

Present: Schneider J.

1924.

SINNETAMBY *v.* RAMALINGAM *et al.*

436—P. C. Anuradhapura, 55,424.

Excise Ordinance—Unlawful transport of arrack—Confiscation of motor car—Notice to owner—Ordinance No. 8 of 1912, ss. 51 and 52.

Where, on the commission of an offence under the Excise Ordinance, an order of confiscation is made under section 51 of the Ordinance, the owner of the thing confiscated should be given an opportunity of being heard against the order; where the owner himself is not convicted of the offence, no order of confiscation should be made against the owner, unless he is implicated in the offence which renders the thing liable to confiscation.

A PPEAL from an order of the Police Magistrate of Anuradhapura confiscating the motor car belonging to one Chelliah, the renter of the arrack rent of the Eastern Province. During the absence of Chelliah, the driver of the car and one Ramalingam, an employee of Chelliah, were charged and convicted of having transported arrack in the car in breach of section 12 of the Excise Ordinance. The learned Police Magistrate thereupon ordered the confiscation of the car. In appeal the case was sent back in order that Chelliah might be given notice before the order of confiscation is made. When the case went back, the Magistrate after issuing notice on Chelliah and hearing the evidence produced by him made order confiscating the car, unless Chelliah paid a fine of Rs. 200. From this order the present appeal was brought.

H. V. Perera (with him *Spencer Rajaratnam*), for appellant.

Illangakoon, C.C., for respondent.

September 8, 1924. SCHNEIDER J.—

One Chelliah was the renter of the arrack rent of the Eastern Province. The evidence proves that he owned a car which was used in connection with the working of the rent. There is room in the evidence to suppose that the car had been sometimes used for transporting arrack. During the absence of Chelliah, Ponniah, the manager of his rent at Trincomalee, is said to have dispatched some arrack in the car. Besides the driver of the car, the only other person in it was one Ramalingam who was also an employee of Chelliah. The car broke down in the neighbourhood of Mihintale, and the discovery was then made by some Government official that the arrack was being transported without a permit. The evidence

1924.

SCHNEIDER
J.

Sinnelamby
v.
Ramalingam

seemed to suggest that the arrack was being conveyed to some area in the Northern Province, where the sale of arrack is not permitted. The driver of the car and Ramalingam were then charged, and were convicted of having transported the arrack in breach of section 12 of the Excise Ordinance, No. 8 of 1912, and were punished under section 43 (a) of that Ordinance. The Magistrate also ordered the confiscation of the car. He did this under the provisions of section 52 (1) of that Ordinance. Chelliah was no party to the proceedings which resulted in the conviction of his chauffeur and servant Ramalingam. He appealed. The case was sent back by this Court in order that Chelliah might be noticed before the order confiscating the car was made. Sampayo J. who decided the appeal pointed out in his judgment that, although there was no procedure laid down in the Excise Ordinance as to how the order of confiscation is to be made, in his opinion, the owner of a car or other conveyance should have some sort of notice. He stated in his judgment: "The Magistrate is given a discretion by section 52 either to confiscate the car or conveyance, or to require the owner to pay a fine. It stands to reason that the owner, if he were present on the occasion when the question of confiscation was being considered, might show cause which would induce the Court to award a fine instead of making the serious order of confiscation, especially in the case of such a valuable vehicle as a motor car." There is one passage in his judgment which appears to suggest that he was sending the case back to the Magistrate only in order that the question of an option of fine might be considered. When the case went back to the Magistrate, notice was issued on Chelliah and evidence produced by him was heard by the Magistrate. Upon that evidence the Magistrate came to the conclusion that it was proved that Chelliah was absent, being in Jaffna, at the time the arrack was dispatched from Trincomalee. He drew the inference that Chelliah was not altogether innocent in regard to the transport of the arrack, because Chelliah admitted that Ponniah and Ramalingam were both in his employment even at the time he gave evidence before the Magistrate. The Magistrate then made order that the car should be confiscated unless Chelliah paid a fine of Rs. 200 by the 3rd of July last. From this order Chelliah has now appealed. The learned Magistrate's order would be unimpeachable if there was evidence to support his finding that Chelliah was not altogether innocent in regard to the offence committed by his servants. It seems to me that the evidence is altogether insufficient to support the finding that Chelliah was in any manner concerned with the transport of the arrack in his car. Chelliah produced a post card which is in Tamil, and of which there is no translation. He told the Magistrate that in that post card he had informed his manager that he was going to get some spare parts for his car, and asked him not to use it in the meanwhile. This post card

appears, from the Post Office stamp on it, to have been dispatched from the Jaffna Post Office and to have been received at the Trincomalee Post Office. The date is indistinct. It would appear, therefore, that the evidence rather points to the innocence of Chelliah than to any complicity on his part with the unlawful act of his servants. For the purpose of deciding this appeal, it is necessary to consider the position of the owner of any of the things which are mentioned in section 51 as liable to confiscation in those cases, where the owner himself is not convicted of any offence. Sections 51 and 52 contain no express provision by which the owner could be touched with notice before an order of confiscation is made. In the special case contemplated in section 52 (2), it is provided that any person claiming to be owner is to be heard. Our Excise Ordinance was borrowed from the Bengal Excise and Licencing Act (VII. B. C. of 1878). Mr. Perera who appeared for the appellant in this appeal drew my attention to the case of *Golap Saha v. Emperor*.¹ In that case it was held that the boat in which the excisable article was carried should not be confiscated under the provisions of section 75 of the Bengal Act (which corresponds to section 52 of our Ordinance) unless it is found that the owner of the boat was in some way implicated in the offence. The learned Judges who decided that case said in their judgments that although the section empowers the Court to confiscate the boat, yet, as a matter of sound judicial discretion, such an order should not be passed in the absence of the owner of the boat. If I may say so with all respect, I approve the principle to be deduced from that case, which is that before an order of confiscation is made, the owner should be given an opportunity of being heard, and that an order of confiscation should not be made, unless the owner is in some way implicated in the offence which renders the thing liable to confiscation.

I would, therefore, set aside the Magistrate's order that the car should be confiscated, and direct that the car be delivered to Chelliah.

Set aside.

1924.

SCHNEIDER
J.

Sinnelamby
v.
Ramalingam