

1946

Present: de Silva J.

PERERA *et al.*, Appellants, and DHARMARATNE, EXCISE INSPECTOR, Respondent.

490-1—M. C. Colombo, 4,303.

Criminal Procedure—Government Analyst's report as evidence—Duty of Court to summon Government Analyst if either party makes request—Criminal Procedure Code, s. 406 (4).

It is the duty of Court, under section 406 (4) of the Criminal Procedure Code, to summon the Government Analyst if either party to a case makes application that he should be summoned to give evidence with regard to his report.

A PPEALS against two convictions from the Magistrate's Court, Colombo.

L. A. Rajapakse, K.C. (with him *K. C. Nadarajah*), for the accused, appellants.

E. P. Wijetunge, C.C., for the Attorney-General.

May 23, 1946. DE SILVA J.—

In this case the two accused were charged with having manufactured an excisable article, to wit, "Tea Cider" in breach of section 19 (a) of Chapter 42 of the Legislative Enactments read with Excise Notification No. 396 published in *Government Gazette* No. 9,431 of July 13, 1945, (2) with having bottled "Tea Cider" for sale without a licence in breach of section 14 (b) of Chapter 42 of the Legislative Enactments, (3) with having in possession material, utensils and implements for the purpose of manufacturing "Tea Cider" in breach of section 14 (c) of Chapter 42 of the Legislative Enactments and thereby committed an offence punishable under section 14 (a) of Chapter 42 of the Legislative Enactments.

After trial the accused were convicted and the first accused was sentenced to pay a fine of Rs. 1,500.

In the course of the proceedings the Counsel who appeared for the accused made an application that the Analyst should be summoned to

give evidence with regard to his report. On this day the Magistrate made the following order :—

As regards the Analyst I do not consider that his presence is necessary in this case. If accused or his Counsel desired to inspect the report the application should have been made earlier. This case was called on 18.1.46 for Analyst's report. It was called again on 8.2.46 and when it was found that report was filed the case was fixed for trial. I do not think this application should in any event be made on the date of trial. The application for a summons on the Analyst today is disallowed. The trial will proceed.

Thereafter owing to the absence of a material witness the trial was postponed and Counsel renewed his application for summons on the Analyst. This application was also refused by the Magistrate.

Now section 406 of the Criminal Procedure Code which makes the report of the Analyst admissible without the Analyst being called provides that, if either party to the case, requests that the Analyst should be present to give evidence at any particular trial to which the deposition or report may refer such Analyst shall be summoned as a witness for the purpose of giving evidence in the same manner as the other witnesses for the prosecution.

In this case there was no doubt that the accused persons had the right to have the Analyst present in Court to testify to the contents of his report. They made an application to exercise that right. I think it was the duty of the Magistrate to allow the application. I think it is necessary that the Magistrate should remember that not only must justice be done but it must also appear to be done.

In the circumstances I set aside the conviction and sentence and send the case down for trial before another Magistrate.

Retrial ordered.
