1933 *Present* : **Dalton and Poyser JJ.**

DHARMARATNE *v.* KANDASAMY.

453—P. C. Point Pedro, 5,116.

Excise Ordinance—Evidence of decoy—Corroboration, where decoy fails to support charge.

Where in a charge under the Excise Ordinance the decoy employed in the case contradicts the evidence for the prosecution, the charge may be proved by other evidence, provided it is sufficient to establish, beyond all reasonable doubt, that a sale in fact took place.

CASE referred by Akbar J. to a Bench of two Judges.

A. Gnanaprakasam (with him *A. Sambandan*), for accused, appellant.

Wendt, C.C., as *amicus curiæ*, on notice.

December 4, 1933. POYSER J.—

The appellant was convicted of selling ganja contrary to the provisions of the Excise Ordinance, No. 8 of 1912, and appeals against such conviction.

The evidence for the prosecution was briefly as follows :—On April 19, 1933, at 7.30 P.M. B. C. Dharmaratna, an Excise Inspector, searched a man called Selliah, gave him three marked 10-cent coins and asked him

to go and buy ganja from the accused. Anthonipillai, an Excise Guard, followed Selliah to watch his movements and the Excise Inspector followed some ten minutes afterwards in a car.

Selliah, according to Anthonipillai, went to the accused and had a conversation with him on the road and in the course of such conversation gave the accused something. Then the accused took something from his waist and handed it to Selliah. Anthonipillai stated he was 20 yards away when this took place and it was not very dark as there were lamps in the boutiques but he also stated the accused used an electric torch to examine what Selliah gave him. The Inspector then came up, seized the accused, searched and found on him the three marked coins. Selliah then gave the Inspector two packets of ganja and stated that he bought them for thirty cents from the accused. Selliah when giving evidence denied that he had been given any money by the Inspector or that he had purchased ganja from the accused and he also stated that he had been given the ganja by another man. The accused gave evidence and denied the charge, and also stated that he had received ten 10-cent coins from Edward, a witness for the prosecution, in payment of a debt.

The appeal first came before Akbar J. on July 18, 1933, and was directed by him to be listed before two Judges.

The following is his order :—

"I think this a case which should go before two Judges. There is a difference of opinion between my brother Maartensz and myself as to the exact evidence required in the case of a sale of an excisable article. The cases will be found reported in *34 N. L. R.* I was of the opinion that if the decoy failed to prove the sale any corroborative evidence of the Inspector or of his guards of the sale, *e.g.,* that the marked coins were found in the possession of the accused and the excisable article in the possession of the decoy, would be insufficient to justify a conviction of the accused for selling an excisable article. My brother Maartensz was of a different opinion. I think this is a good case for the point to be settled by a Bench of Two Judges and I direct that it be listed before two Judges."

There are two cases referred to in this order, namely,: *Rodrigo v. Karunaratne*[1], in which Akbar J. delivered the following judgment :—

"The appellant was charged with selling fermented toddy without a licence and he was fined Rs. 75. According to the evidence a decoy was sent ahead with a marked 50-cent piece to buy toddy from the accused, who is a toddy contractor. The decoy, however, did not support the prosecution case and the prosecution case was only left with the evidence of the Excise Inspector and of the Police Inspector, neither of whom saw the sale. This being a criminal case, it is incumbent on the prosecution to prove the sale. All that the accepted evidence proves was that the decoy had a coconut shell of toddy in his hand and a pot full of toddy behind a shed and that a marked 50-cent piece was found in the accused's waist. I do not think this is sufficient evidence to prove a sale. Mr. Schokman cited a case of my brother Maartensz, but I regret I am unable to follow this case as an authority. If full effect is given to the case cited, a decoy need not give evidence

[1] *34 N. L. R. 366.*

in an excise case. The very reason why decoys are called to give evidence is because there must be some evidence to prove a sale. The mere fact that a marked coin is found in the accused's possession and the decoy is found with a coconut shell of toddy, cannot, I think, in a criminal case be held to be sufficient evidence of a sale. It was for this reason that I postponed the case to enable Mr. Schokman to cite English authorities on the point, but he was unable to do so. I am therefore compelled to set aside the conviction and acquit the accused."

