

1928.

Present : Lyall Grant J.

HOLSINGER v. JOSEPH.

553—P. C. Colombo, 3,493.

Excise Ordinance—Charge of possessing ganja—Tin of legium found in premises of accused—Sealing of tin after seizure—Production in evidence.

Where in a search under the Excise Ordinance, a tin of legium alleged to contain ganja was found in the premises of the accused by an Excise Inspector, who removed the tin to the Police Station and had it sealed, before it was sent to the Public Analyst for examination.—

Held, that it was duty of the Excise Inspector to have the tin sealed in the presence of the accused immediately after seizure.

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

Talaiaingham, for appellant.

September 27, 1929. LYALL GRANT J.—

The accused in this case was convicted of selling an excisable article, ganja, in breach of section 17 of the Excise Ordinance, No. 8 of 1912, read with Excise Notification No. 46 published in the *Ceylon Government Gazette* No. 6,712 of May, 1915, and also of at the same time and place possessing an excisable article, to wit, ganja, in breach of section 16 of the said Ordinance read with Notification No. 26 published in the *Ceylon Government Gazette* No. 6,606 of February, 1914, and of thereby having committed offences punishable under section 43 (b) and 43 (a) of the Excise Ordinance, No. 8 of 1912.

The case for the prosecution was that on the Excise Inspector receiving information that ganja was being sold in a certain street he sent a person with a marked 25 cents coin to buy ganja from the place to be pointed out. When the Excise Inspector followed, the decoy gave him legium wrapped in a plantain leaf and told him that the accused had sold it to him. The Inspector goes on to say that he searched and found a tin containing legium under the counter and he found the 25 cents in the accused's money drawer. The accused was a boutique-keeper, and the legium was sent to the Government Analyst and found to contain ganja. The decoy was also called but denied the whole story. The Excise guard was called and corroborated the Inspector's evidence. The accused was convicted and fined Rs. 150 or in default to undergo 6 weeks' rigorous imprisonment.

Objection has been taken that the procedure adopted by the Excise Inspector is wrong inasmuch as he entered and searched the boutique and arrested the accused illegally. It is urged that the powers of search and of arrest were given to him under section 36 of the Excise Ordinance, and that section 36 only conferred those powers on an officer who had previously recorded the grounds of his belief that an offence had been committed before proceeding to make the search, seizure, and arrest. In this case the Excise Inspector has admitted that he made the entry in his book after the arrest and that he had no search warrant. In *Zilva v. Sinno*¹ it was held by a Bench of two Judges that the powers of an Excise Inspector to search a house for excisable articles is dependent upon his having made a record of the grounds of his belief as to the necessity of a search, as is provided by section 36 of the Ordinance.

The circumstances of that case were that the Excise Inspector was obstructed and a prosecution was brought for obstruction, and the decision was that the obstruction was not an offence because the act of search was not an official act. It seems to me that the remark made by Mr. Justice Pereira in that case are applicable to this case. Mr. Justice Pereira says that "Crown Counsel argued that under section 114 of the Evidence Ordinance the Court should presume that such a record was made, because that section enacts that the Court may presume that judicial and official acts have been regularly performed. This, if I might say so, is tantamount to begging the question. It assumes that the act of search was an official act. It does not become so until the record referred to has been made. It is that record that vests in an excise officer the authority to search. Until he makes that, he has no more authority in that direction than any ordinary individual." It is clear, therefore, that the Excise Inspector had no authority to search or seize the article, but it does not follow that a conviction cannot be based upon evidence admittedly the result of an illegal procedure. But another objection has been taken to the conviction on a ground which has also been decided by this Court. The Inspector admits that the tin which he alleged he found in the boutique containing legium was not sealed until he reached the Police Station. A similar case was decided by my brother Jayawardene on September 14, 1926.² In that case my brother said: "I do not say that in this case the Excise Inspector had introduced the ganja into the medicine that was found in the accused's dispensary, but it was possible for such an introduction to have taken place, and in cases of this kind we have to see that whatever is found in the accused's possession is not tampered with before it is analysed by the Government Analyst. The stuff containing ganja was taken from the accused's house to the Police Station, and at the Police Station

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Joseph¹ 17 N. L. R. 473.² S. C. No. 580, P. C. Col. 22,098, vide S. C. Minutes of September 14, 1926.

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the tins were sealed—(that is the case in this case also)—I do not think that the procedure is satisfactory. They should have been sealed, and sealed as soon as they were seized by the Excise Inspector. I think the failure to seal them entitles the accused to take the objection that the ganja might have been introduced between the seizure in the dispensary and its sealing at the Police Station. I have had to deal with the question of sealing of articles found in the possession of the accused persons before, and I think it is necessary to deal with this case in the way I am dealing with it in order to compel Excise Inspectors to see that the stuff seized is sealed in the presence of the accused and before it is removed.”

In that case the appeal was allowed, and I think I ought to follow the line taken by this Court and to quash the conviction in this case on this ground.

The appeal is allowed and the accused acquitted.

Set aside.

