1935 *Present :* **Maartensz J.**

ALWIS *v.* ARALISHAMY

1,104—P. C. Matara, 3,054.

Excise Ordinance—Charges of drawing toddy without a licence and of failing to give information of offence—Misjoinder of charges—Proof of intention in latter charge—Ordinance No. 8 of 1912, ss. 43 and 47.

Where two persons were charged together, the one with drawing sweet toddy from coconut trees without a licence, and the other with, being owner of the land, having failed to give information of the offence to the proper authorities,—

Held, that they cannot be tried together in the same proceedings.

Held, further, that in the case of the latter charge there must be proof that failure to give information was intentional.

APPEAL from a conviction by the Police Magistrate of Matara.

L. A. Rajapakse, for the second accused, appellant.

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

February 25, 1935. MAARTENSZ J.—

There were two accused in this case. The first accused was charged with tapping and drawing sweet toddy from certain coconut trees without a licence. The second accused was charged with "being the owner of the land Ketakelagahawatta and failing to give information of the same to the proper authorities". The first accused was convicted under section 43 (*d*) and (*e*) and sentenced to pay a fine of Rs. 25. He has not appealed, and I understand that an application for revision made by him has already been refused. The second accused was convicted under the provisions of section 47 and sentenced to pay a fine of Rs. 10. She has appealed on a matter of law, namely, that it has not been proved that she was the owner of the land Ketakelagahawatta and that her failure to give information was intentional.

There is a certain irregularity in these proceedings apart from the matters of law certified to in the petition of appeal to which I think attention should be drawn, as it vitiates the proceedings, and I should have had to consider it in revision if the legal objections could not be sustained. The irregularity is that the two accused were charged and tried together.

Under section 184 of the Criminal Procedure Code two or more persons may be tried together when they were accused of jointly committing the same offence or of committing different offences in the same transaction; or where one of them is accused of committing an offence and the other or others of abetment of or attempt to commit such offence. The two accused in this case were not accused of jointly committing the same offence nor was the second accused charged with abetting or attempting to commit the offence which the first accused is alleged to have committed; and the only ground on which they could possibly have been charged and tried together was that they committed different offences in the same transaction. In my opinion a person who is accused of failing to give notice that another person is or has been committing an offence cannot be said to have committed a different offence in the same transaction, and I hold that the first and the second accused should not have been charged and tried together. It is, however, unnecessary for me to deal with the case in revision as, in my opinion, the legal objections to the conviction stated in the petition of appeal must be sustained. Before the second accused could be convicted of a breach of the provisions of section 40 (*a*) it must be proved that she was the owner of the land on which the excisable article was manufactured, and in view of the provisions of section 47 of the Ordinance which only penalizes an intentional omission, that her failure to comply with its provisions was intentional—that is to say, that she being aware that first accused was manufacturing an excisable article on her land without a licence failed to give notice of the same to one or other of the officials mentioned in the section. The evidence that the second accused was the owner fails, as the Police Headman Haramanis Silva, who was the only witness who deposed to the ownership of the land, has not distinguished between the two accused. His evidence on the point is as follows:—"On September 21 about 7 a.m., I went with David, whom I met, to Ketakelagahawatta belonging to accused". It is not alleged that the land belonged to both accused and the evidence leaves it in doubt whether the land belonged to the first

accused or second accused, and the second accused is entitled to the benefit of the doubt. I must here point out that in several places in the evidence the witnesses refer to "the accused" when obviously they meant to refer to one or other of the accused and not to both.

There is also no evidence direct or indirect that the second accused intentionally failed to give the notice required by section 40.

Direct evidence of an intentional omission cannot as a rule be obtained, but where such evidence is not available facts should be proved from which it could be inferred that the accused knew that the illegal acts were being committed. Such an inference might be drawn from evidence that the accused lived in the immediate vicinity of the place where the offence was committed, that he was closely related to or associated with the person committing the illegal acts, that the illegal acts were being committed for such a length of time that the accused could not but be aware of their commission.

There is no such evidence in this case. In fact I do not think, judging from the evidence in the case, that the prosecutor realized that there must be proof that the second accused intentionally omitted to comply with the provisions of the section for a breach of which she was charged. I am not prepared to give the prosecution a further opportunity of proving the charge against the second accused, and I quash the conviction and acquit her.

Set aside.