1965 *Present :* **Manicavasagar, J.**

THE SOLICITOR-GENERAL, Appellant, *and* W. M. PODISIRA, Respondent

S. C. 189/65—M. C. Badulla, 4,543

Excise Ordinance—Charge of unlawful sale of an excisable article—Evidence of expert—Burden of proof as to whether a witness is an expert and as to identity of excisable article.

In a prosecution for unlawful sale of an excisable article, namely, Government arrack, the Preventive Officer, who identified the article as Government arrack, made the following statement to establish his qualification as an expert :—" I have been in Service for the last 7 years. I had undergone special training to identify excisable articles. "

Held, that the evidence was not sufficient to prove that the witness was an expert. The burden lay on the prosecutor to elicit relevant material on this matter. Further, it was the duty of the Court to satisfy itself that the witness was specially skilled on the subject on which he was called to testify.

In order to prove the identity of the excisable article, the prosecutor relied on the following evidence of the Preventive Officer :—" I examined the contents of the bottle. . . . I am of opinion that it contained Government arrack. "

Held, that the evidence was not sufficient to identify the excisable article. Here again the burden was on the prosecutor to elicit the facts on which the witness based his opinion ; if he had not done so, it was the right and the duty of the Magistrate to question the witness. The Court ought not to act on the nude opinion of an expert.

APPEAL from a judgment of the Magistrate's Court, Badulla.

V. S. A. Pullenayegum, Crown Counsel, for Complainant-Appellant.

No appearance for Accused Respondent.

Cur. adv. vult.

August 27, 1965. MANICAVASAGAR, J.—

The accused-respondent was acquitted at the conclusion of the trial on the charge of selling an excisable article, namely, Government arrack, without a licence from the Government Agent, Badulla District, to Police Constable 549 Ayupala. The Magistrate in his judgment said that Gurudevan, the Preventive Officer, who identified the article as Government arrack did not give any reasons as to how he came by his opinion. The Solicitor-General appeals from the order of the Magistrate.

The accused-respondent was not present at the hearing, nor was he represented.

Mr. Pullenayegum for the appellant contended that the Magistrate should have accepted the opinion of the Preventive Officer, once he had satisfied himself that he was competent to testify as an expert, unless his opinion had been demonstrated to be unreliable. In this case he submits that the Magistrate had regarded the witness as an expert, and not a question was put to him either in cross-examination or by the Magistrate in regard to the opinion he had expressed ; in this state of the evidence he argued that the Magistrate should have accepted the opinion of the witness though he had not given any reasons for his view.

Two questions arise in my opinion for determination. Is the witness an expert ? In other words, has he a specialised knowledge on the matter he was called upon to testify by reason of special study and experience ? The Magistrate has not expressed a direct opinion in regard to this, but it is implicit in his judgment that he regarded him as an expert. If I was hearing this case I would have probed further into the competency of the witness as an expert before I regarded his evidence as that of a person specially skilled on the subject. I think it is not sufficient to say " I have been in Service for the last 7 years. I had undergone special training to identify excisable articles." The witness should have been questioned in regard to his experience, the special skill which he claimed to have acquired, the number of instances where he had given his opinion as an expert in Court or elsewhere, the number of cases and the period during which he had testified in Court, and whether there were any cases where his opinion had not been accepted. The burden lay on the prosecutor to elicit relevant material on this matter in order to satisfy the Court that he is what the prosecutor represents him to be ; this, however, does not exclude the duty cast on the Court to satisfy itself that the witness is specially skilled on the subject on which he is called to testify. Though this particular matter was not argued at the hearing of this appeal, I am of the view that the Magistrate should have satisfied himself on this aspect of the matter before he embarked on a consideration of the question whether the evidence of the witness on the identity of the excisable article should be accepted or rejected The evidence that has been recorded on this question is not sufficient to hold that the witness is an expert.

In regard to the issue on which Counsel for the Crown made his submission, I am unable to accept his argument that the opinion of an expert should be accepted, though he has not given the reasons therefor, unless the Court is of the view that his evidence cannot be relied upon. In this case the witness stated, "I examined the contents of the bottle .....I am of opinion that it contained Government arrack." I certainly think this will not suffice ; the Court must be satisfied that the contents were Government arrack and ought not to act on the nude opinion of an expert ; his evidence should be tested by questions as to the opinion he had expressed ; here again the burden is on the prosecutor to elicit the facts on which the witness has based his opinion ; if he had not done so, it is the right and the duty of the Magistrate to question him, because it is he who has to be satisfied. Mr. Pullenayegum submits, "Well, all that a witness if questioned further would say is that he identified the contents to be Government arrack by its smell, taste and colour, and no one woud be any the wiser by questioning him any further in regard to these matters." It is not for me to anticipate what questions may be put to the witness in cross-examination or by the Court on these matters, and I would not be so bold as to say that no useful purpose would be served by questioning the witness on these matters. Crown Counsel's submission is tantamount to saying that the bare opinion of an expert should be accepted without question ; if this view be right, and I certainly do not accept it, the Court would be surrendering its fundamental duty of satisfying itself on a matter of which the burden of proof lies on the prosecutor.

On the evidence that is before me, my judgment is that the appeal should be dismissed. I have given thought to the question whether I should send the case back for a fresh trial, but on reflection I have decided against taking that course.

Appeal dismissed.