

1954

Present : Swan J.

ANDIYA VIDANE, Appellant, and I. JANSZE (Excise Inspector), Respondent ^d

S. C. 1,077—M. C. Chilaw, 52,026

Excise officer—Power to release on bail an arrested person—Excise Ordinance (Cap. 42), ss. 7, 33 (1), 34, 37—Criminal Procedure Code, ss. 2, 36, 39.

An excise officer is not *prima facie* a peace officer. When he arrests a person without a warrant, under section 34 of the Excise Ordinance, he has no power under section 37 to release that person on bail.

Therefore, when an excise officer takes a bond from a surety in order to secure the arrested person's attendance in court, a Magistrate has no jurisdiction to forfeit that bond if the accused fails to appear.

APPEAL from a judgment of the Magistrate's Court, Chilaw.

G. E. Chitty, with *A. S. Vanigasooriar*, for the surety appellant.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 13, 1954. SWAN J.—

This appeal raises an interesting question, namely whether an Excise Inspector can take from a person whom he has arrested a bond in order to secure his attendance in court and whether a Magistrate can forfeit that bond if the accused fails to appear.

Excise Inspector Jansze of Chilaw had arrested one Devadasan on a charge of possessing an excisable article. He then took a bail bond from Devadasan and the appellant by which Devadasan undertook to

appear and the appellant bound himself as surety to produce Devadasan in court on 23.4.52 to answer the charge against him. The accused failed to appear, and the appellant was noticed to show cause why his bail bond should not be forfeited. Mr. Vanderkoeen appearing for him submitted that the Excise Inspector had no authority to release the accused on bail and that the court had no jurisdiction to forfeit the bond of the surety. The learned Magistrate however overruled the objection and forfeited the bond.

In the course of his order the learned Magistrate observed that the bond was voluntarily given. He also remarked that "most persons arrested would be so happy to get out on bail forthwith that they would not question whether the taking of bail was permitted or not". But neither of these matters is really relevant to the point in issue. It may be that a bond given by an arrested person in circumstances like these could be enforced by the person to whom it was given. The question is whether the Magistrate's Court had jurisdiction to forfeit it.

That the Inspector had the right to arrest the accused without a warrant is beyond question. Section 34 of the Excise Ordinance makes that quite clear. As the offence was bailable the accused was entitled to be released on bail. If Mr. Jansze was a Peace Officer he could have released the accused either on his own bond or on bail. Section 36 of the Criminal Procedure Code provides that a peace officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein mentioned as to bail take or send the person arrested before a Magistrate having jurisdiction in the case, and section 39 provides that no person who has been arrested by a peace officer shall be discharged except on his own bond, or on bail, or under the special order in writing by a Magistrate.

The crux of the question, therefore, is whether an Excise Officer can be equated to a peace officer. In section 2 of the Criminal Procedure Code the expression "peace officer" is said to include Police Officers and Headmen appointed by a Government Agent to perform police duties. In the Excise Ordinance an Excise Officer is stated to mean a Government Agent, Assistant Government Agent or an officer or other person appointed or invested with powers under Section 7. So that an Excise Officer is not *prima facie* a peace officer. We must therefore see whether there is anything in the Excise Ordinance which can be construed as conferring upon Excise Officers the power, authority, rights or obligations of peace officers.

Section 33 (1) of the Excise Ordinance provides :—

"Within such specified area as the Minister by notification may direct any excise officer not below such rank as the Minister may prescribe shall, within the limits of the area to which he is appointed, and as regards all offences under this Ordinance, exercise the powers that may be exercised in respect of cognizable offences by an inquirer, or by an officer in charge of a police station, under the provisions of Chapter XII of the Criminal Procedure Code."

Admittedly no notification has been made under this Section. But the learned Magistrate upon an interpretation of section 37 took the view that an Excise Officer by necessary implication is invested with all the powers of a peace officer. Now Section 37 reads as follows :—

“ The provisions of the Criminal Procedure Code, relating to arrests, searches, search warrants, the production of persons arrested, and the investigation of offences shall be held to be applicable to all action taken in these respects under this Ordinance.”

The learned Magistrate's reasoning is that inasmuch as section 37 of the Excise Ordinance makes the provisions of the Criminal Procedure Code applicable it follows that section 36 of the Criminal Procedure Code which provides for what is to be done to a person arrested must be read in Excise cases to read as if it was “ *an Excise Officer making an arrest without a warrant shall without unnecessary delay and subject to the provisions hereinafter mentioned as to bail take or send the person arrested before the Magistrate having jurisdiction in the case* ”.

I am unable to agree with this view for the simple reason that while section 37 of the Excise Ordinance refers to the production of persons arrested it does not mention the taking of bail or the release of arrested persons on their own bond or on bail.

Mr. Chitty suggests that the legislature apparently did not think it prudent to give Excise Officers the power to release arrested persons on bail. He also points out that in Excise Stations there are no lock-ups so that if an arrested person does not choose to give bail or sign a bond the officer who arrests an offender would not know what to do with him till he is produced in court. In this connection he drew my attention to section 66 of the Police Ordinance which provides that every person taken into custody by a police officer without a warrant shall forthwith be delivered into the custody of the officer in charge of the station *in order that such a person may be secured until he may be brought before a Magistrate to be dealt with according to law*.

There may be something in Mr. Chitty's suggestion but there is no doubt in my mind that inasmuch as section 37 makes no reference at all as to the applicability of the provisions of the Criminal Procedure Code with regard to releasing arrested persons on their own bond or on bail, Excise Officers who arrest persons without a warrant have no power to release them on bail.

The order forfeiting the bond of the appellant is set aside. If the amount forfeited has already been paid it will be refunded.

Appeal allowed.