1934 *Present :* **Drieberg J.**

JAYATILEKE *v.* DONA ANA.

81—P. C. Kalutara, 10,709.

Excise Ordinance—Unlawful possession and sale of toddy—Decoy fails to support charge—Proof of sale—Circumstantial evidence.

Where, in a charge of unlawful possession and sale of toddy, the decoy employed fails to support the charge, the sale may be established by circumstantial evidence.

APPEAL from a conviction by the Police Magistrate of Kalutara.

Peter de Silva, for accused, appellant.

Wendt, C.C., for complainant, respondent.

Cur. adv. vult.

March 6, 1934. DRIEBERG J.—

The accused was convicted of unlawful possession and sale of toddy. The facts, as found by the learned Police Magistrate, are as follows:— The Excise Inspector, after searching the decoy Robert Perera, gave him three marked 10-cent coins and directed him to go to the house of the appellant, buy toddy there and to continue drinking until the search party entered. When the Excise Inspector entered after a short while, the decoy had a glass in which was some soddy. By the appellant was a pot of toddy which she tilted over and some of it was spilt. What was left in the pot was 6 drams in excess of the permitted quantity and about a bottle of toddy was spilt. In the betel bag of the appellant were found the three marked coins.

The decoy, who was the first witness called, did not give the evidence expected of him. He admitted being sent with the marked coins, but said that when he asked the appellant for toddy she said she had none. He denied that he had given the appellant the coins, that he had a glass of toddy in his hand when the Inspector entered; that the pot of toddy was in the room and that the marked coins were found in the betel bag of the appellant; he said the coins were with him until he later returned them to the Inspector. If this evidence is true, the Excise Inspector and the others of his party have committed perjury and fabricated a case against the appellant. The learned Police Magistrate has, however, believed their evidence and I think he had good reason for doing so. The question for decision is whether the appellant could be found guilty on the facts I have stated without the evidence of the decoy that there was in fact a sale.

It is now settled that a charge of sale of toddy can be maintained without the express evidence of the decoy that liquor was obtained in exchange for money—*Dharmaratne v. Kandaswamy* [1], a decision of a Bench of two Judges. The sale may be proved by others who were present or there may be circumstantial evidence of the sale.

The rule regarding circumstantial evidence and its effect if not explained by the accused is admirably stated in the judgment of Chief Justice Shaw in an American case, *Commonwealth v. Webster in* Ammer Ali's *Law of Evidence (8th ed.), p. 784*—"where probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered, though not alone entitled to much weight, because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the

[1] *35 N. L. R. 206.*

charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution".

Another point in such cases is that the presumption will be drawn more readily in proportion to the difficulty of proving the fact by postive evidence, and to the facility of disproving it or of proving facts inconsistent with it if it did really occur (*Sub-Inspector of Police v. Rajalingam* [1]).

Applying these principles to this case, one has to consider whether pretty stringent proof has been given of circumstances tending to support the charge. I think it must be held that such proof does exist. There is the fact that there was toddy in the hand of the decoy and the appellant had with her toddy of an unlawful quantity, that she endeavoured to spill it to avoid proof of the quantity in the pot, and that the marked coins were found on her.

There are circumstances which distinguish this case from *Dharmaratne v. Kandesamy* [2], where it was held that the evidence was insufficient. There the decoy denied the sale as in this case and the only evidence was that the decoy was found with two packets of ganja and the marked money was with the accused; no ganja was found in the possession of the accused, while in this case the accused had with her toddy in an unlawful quantity. Further the accused there did not deny the possession of the marked coins but explained them by stating that he had got them from one of the witnesses for the prosecution in payment of a debt.

In *Rodrigo v. Karunaratne* [3] in which Akbar J. held the evidence insufficient, it was proved that the marked coin was found in the possession of the accused and the decoy had a coconut shell of toddy. The accused was a toddy contractor; it does not appear whether he had any toddy with him at the time, but if he had, no inference adverse to him could be drawn from the fact.

Here the appellant does not seek to explain the suspicious facts against her and show that they are consistent with her innocence, but she denies these facts exist; but these circumstances have been proved and she can only succeed by explaining them. The facts proved in this case are similar to those in *Rex v. Valley* [4]. In the latter case, Sir Philip Macdonell C.J. said that on these facts there was sufficient evidence on which the Court could if it was so minded infer that a sale had taken place.

[1] *31 N. L. R. 157 on p. 159.*
[2] *35 N. L. R. 206.*
[3] *(1932) 34 N. L. R. 366.*
[4] *(1932) 1 C. L. W. 227 ; and 263 P. C. Galle 411 ; S. C. M. of 29th May, 1933.*

I do not think that the recognition of the sufficiency of such evidence as this need lead to the danger referred to by Akbar J. in *Rex v. Valley* (*supra*). Where there is available direct evidence of sale to a decoy I doubt whether a Court would permit the prosecution to ask for a conviction on the inference to be drawn from the possession by the accused of the marked coin and the possession by the decoy of the excisable article while withholding from the Court the express evidence of the sale. The fact that the case was presented in such an artificial manner would be a sufficient ground for rejecting it (*Wijeyratne v. Rubesinghe* [1]). The decoy in this case was called and denied that he was found with a glass of toddy and that the coins were in the accused's betel bag. The Court, believing the other witnesses on this point, rejected his evidence and proceeded to consider whether the evidence of these witnesses raised a presumption of guilt which was not explained by the appellant.

Mr. de Silva asked me to consider the sentence passed. I have done so and I cannot say that it is excessive. The appeal is dismissed.

Affirmed.