

Present: Pereira J. and Ennis J.

1914.

ZILVA v. SINNO.

766 and 767—P. C. Gampola, 5,484/5,485.

Excise Inspector enlisting services of constable to help him to search for excisable articles—Obstruction to constable—Charge of obstructing Excise Inspector—Power of Excise Inspector to search house.

An Excise Inspector may legitimately enlist the services of a police constable to help him in searching a house for excisable articles in any case in which the Inspector himself has the right to search, but when obstruction is offered to the constable in so helping the Excise Inspector, the offender should be charged with obstructing, not the police constable, but the Excise Inspector himself, inasmuch as there is no provision in the Excise Ordinance giving an Excise Inspector any right to give a police constable an order to search a house.

The power of an Excise Inspector to search a house for excisable articles is dependent upon his having made a record of the grounds of his belief as to the necessity of a search, as is provided by section 36 of the Ordinance. In a prosecution for obstructing him in searching a house, the fact of his having made such a record should be affirmatively established by evidence.

THIS case was reserved for argument before a Bench of two Judges by Pereira J.

F. J. de Saram, for the accused, appellant.—There is nothing in the record to show that the search by the Excise Inspector was

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lawful. Section 36 of the Excise Ordinance empowers an Excise Officer to make search without a warrant only after having recorded his grounds for believing that an offence under section 43 or 44 has been, or is being, or is likely to be, committed, and that a search warrant cannot be obtained without affording the offender an opportunity of escape. In this case there is no proof that such a record was made. The search was, therefore, not lawful. *Deen Assen v. Silva*;¹ see also *13 Cal. 199*. It is no part of the duties imposed by law on an Excise Peon to help an Excise Inspector to search a dwelling house for excisable articles. *The Attorney-General v. Silva*.²

The second accused was wrongly convicted of voluntarily obstructing the constable.

S. Obeyesekere, C.C., for the respondent.—There is no evidence one way or the other as to the making of the record as required by section 36. The Court will presume that all official acts have been regularly performed. Evidence Ordinance, section 114. Counsel also cited *10 N. L. R. 18*, *20 Bom. 732*, *Broom's Legal Maxims 739*.

Cur. adv. vult.

October 6, 1914. PEREIRA J.—

In this case the first accused has been convicted under section 183 of the Penal Code of voluntarily obstructing a public officer, to wit, Excise Inspector de Silva, in the discharge of his public functions, and the second accused, under the same section, with voluntarily obstructing Police Constable Ekanayaka while acting under the lawful orders of Excise Inspector de Silva in the discharge of his public functions. It appears that the Excise Inspector received information that arrack was being illicitly sold in the house of the first accused, and therefore he "made a raid," as he says, on that house with the assistance of Police Constable Ekanayaka and others. He seized the first accused while selling arrack, and then made up his mind to search the house. His own words are: "I seized the arrack as it was being sold, and then I said I must search the house." In the course of the search, or some time after, he and the police constable were beaten by the accused, and hence this charge. Now, in a case of obstructing a public servant in the execution of his duty, it is essential that it should be proved beyond doubt that the public servant had proper legal authority to do the act in the doing of which he was obstructed. Assuming for the sake of argument that the Excise Inspector had full authority to search the first accused's house, can it be said that Police Constable Ekanayaka was acting under his lawful orders? There is nothing to show that the Excise Inspector had any right to give any orders to the police constable to search any house at all. The fact, however, that the Excise Inspector had no such right did not imply that he could not legally enlist the

¹ (1887) 6 Tam. 61.

² (1914) 17 N. L. R. 193.

services of the police constable to search the house, provided of course that he himself had proper authority to search. But, then, the obstruction of the police constable would be tantamount to obstruction of the Excise Inspector himself, and the conviction of the second accused with having obstructed the police constable when acting under the lawful orders of the Excise Inspector cannot be supported.

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It has not been contested that an Excise Inspector is a public servant, and that voluntarily obstructing him in the discharge of his public functions would be an offence under section 183 of the Penal Code. The main question in the case is whether the Excise Inspector had lawful authority to search the first accused's house. Power of search is given to him under section 36 of the Excise Ordinance, No. 8 of 1912. What that section enacts (omitting immaterial portions) is that when an Excise Officer has reason to believe that an offence under section 43 or section 44 of the Ordinance has been, is being, or is likely to be, committed, and that a search warrant cannot be obtained without affording the offender an opportunity of escape or of concealing evidence of the offence, he may, after recording the grounds of his belief, enter and search any place, &c. There is no evidence whatever in this case that the Excise Inspector made the record required by this section. Crown Counsel argued that under section 114 of the Evidence Ordinance the Court should presume that such a record was made, because that section enacts that the Court may presume that judicial and official acts have been regularly performed. This, if I might say so, is tantamount to begging the question. It assumes that the act of search was an official act. It does not become so until the record referred to has been made. It is that record that vests in an Excise Officer the authority to search. Until he makes it he has no more authority in that direction than any ordinary individual. I think that in every case of search by an Excise Inspector compliance by him with the requirements of section 36 should be affirmatively established by him by evidence. Moreover, in this particular case, the fact cited above as having been sworn to by the Excise Inspector himself renders it unlikely that he made the necessary record, and, assuming that section 114 of the Evidence Ordinance applied, I should not be prepared to presume anything under that section.

For the reasons given above I would set aside the conviction and acquit the accused.

ENNIS J.—

I agree. The evidence given by the Excise Inspector precludes the Court from drawing the presumption contemplated in section 114 of the Evidence Ordinance.

Set aside.