

1965

Present : T. S. Fernando, J.

THE SOLICITOR-GENERAL, Appellant, and W. VICTORIA
FERNANDO, Respondent*S. C. 1360 of 1964—M. G. Kanuwana, 6018/E**Excise Ordinance—Section 17—Charge of unlawful possession of fermented toddy—
Evidence of expert—Meaning of term “persons specially skilled”—Evidence
Ordinance, s. 45.*

The training, practical knowledge and experience of a person who is not a professional analyst may be sufficient in certain cases to qualify him, within section 45 of the Evidence Ordinance, as “specially skilled” on a question of science involving the examination or analysis of a substance. Therefore, in a prosecution for unlawful possession of an excisable article, namely fermented toddy, an Excise Inspector who has sufficient experience and practical knowledge in the detection of excise offences relating to fermented toddy may be qualified to give evidence as an expert on the question whether the liquid claimed to have been found in the possession of the accused was fermented toddy.

APPEAL from a judgment of the Magistrate’s Court, Kanuwana.

V. S. A. Pullenayegum, Crown Counsel, in support of the appeal.

No appearance for the accused-respondent.

Cur. adv. vult.

March 17, 1965. T. S. FERNANDO, J.—

The respondent to this appeal was charged in the Magistrate’s Court with the offence of possession of an excisable article, to wit, 1 gallon and 4 drams of fermented toddy, without a pass or permit from the proper authority, in contravention of section 17 of the Excise Ordinance and punishable under section 46 thereof.

The case did not proceed to the stage of trial. It was admitted before the learned Magistrate that the liquid in question had not been forwarded to the Government Analyst for examination and report. The prosecution apparently relied on other evidence to establish that the liquid claimed to have been found in the possession of the respondent was an excisable article, viz., fermented toddy. That other evidence was apparently the evidence of an Excise Inspector who claimed to have more than ten years’ experience in the detection of excise offences relating to fermented toddy and to possess the practical knowledge that qualified him as an expert on the question as to which the Magistrate had to form an opinion, viz., whether the liquid claimed to have been found in the possession of the accused was fermented toddy. The learned Magistrate, considering himself bound by the decision of this Court in

*Mitradasa Fernando v. Sub-Inspector of Police, Kalubovila*¹, although there were other decisions which had taken a contrary view, purported to acquit the respondent without taking the evidence of the prosecution.

In *Mitradasa Fernando's case* (supra) the charge was one of possession of unlawfully manufactured liquor, and the prosecution relied on the evidence of a Sub-Inspector of Police who claimed to be an expert who had undergone a special course of training in the Excise Department to identify excisable articles. Basnayake C.J. held that the evidence of the Sub-Inspector was not relevant to the charge unless he came within the class of persons contemplated as experts in section 45 of the Evidence Ordinance. He went on to hold that the evidence did not show that the Sub-Inspector was specially skilled in any science or art which qualified him, as in the case of the Government Analyst, to express an opinion on the question whether the liquor seized was Government arrack or unlawfully manufactured arrack.

For several years the Excise Department, in establishing that particular liquor seized is an excisable article, has been relying on and the Courts have often accepted the evidence of officers, irrespective of the Department to which they belong, who have satisfied such Courts of their experience and capacity to distinguish between various kinds of liquor. I do not propose on this appeal to refer to the two cases cited to the learned Magistrate or to other cases decided by this Court where a view different to that formed by Basnayake C.J. has been expressed on this very point. It is sufficient to observe that no previously decided case appears to have been brought to the notice of the learned Chief Justice. Instead, I think it is opportune to quote from a decision of the Privy Council (brought to my notice by Mr. Pullenayegum) in the West African case of *Said Ajami v. Comptroller of Customs*². In that case Their Lordships of the Judicial Committee were called upon to consider whether a bank manager who had been engaged in banking business in Nigeria for 24 years and had in the course of his business kept in touch with current law and practice with regard to notes that were legal tender in French West Africa was a person "specially skilled" on a point of foreign law so as to render him an expert within the meaning of the Evidence Ordinance of Nigeria. (Section 56 of that Ordinance is in the material respects similar to section 45 of our Evidence Ordinance—Cap. 14). In tendering their advice to Her Majesty, Mr. L. M. D. de Silva stated in the report of the Board as follows:—

"The Ordinance enacts that the evidence of a person "specially skilled" on a point of foreign law is admissible as expert evidence. The knowledge which entitles a person to be deemed "specially skilled" on some points of foreign law may, in Their Lordships' opinion, be gained in appropriate circumstances by a person whose profession is not that of the law."

¹ (1961) 63 N. L. R. 422.

² (1954) 1 W. L. R. 1405.

According to Their Lordships, a principle which emerged from a consideration of relevant cases is that not only the general nature, but also the precise character of the question upon which expert evidence is required, has to be taken into account when deciding whether the qualifications of a person entitled him to be regarded as a competent expert. So the practical knowledge of a person who is not a lawyer may be sufficient in certain cases to qualify him as a competent expert on a question of foreign law. Analogously the training, practical knowledge and experience of a person who is not a professional analyst may be sufficient in certain cases to qualify him as a competent expert on the question of examination or analysis of a substance, a question of science which, I take it, was the question in the case before the learned Magistrate here. I therefore think the Magistrate should not have refused to hear the evidence of the Excise Inspector and any other evidence that the prosecution proposed to lead before him.

The acquittal is set aside and, when the record is received back in the Magistrate's Court, the Magistrate will take the evidence for the prosecution and proceed thereafter according to law.

Acquittal set aside.

