

1935

*Present: Drieberg J.*MENDIS *v.* KAITHAN APPU.990—*P. C. Gampaha, 31,713.*

Charge—Conviction under Excise Ordinance—Failure to set out particulars of Excise Notification—Fatal irregularity.

Failure to set out in a charge under the Excise Ordinance the section of the Ordinance and the notification for breach of which the accused was charged is a fatal irregularity.

A PPEAL from a conviction by the Police Magistrate of Gampaha.

J. R. Jayewardene, for accused, appellant.

Pulle, C. C., for complainant, respondent.

February 25, 1935. DRIEBERG J.—

This appeal was partly argued before me on December 20 last. The hearing was adjourned as Mr. Pulle desired time for the consideration of the point raised. The vacation and my taking the Assize Court prevented the hearing being resumed earlier. The charge against the appellant is based on the acceptance by him of a packet containing a large quantity of ganja sent to him by post.

He was tried and convicted on a charge of possessing an excisable article, to wit, seven pounds of ganja, without a licence, in breach of section 16 (3) of the Excise Ordinance, No. 8 of 1912, thereby committing

an offence punishable under section 43 (a) of that Ordinance. Section 16 (3) does not make the possession of ganja an offence but empowers the Governor by notification to prohibit the possession, by any person or class of persons, of an excisable article such as ganja either throughout the whole Island or in any local area, absolutely or subject to prescribed conditions.

By Excise Notification No. 46 published in the *Government Gazette* of May 7, 1915, His Excellency the Governor in Executive Council absolutely prohibited throughout the whole Island the possession of ganja, every admixture and preparation of it and every intoxicating drink or substance prepared from any part of the hemp plant (*Cannabis sativa or indica*). I notice that this notification was not under the powers conferred by section 16 (3), but under section 55 which deals with medicated articles containing ganja. It is not necessary, however, to consider this proclamation, for it is contended for the appellant that the conviction cannot stand for section 16 (3) under which he has been convicted creates no offence of the possession of ganja. This is so, and the only question is whether I shall allow a retrial or set aside the conviction. This is a question which is often before the Court and Mr. Jayewardene has referred me to several cases in which this Court has declined to order a retrial. I need only refer to the most recent of them, *Marambe v. Kiriappa*¹, where Sir P. J. Macdonell C.J. said that to send a case back for retrial in such circumstances as these would encourage slackness and inexactitude on the part of the prosecutors. Mr. Palle asked that an exception be made in this case in view of the gravity of the offence. The quantity of ganja is no doubt great. But the more serious the case the stronger is the call for care and precision in bringing it before the Court.

The appeal is allowed; the conviction is set aside and the appellant acquitted.

Set aside.

