

1905.
April 11.

THE KING v. SILVA.

D. C., Kalutara, 1,572.

Arrack—Ordinance No. 10 of 1844, s. 7—Leaving distilled spirits in a part of the distillery other than store.

Where a renter sent his agent to buy arrack of a distiller and the agent went to the distillery, had his cask filled on a Saturday evening, and went away saying he would obtain a permit of removal and come back for the cask, but did not return as he fell ill and died, and where the excise officer, visiting the store on Monday thirty-six hours after the sale, prosecuted the distiller for leaving 80 gallons of distilled spirits in a part of the distillery other than the store—

Held, that the case was not taken out of the scope of section 7 of the Ordinance No. 10 of 1844, as property in possession of the renter under section 32, and that the distiller was liable to the penalty provided in section 7.

THE accused, being a licensed distiller and the manager of his business as such distiller, was charged with leaving on 24th October, 1904, 80 gallons and 9 gills of distilled spirits in a part of the distillery other than the store or secure house constructed on the premises, and thereby committed an offence punishable under section 7 of Ordinance No. 10 of 1844.

After hearing evidence the District Judge (Mr. Brodhurst) found as follows:—

“ The arrack in question, some 80 gallons, was found in a cask in the accused’s distillery outside the store. The accused alleges, and I see no reason to doubt the correctness of his statement, that he is under agreement to supply his arrack to Mr. A. N. Silva, an arrack renter in Colombo, and that this arrack had been measured out and poured into Mr. A. N. Silva’s cask and handed over to his agents. The agents then went away leaving the arrack in the distillery, intending to get a permit in due course and remove the arrack. It is argued for the defence that the ownership and possession of the arrack had passed to the purchaser, who is a renter, and who might lawfully possess the arrack under section 32 of the Ordinance.

“ The Ordinance (section 7) does not appear to contemplate possession of arrack by some other person in a distillery. It provides that any spirits found in the distillery outside the store shall be forfeited, unless the same shall be lawfully possessed by “ him,” i.e., the distiller, rectifier, or compounder.

“ The plain question seems to be, Did the accused allow the arrack to remain in his premises and outside his store for an unnecessarily long time ?

“ The arrack was measured on a Saturday evening, and no permit for removal could be obtained until the following Monday. The arrack remained outside the store over the Sunday and was seized on the Monday. I am of opinion that the accused should not have allowed the arrack to be measured on a Saturday evening, or, if he did allow it, he should have locked up the arrack in his store until the permit for removal was brought. I find nothing in the case to show that it was necessary to leave the arrack outside the store for some thirty-six hours. It does not appear from the evidence that it is actually necessary to leave the arrack outside at all pending the production of the permit, though it may be the custom to do so. The arrack has to be measured in the store, and there seems to be no reason why the cask should not be filled in the store and brought out when the permit is produced.

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“ I find the accused Anthonis Silva guilty of leaving 80 gallons 9 gills of arrack in his distillery in a place other than the store, in breach of section 7 of Ordinance No. 10 of 1844, and I sentence him to pay a fine of Rs. 100, and I order the arrack to be confiscated.”

The accused appealed.

The case was argued on 5th April, 1905.

Walter Pereira, K.C., for appellant.

Rámanáthan, S.-G., for respondent.

Cur. adv. vult.

11th April, 1905. MONCREIFF, J.—

The appellant is a distiller. On the evening of Saturday, the 22nd day of October, 1904, one Silva, who is a renter, sent his agents to the distillery with a cask belonging to him to be filled with arrack. The renter had advanced to the distiller Rs. 4,000 and in consideration of that sum the distiller, as on other occasions, complied with his request and filled his cask with arrack. The renter's agents then went away, saying that they would obtain a permit to remove the cask. Pedro Silva, one of the agents, fell ill, went to Colombo, and died; and on Monday, the 24th October, thirty-six hours after the arrack was poured into the cask, the excise officer came upon the scene. This prosecution ensued, and the distiller, who appeals, was under section 7 of Ordinance No. 10 of 1844 fined Rs. 100 and the arrack was confiscated. The conviction clearly comes within section 7, unless the case is taken out of the operation of the section by virtue of the exceptions specified therein. Of course a reasonable time must be allowed for the removal of arrack after it is poured into the purchaser's cask, but in this case I agree with the District Judge that the delay was

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something more than reasonable. The parties must have been aware that a permit could not be obtained before Monday morning. The section, however, does not apply where the spirits in question are lawfully possessed by the distiller under any of the provisions of the Ordinance.

Mr. Pereira contended that the case was taken out of the section by virtue of possession under section 32, because the spirit had been sold to the purchaser in whose possession it was found. The argument is that property passed to the renter when the arrack was poured into his cask, and that on his leaving the cask in the distiller's premises the distiller's possession of the cask was in law the possession of the renter who had bought it. I think, however, that to adopt that view it would be necessary to put an undue strain upon the terms of the 32nd section.

In view of the fact that the course pursued was said to be in accordance with the practice of distillers, the Solicitor-General expressed an opinion that the case might be met by a nominal fine. On the strength of that opinion I substitute a fine of Rs. 10 for the fine inflicted by the District Judge. I do not appear to have power to set aside the forfeiture of the arrack, which is the property of the renter.

