

THE QUEEN v. FERNANDO *et al.*

*P. C., Nuwara Eliya, 8,729.*

*Ordinance No. 10 of 1844, ss. 33 and 36—Neglect to grant permit for removal of arrack—Discretion of persons authorized to grant permit.*

Under sections 33 and 36 of the Ordinance No. 10 of 1844, a licensed retail dealer in arrack is no more bound than the Government Agent is to grant a permit for the removal of arrack. They have a discretion to grant or withhold it according to circumstances.

The punishment provided in section 36 is in respect of those who attempt to exercise this discretion for reward or gratuity.

THE accused in this case, being licensed retail dealers in arrack, were prosecuted for having neglected to grant a permit for the removal of arrack, in breach of section 36 of Ordinance No. 10 of 1844. The second accused was convicted and sentenced to pay a fine of Rs. 50.

On the motion of his counsel, this judgment was brought in review before the Supreme Court.

*Dornhorst*, for appellant.

*Templer* (Acting Solicitor-General), for respondent.

*Cur. adv. vult.*

21st February, 1895. LAWRIE, A.C.J.—

This conviction under the 36th section of the Arrack Ordinance, No. 10 of 1844, came before me in review at the instance of the accused, who was fined Rs. 50 by the Police Magistrate of Nuwara Eliya.

The parties empowered by the 33rd clause to grant permits are (1) the Government Agent of the Province; (2) any person duly authorized in writing under the hand of the Government Agent; (3) any licensed retail dealer for removal within the limits of his district.

The learned Magistrate implies that every licensed retail dealer is bound to grant a permit whenever his customer asks for one. If the Legislature had meant to make that imperative and to punish every retail dealer who refused to give every purchaser a permit, it would have been easy to have so enacted, but I do not find that the duty is cast more on the vendor than on the Government Agent or on the persons appointed by him, or on any other licensed retail dealer. I think it is not an imperative duty thrown on these three classes of people, but a discretion given to them to be exercised or withheld according to circumstances. The Ordinance however provides a punishment for those who attempt

to make this discretion an instrument of extortion. If they make the granting of a permit depend on payment to them of a fee, gratuity, or reward, they shall be punished.

It seems to me impossible to read the 33rd and 36th clauses as meaning that men can demand permits of removal, and that the man refusing is guilty of an offence merely if he refuses or neglects or delays to grant one. A Government Agent (and the same may be said of the other persons) may very reasonably say : " I know nothing about the applicant," or " I know him to be of doubtful character, let him go to some one who knows him better, or who is willing to take a responsibility which I am unwilling to take." Of course the position of the Government Agent would be very different if he were to say to the applicant, " My fee for granting a permit is Rs. 2·50. You cannot get one from me until that is paid."

For these reasons, the conviction is set aside and the accused is acquitted, there being no evidence that he demanded or suggested the payment to him of a fee, gratuity, or reward.

