

1932

Present : Akbar J.

RODRIGO v. KARUNARATNE.

855—P. C. Balapitiya, 17,513.

*Excise Ordinance—Sale of fermented toddy—Evidence of decoy—Ordinance No. 8 of 1912, s. 3 (12).*

Where, in a charge of selling fermented toddy without a licence, it was proved that a marked coin was found in the accused's possession and the decoy was found with a coconut shell of toddy,—

*Held*, that the evidence of a sale was insufficient.

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

*Rajapakse*, for accused-appellant.—Decoy's alleged statement to Inspector, which he denied at trial, cannot be used as substantive evidence of the facts against the accused. *See Rex v. Silva*<sup>1</sup>.

<sup>1</sup> 30 N. L. R. 193.

There is no proof of a sale or even of a voluntary transfer of the toddy. The accused says the toddy was taken forcibly by the decoy. Therefore, the presumption under section 3 (12) of Excise Ordinance does not arise, and the *onus* is on the prosecution to prove a sale.

*Schokman, C.C.* (with him *Wendt, C.C.*), for the complainant-respondent.—Once the toddy is found with the decoy and the marked money with the accused, the *onus* is on the accused to prove there was no sale or in other words that the transfer of the toddy was a gift. See section 3 (12) of Ordinance and *Lockhart v. Fernando*.<sup>1</sup>

On identical facts the Supreme Court has decided the conviction can be maintained. See 814-815 P. C. *Jaffna, 8,124—S. C. Min. of February 9, 1932.*\*

April 26, 1932. AKBAR J.—

The appellant was charged with selling fermented toddy without a licence and he was fined Rs. 75. According to the evidence a decoy was sent ahead with a marked 50-cent. piece to buy toddy from the accused, who is a toddy contractor. The decoy, however, did not support the prosecution case and the prosecution case was only left with the evidence of the Excise Inspector and of the Police Inspector, neither of whom saw the sale. This being a criminal case, it is incumbent on the prosecution to prove the sale. All that the accepted evidence proves was that the decoy had a coconut shell of toddy in his hand and a pot full of toddy behind a shed and that a marked 50-cent piece was found in the accused's waist. I do not think this is sufficient evidence to prove a sale. Mr. Schokman cited a case of my brother Maartensz, but I regret I am unable to follow this case as an authority. If full effect is given to the case cited, a decoy need not give evidence in an excise case. The very reason why decoys are called to give evidence is because there must be some evidence to prove a sale. The mere fact that a marked coin is found in the accused's possession and the decoy is found with a coconut shell of toddy cannot, I think, in a criminal case be held to be sufficient evidence of a sale. It was for this reason that I postponed the case to enable Mr. Schokman to cite English authorities on the point, but he was unable to do so. I am therefore compelled to set aside the conviction and acquit the accused.

*Appeal allowed.*

\*S. C. 814-815—P. C. *Jaffna, 8,124.*

February 9, 1932. MAARTENSZ A.J.—

Appeal No. 814 is by the accused in this case who was convicted of selling brandy without a licence from the Government Agent, an offence punishable under section 41 (b) of the Excise Ordinance, No. 8 of 1912.

The evidence which the Police Magistrate has believed is that on the day in question, the 29th of May last, one Anjalingam was sent by Excise Inspector Ferdinands with a marked Rs. 5 note and Re. 1 note with instructions to purchase a bottle or a pint of brandy from the accused. Anjalingam went to the accused's house followed by an Excise Guard and later by Excise Inspector Ferdinands and Excise Inspector Guna-sekera. The signal for them to rush in was the flashing of a torch. On seeing the signal they rushed in and found Anjalingam with a bottle of brandy in his hand. In a box in the accused's house was found a bottle of brandy and a pint of brandy. In another small wooden box was found the Rs. 5 note and the Re. 1 note.

<sup>1</sup> 27 N. L. R. 229.

Anjalingam in his evidence before the Police Magistrate denied going to the accused's house at all. This denial appears to be in conflict with a statement which the witness made to Mr. Moses, Justice of the Peace, on June 10. It is unnecessary for me to consider whether this statement to Mr. Moses was admissible in evidence as there is sufficient evidence without the evidence of Anjalingam to establish that the accused sold a bottle of brandy to Anjalingam. That evidence is the evidence of the Excise Inspectors who saw Anjalingam in possession of a bottle of brandy and the marked notes in a box in the accused's possession. But the statement made to the Justice of Peace was admissible in this way, to show that Anjalingam made a different statement to the Justice of the Peace and that therefore his evidence to the Police Magistrate was not worthy of credit so as to make the evidence of the Excise Inspectors unreliable. Apart from that, it is not evidence against the accused. However, as I have said, the evidence which the Police Magistrate has accepted establishes the case against the accused, even if Anjalingam's evidence is eliminated from the record. I accordingly affirm the conviction and sentence passed on the accused.

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