

1922.*Present : De Sampayo J.*ANTHONY PILLAI *v.* SUBRAMANIAM

164—P. C. Batticaloa, 10,866

Tavern-keeper convicted for selling arrack after hours—Order that arrack be destroyed.

Where a tavern-keeper was convicted for selling arrack after hours in contravention of section 17 of Ordinance No. 8 of 1912, the Magistrate ordered that the arrack should be destroyed.

Held, that the order was wrong, the Supreme Court directed the arrack to be delivered to the person who purchased it.

THE facts are set out in the judgment.

Arulanandan, for the appellant.

Jansz, C.C., for the Crown.

May 12, 1922. DE SAMPAYO J.—

The accused is the keeper of a tavern at Batticaloa. Next to the tavern is a barber's shop, which is run by a man named Antho. The case presented by the prosecution is that about 7 o'clock in the evening of the day in question the barber came in front of the tavern, which was then closed, but the barber was able to pass his hand through the planks, which were rather loosely put together. The police who prosecute suggest that the barber passed some money through. Then the barber re-entered his shop. The police sergeant having observed the proceeding suspected that there was something irregular being done, and went into the barber's shop. Then he observed a tumbler and a bottle being passed over from the tavern side of the barber's shop through an opening in the partition wall. The police accordingly prosecuted this accused. But the charge actually made, which I am surprised to see was adopted by the Police Magistrate also, is a great jumble, for it alleged that the accused sold arrack after hours without a license from the Government Agent, in contravention of section 17 of Ordinance No. 8 of 1912. It appears, according to the regulation applicable to Batticaloa, that the hour for closing taverns is 6.30 P.M. The accused being a tavern-keeper must necessarily have had a license. The charge should properly have been under section 45 of the Ordinance for contravening the conditions of the license, or the rule framed under section 31. This imperfection, however, may be overlooked, and the case dealt with on its merits.

The accused denies having sold the arrack after hours, and particularly that he passed a bottle of arrack over the wall to the barber, as stated by the witnesses for the prosecution. The Magistrate, however, is quite satisfied with the evidence of the two police sergeants, especially as he says he inspected the place himself, and found that the statement of the sergeants in every detail was quite accurate. It appears that some bricks had been loosened on the top of the wall, and when any brick or several of them are taken off anything can be passed from one side to the other quite easily. This explains the evidence of the police sergeants, that when they went into the barber's shop they observed a bottle of arrack emerging from the side of the tavern into the barber's shop. There is room for suspicion that the barber re-sells the arrack to the people who come to his shop ostensibly to get shaved. As a matter of fact, the police thought that there should be some charge against the barber for buying the arrack from the tavern, but they no doubt soon found that no such charge was possible. I think the Police Magistrate had ample grounds for coming to the conclusion he did. The appeal must, therefore, be dismissed.

But I find that the Magistrate followed up his judgment by an order that the arrack should be destroyed. I do not see why, under any circumstances, an article of this kind should be destroyed. But, if the prosecution is true, the barber is the lawful owner of the arrack, he having purchased it from the tavern-keeper. He cannot be said to have committed an offence by buying arrack after hours. It seems to me that, if any order was to be made as to the arrack, it should have been that the arrack should be returned to the barber. Accordingly I delete the order requiring the arrack to be destroyed, and further direct that, if it is still in existence, it be returned to the barber.

Appeal dismissed.

1922.

DE SAMPAYO
J.

Anthony-
pillai v.
Subrama-
niam