

1934

Present : Akbar J.

FONSEKA v. FERNANDO.

40—*P. C. Panadure, 23,623.**Excise Ordinance—Prohibition of possession or transport of toddy—Possession by a person in a railway train—Ordinance No. 8 of 1912, s. 16 (3).*

Where an Excise notification prohibited the possession or transport of toddy within a certain area,—

Held, that possession of toddy by a person in a railway train passing through the prohibited area to a destination outside the area was unlawful.

A PPEAL from an acquittal by the Police Magistrate of Panadure.

Wendt, C.C., for appellant.

H. V. Perera (with him *D. R. Jayakoddy*), for accused, respondent.

Cur. adv. vult.

March 27, 1934. AKBAR J.—

This is an appeal by an Inspector of the Excise Department with the sanction of the Solicitor-General against an acquittal of the accused on a charge of possessing 16 drams of fermented toddy at the Moratuwa Railway Station in breach of section 16 (3) of Ordinance No. 8 of 1912, and Excise Notification 246 of July 21, 1933 (see *Government Gazette* No. 7,993 of that date). By this notification the Governor prohibited the possession or transport of any quantity of fermented toddy within the Urban District Council area of Moratuwa by virtue of the powers vested in him by sections 12 and 16 (3) of Ordinance No. 8 of 1912.

There is no dispute as regards the facts. The accused was passing through Moratuwa Railway Station in a train on his way to Egoda Uyana which is not a prohibited area, having in his possession some toddy. The learned Magistrate acquitted the accused as he was of opinion that the intention of passing this notification appeared to him to have been to prohibit transport or possession by residents in the Moratuwa Urban District Council area. Mr. Perera on behalf of the accused quoted some authorities to show that one must try to interpret a penal statute according to the spirit or true intent of the statute. He quoted in particular a case referred to in an Indian text book relating to the Indian Excise Acts, viz., *Marwari v. King Emperor*¹. I do not think this case is binding on me. What I have to do is to interpret a penal rule prohibiting any person having in his possession or transporting any toddy within the Moratuwa Urban District Council. There is no limitation in the rule applying it only to residents in Moratuwa area and one can conceive of many practical difficulties arising in interpreting the rule in this narrow sense. The rule has been made by an authority who has power to make rules to apply all over the Island. Moreover the rule applies not only to possession but also to the transport of fermented toddy. Why should it be an offence for a passenger to alight with the toddy for the temporary purpose of visiting a shop and then catching another train after such visit and yet that it should not be an offence if he remains in the train at Moratuwa Station? Sections 72 and 73 of the Penal Code, which are applicable to all offences in Ceylon (section 38 (b)), expressly exclude cases where an accused makes a mistake in the law. Section 50 of the Excise Ordinance casts the burden of giving a satisfactory explanation on the accused, showing to my mind that the explanation must refer to a question of fact and not to a question of law. The excuse put forward by the accused in this case, if believed, can legitimately be taken into account on the question of sentence.

In my opinion the acquittal is wrong, and I would set aside and convict the accused and order him to pay a fine of Re. 1 or in default 2 days' simple imprisonment.

Set aside.

¹ (Pat.) 21 Cr. L. J. 172.