

1936

*Present : Abrahams C.J.*

ROSEMALECOCQ *v.* KALUWA.

430—*P. C. Matale, 16,521.*

*Misjoinder of charges—Illegality of trial—Acquittal of accused ineffective—Appropriate order to be made—Order of discharge.*

Where two persons were charged together, the one with manufacturing toddy without a licence in breach of section 14 (a) of the Excise Ordinance and the other with failing to give information of the illicit manufacture of fermented toddy on a land in breach of section 40 of the Excise Ordinance,—

*Held*, that the joinder of the two charges in one trial was illegal.

In such a case an appropriate order to be made would be to set aside the conviction and discharge the accused, which is the only alternative course to ordering a retrial.

*Mendis v. Kaithan Appu* (37 N. L. R. 285) and *Marambe v. Kiriappu* (2 C. L. W. 122) referred to.

**A** PPEAL from a conviction by the Police Magistrate of Matale.

*Cyril E. S. Perera* (with him *G. E. Chitty*), for accused, appellant.

*M. F. S. Pulle, C.C.*, for complainant, respondent.

November 4, 1936. ABRAHAMS C.J.—

The appellant was charged with manufacturing fermented toddy without a licence in breach of section 14 (a) of the Excise Ordinance, No. 8 of 1912. He was convicted and sentenced to a fine of Rs. 35, or in default one month's rigorous imprisonment. He was tried together with another man against whom the charge was laid as follows:—

“In the alternative the second accused being the tenant or under-tenant of the land called Pansalakumburewatta did fail to give information of the illicit manufacture of fermented toddy on the said land by Deewillalegedera Kaluwa in breach of section 40 of the Excise Ordinance, No. 8 of 1912, and thereby committed an offence punishable under section 43 (b) or 47 of the Excise Ordinance, No. 8 of 1912.”

What the Excise Inspector who presented these charges meant by “In the alternative”, I do not know and cannot fathom. I understand the Excise Department manages its own prosecutions, and if Government departments follow such a practice, without getting legal advice as to the form and validity of the charges they present, they must expect to make technical errors and to encourage convicted persons to appeal to the increase of work of the Supreme Court, which has so happened here since the appellant objects that these two charges could not be validly joined together and therefore that the trial was illegal.

I agree with the submission that the trial was illegal, and indeed Counsel for the Crown does not contest the point. It was also submitted for the appellant that the evidence does not support the conviction, but since the trial is invalid it will be useless for me to go into the facts.

The question now for my decision is what will be the appropriate order to make. Counsel for the appellant submits that it will be unfair to order a new trial. Counsel for the Crown, on the other hand, urges that these violations of the Excise laws ought to be punished and asks that a new trial should be ordered. I can no doubt order a new trial. On the other hand, if I do not make any order for a new trial, can I prevent the prosecution of the appellant on the same facts? If I have the power to make an order of acquittal, that would prevent the appellant being put upon his trial again. Counsel for the appellant argues that I can make an order of acquittal. He cites to me the case of *Mendis v. Kaithan Appuhamy*<sup>1</sup> where Driberg J., following Macdonell C.J. in *Marambe v. Kiriappu*<sup>2</sup> allowed an appeal and acquitted the appellant on the ground that to send the case back for retrial in such circumstances as those which existed in the case in question would encourage slackness and inexactitude on the part of prosecutors. I have not examined either of those cases very closely, because if the learned Judges who tried those cases are to be taken to have implied that an Appellate Court would acquit in a case

<sup>1</sup> 37 N. L. R. 285.

<sup>2</sup> 2 C. L. W. 122.

where a trial was void I should respectfully differ from them as, in my opinion, any illegal trial is no trial at all, and, therefore, an acquittal either by the trial Court or an Appellate Court would be ineffective. See the cases of *Rami Reddi and Seshu Reddi*<sup>1</sup> and *Emperor v. Jethalal Hurlochand*<sup>2</sup>. It seems to me, however, that both in the case of *Mendis v. Kaithan Appuhamy* (*supra*), and that of *Marambe v. Kiriappu* (*supra*), the trial was only defective and not necessarily illegal.

Without saying that in no circumstances ought a Court of Appeal to order a new trial where it sets aside a conviction on the ground that the trial was bad, in this instance I do not propose to offer any comments on the merits of a case which has not been legally tried and I set aside the conviction and order the appellant to be discharged, which is the only alternative course to ordering a retrial which is open to me.

*Set aside.*

