

1896.
September 8.

HETUHAMY v. MUDELIHAMY *et al.*

P. C., Kégalla, No. 15,754.

The Village Communities' Ordinance, 1889, s. 6—Rules by inhabitants of division within the operation of the Ordinance—Possessing or drawing toddy—Illicit sale of arrack.

It is *ultra vires* of the inhabitants of a local district brought within the operation of the Village Communities' Ordinance to make a rule to the effect that "any person possessing or drawing fermented toddy "without a license, or illicitly selling arrack, shall be guilty of an offence."

THE facts of the case appear in the judgment of BONSER, C.J.

Bawa, for appellant.

8th September, 1896. BONSER, C.J.—

In this case the Police Magistrate has declined to exercise jurisdiction on the ground that the case is one within the exclusive jurisdiction of a Gaṅsabháwa court. The complaint was in the following terms :—

"That the second defendant did on the 16th day of July, 1896, unlawfully, for some other purpose than the purpose mentioned in the section 39 of Ordinance No. 10 of 1844, at Kabbunkaduwa, draw 15 gills of fermented toddy from a kitul tree standing on the land called Hitinawatta, which belongs to the first defendant; and that the first defendant did cause the same to be drawn without first obtaining a license for that purpose from the Government Agent of the Province, or from the licensed retail dealer of the district, within which such palm was situated, contrary to the provisions of the Ordinance No. 10 of 1844, and in breach of sections 40 and 46 of such Ordinance."

The first observation I would make is, that this appears to charge the accused with an offence which is physically impossible. Toddy cannot be drawn from a tree in a state of fermentation. The juice must stand for some time, and then it ferments. The Magistrate issued sommons upon this complaint. When the defendant appeared before him he refused to proceed with the case, because it was stated that a rule had been made under the Village Communities' Ordinance, of which the conduct of the defendants was a breach. The rule is No. 105, published in the *Government Gazette* of 14th December, 1888. It was made under section 6 of the now repealed Ordinance No. 26 of 1871, the rules under which were expressly kept alive by Ordinance No. 24 of 1889, which repealed that Ordinance.

The rule is in the following terms : " Any person possessing or drawing fermented toddy without a license, or illicitly selling arrack, shall be guilty of an offence."

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I am of opinion that the rule was *ultra vires*. Section 6 of Ordinance No. 24 of 1889 enumerates a large number of matters, on which it authorizes the inhabitants of a locality to make rules, which when made and approved by the Governor in Executive Council are to take effect. But there is nothing which gives colour to or supports rule 105. The only clause which deals with toddy drawing is clause 9, which empowers the making of rules " for the prevention of accidents connected with toddy drawing, and the periodical inspection of the ropes and other appliances used." By no stretch of imagination can this rule be brought within that clause. Again, section 28 of the Village Communities' Ordinance of 1889 expressly provides that no case, civil or criminal, which is instituted for the protection of the revenue, is to be brought before a village tribunal.

The present case appears to me to be peculiarly one brought for the protection of the revenue, and therefore expressly forbidden to be brought in a Gaṅsabhāwa court. Then there is another objection to this order. The offence charged is one which is already an offence under Ordinance No. 10 of 1844, and in my opinion it is not competent for the inhabitants of any local district under the provisions of the Village Communities' Ordinance to take that which is already an offence, and convert it into an offence within the sole and exclusive jurisdiction of their own tribunal.

For these reasons I am of opinion that the Police Magistrate was wrong in referring the case to the village tribunal.

WITHERS, J.—

I agree. This case first came before me sitting alone. Though I then entertained very much the same opinion as the Chief Justice has just expressed, I thought it better that it should come up before two Judges of this Court. I would observe in this connection that it is no longer an offence to draw toddy without a license. The offence consists in drawing it, and omitting to take necessary precaution to prevent the toddy intended to be drawn from fermenting—section 47 of Ordinance No. 10 of 1844.