

1904.  
November 11.

JAMES APPU v. CAROLIS.

P. C., Matara, 15,026.

*Ordinance No. 10 of 1844, ss. 14 and 32—Sale of arrack by distiller—Possession of quantity of arrack not exceeding two quarts.*

A person being legally entitled to remove any quantity of arrack not exceeding two quarts commits no offence under section 32 of Ordinance No. 10 of 1844 by being in possession of such quantity.

Although a distiller commits an offence under section 14 of the Ordinance by selling at a time any quantity of arrack less than thirty-five gallons, the purchaser from such distiller or from a retail dealer commits no offence so long as the quantity bought by him is not in excess of two quarts.

**T**HE accused in this case was charged under section 32 of Ordinance No. 10 of 1844 with unlawful possession of a quantity of arrack.

The amount possessed by him was about a quart, which the prosecutor contended had been purchased from a distiller.

The Police Magistrate convicted the accused on the following grounds:—"Under section 14 (1) of Ordinance No. 10 of 1844, as amended by section 6 of Ordinance No. 13 of 1891, the sale of arrack in any smaller quantities than thirty-five gallons is illegal. It is clear that arrack thus illegally sold is illegally possessed under section 32. This is so even if the quantity possessed is under two quarts."

Against this conviction the accused appealed.

The case came up for argument before Moncreiff, J., on the 11th November, 1904.

*Dornhorst, K.C.* (with him *Prins*), for appellant.—If section 32 of Ordinance No. 10 of 1844 stood alone, the conviction would be right. Accused brings himself under the second exception of that section. Section 28 speaks of "quantity exceeding two quarts." Removal of less than two quarts does not require a certificate, as may be seen by section 33. P. C., Balapitiya, 48,211, *Rámanáthan* (1876), 315; P. C., Galle, 19,033, decided by *Wendt, J.*, on 21st January, 1903.

*Rámanáthan, S.-G.*, *contra*.

11th November, 1904. *MONCREIFF, J.*—

•The appellant was convicted on a charge framed under section 32 of Ordinance No. 10 of 1844 on the allegation that he was in unlawful possession of a quantity of arrack.

On his behalf it is urged that the possession contemplated by that section is subject to four exceptions, and that a person who is in possession of arrack, if he is so in possession being legally

empowered to remove the same, comes within the second exception, and is not subject to the main provision of the section. The Judge says that there is a very strong probability that the accused bought the arrack which was found in his possession at the distillery. I cannot quite make out whether he means to find it absolutely proved that he did so, or assume that he did so. He was in possession of an ink bottle containing arrack, which was capable of containing only one quart. If he bought that quantity from the distiller, the case would come under the provision of section 14, by virtue of which the distiller may be punished for selling arrack in a less quantity than thirty-five gallons at a time. The section, however, does not, while it declares that such sales are unlawful, affect the purchaser with any pains or penalties, and, as I understand, such purchaser may, so far as this Ordinance is concerned, go free from the consequences of his having purchased arrack under those conditions.

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The argument of the Solicitor-General is, as I understand, that the sale by the distiller being by the Ordinance illegal, the purchaser has no right to deal with what he has bought. Now, section 33 provides that no such spirit as arrack, exceeding two quarts in quantity, shall be removed without a permit; and Mr. Dornhorst has argued for the appellant that the quantity of arrack contained in the appellant's ink bottle amounting to no more than one quart, he was entitled by the terms of section 33 of the Ordinance to remove that quantity, and was therefore not in unlawful possession. In other words, he says that the intention of the Ordinance is that, while a distiller may be punished for selling a smaller quantity than thirty-five gallons of arrack, even if it is no more than one quart, yet a purchaser is not to be punished under this Ordinance as having committed an offence if the quantity which he purchased is under two quarts. The second exception in section 32 protects him. A case reported in *Rāmanāthan's Reports (1872-1876)*, p. 315, was quoted, which expresses the view that section 32 must be read in connection with the other provisions of the Ordinance. The particular provision now in force is section 33, and section 32 read along with section 33 seems to me to establish the contention that, whether a purchaser has bought from a distiller or from a retailer, he is not to be punished for the possession of the arrack, provided that that arrack amounts to no more than two quarts.

In my opinion, the Magistrate was wrong. The conviction is set aside.

I forgot to mention that the same view was taken of this section by Mr. Justice Wendt in case No. 19,033 of the Police Court of Galle on the 21st January, 1903.