The other case cited is *S. C. No. 814-815, P. C. Jaffna, No. 8,124*,[1] and the judgment was as follows:—

"Maartensz J.—Appeal No. 814 is by the accused in this case who was convicted of selling brandy without a licence from the Government Agent, an offence punishable under section 41 (b) of the Excise Ordinance, No. 8 of 1912. The evidence which the Police Magistrate has believed is that on the day in question, the 29th of May last, one Anjalingam was sent by Excise Inspector Ferdinands with a marked Rs. 5 and Re. 1 note with instructions to purchase a bottle or a pint of brandy from the accused. Anjalingam went to the accused's house followed by an excise guard and later on by Excise Inspector Ferdinands and Excise Inspector Gunasekera. The signal for them to rush in was the flashing of a torch. On seeing the signal they rushed in and found Anjalingam with a bottle of brandy in his hand. In a box in the accused's house was found a bottle of brandy and a pint of brandy. In another small wooden box was found the Rs. 5 note and the Re. 1 note. Anjalingam in his evidence before the Police Magistrate denied going to the accused's house at all. This denial appears to be in conflict with a statement which the witness made to Mr. Moses, Justice of the Peace, on June 10. It is unnecessary for me to consider whether this statement to Mr. Moses was admissible in evidence as there is sufficient evidence, without the evidence of Anjalingam, to establish that the accused sold a bottle of brandy to Anjalingam. That evidence is the evidence of the Excise Inspectors who saw Anjalingam in possession of a bottle of brandy and the marked notes in a box in the accused's possession. But the statement made to the Justice of the Peace was admissible in this way, to show that Anjalingam made different statement to the Justice of the Peace and that therefore his evidence to the Police Magistrate was not worthy of credit so as to make the evidence of the Excise Inspectors unreliable. Apart from that, it is not evidence against the accused. However, as I have said, the evidence which the Police Magistrate has accepted establishes the case against the accused, even if Anjalingam's evidence is eliminated from the record. I accordingly affirm the conviction and sentence passed on the accused."

The other cases on this point are:—(*a*) *Wijeratne v. Rupasinghe*.[2] In this case Drieberg J. in the course of his judgment said:—

"I am not sure that it is not possible to prove charges of this nature without the evidence of the decoy. The sale to the decoy might be proved by those present who may be in a position to speak to every

[1] *S. C. Minutes of February 9, 1932.* [2] *2 Cey. Law Weekly 284.*

detail of the incident, except matters which would be legally inadmissible, unless the decoy were called, such as statements by him, but when the decoy is not called and the evidence is that of one person alone who says he was present, the evidence of the sale must be given with sufficient detail to enable a Court to judge its truth. A bare statement by one witness 'I saw the accused sell ganja to the decoy' is clearly insufficient for this purpose, specially when the omission of necessary details is intentional, as I believe it is in this case."

(b) *S. C. No. 112, P. C. Dandagamuwa, No. 11,551*[1]—a case in which the facts were very similar to this one. Akbar J. said after referring to *Rodrigo v. Karunaratne* (*supra*):—

"I cannot see how the gap can be filled up when the decoy gives the lie to the rest of the prosecution case."

(c) *S. C. No. 263, P. C. Galle, No. 411*[2]. In this case Macdonell.C.J. concurred with the judgment of Maartensz J. (*supra*) and added:—

"In considering a case such as this it is not a bad test to ask yourself how you would direct the jury on the facts. Would you direct the jury to acquit the accused or would you point out that if they accepted the facts set out in this case as proved, they could if they were so minded, convict the accused."

Having considered these judgments I am unable, with the greatest respect, to agree with Akbar J. that a conviction cannot be sustained when the decoy fails to prove the sale or gives the lie to the rest of the prosecution evidence.

I think that the correct principles in deciding cases of this description are those laid down in the judgment of Macdonell C.J. and Drieberg J. which may be summarized as follows:

Charges of this nature may be proved without the evidence of the decoy or even if the decoy contradicts the rest of the prosecution evidence, provided that there is sufficient other evidence to establish beyond all reasonable doubt that a sale in fact took place.

In regard to this case I do not consider there was sufficient evidence to establish beyond all reasonable doubt that a sale took place. On reading the judgment it appears that the Magistrate attached considerable importance to the statement made by Selliah to the Inspector. This evidence however, although admissible to show that Selliah's evidence was not worthy of credit, was not evidence against the accused.

Therefore the only evidence against the accused was that of the Inspector and Anthonipillai and that evidence is not, in my opinion, sufficient to support the conviction.

As Drieberg J. said in *Wijeratne v. Rupasinghe* (*supra*), the sale might be proved if those who were present were able to speak to every detail of the incident, but in this case the witnesses are unable to do so.

I think the appeal should be allowed and the conviction set aside.

DALTON J.—I agree.

Set aside.

[1] *2 Cey. Law Weekly 286.*

[2] *S. C. Minutes of May 29, 1933.*