was unable of course to say why leave to appeal was refused.

The acts set out in the charge having been proved against the accused, and the accused having failed in their defence that they had reasonable cause to suspect the complainant, or that complainant was resisting arrest, it is not necessary to consider the further questions raised on the appeal, as to whether the Inspector had exceeded his instructions, whether even if he had reasonable cause to suspect the complainant was committing an offence he was entitled to obstruct the highway as was done here, or what is meant by the words "all means necessary" in section 23 (2) of the Criminal Procedure Code. In the interests, however, of the Excise Department itself, to forget for the moment the interests of everyone else, I would strongly advise that this dangerous implement, used I understand for the first time on this occasion with such unfortunate results, be relegated to the Police Museum, before further and more serious injury be caused to innocent users of the road. The roads are quite dangerous enough without having to face this kind of thing in the hands of irresponsible officers, as the evidence discloses here.

The application must be allowed and the case be sent back to the Police Magistrate to record a conviction against the accused and to pass sentence. He will, of course, in passing sentence bear in mind to what extent the first accused has carried out the instructions given him by his department, with which the responsibility for the use of this implement must lie, and to what extent the second and third accused were carrying out the orders of the first accused. The Magistrate will doubtless be aware also whether any civil proceedings are pending for the damage done or whether any compensation has been paid to the owner of the car.

Set aside.