

1956

Present: T. S. Fernando, J.

M. EBERT FERNANDO, Appellant, and E. L. GOONEWARDENA,
Respondent

S. C. 1,200—M. C. Colombo South. 65,526

Excise Ordinance—Section 41—Charge of possession of unlawfully manufactured liquor—Quantum of evidence.

In a prosecution for possession of unlawfully manufactured liquor in breach of section 44 of the Evidence Ordinance, the sole evidence relied on by the complainant was a report of the Government Analyst that the liquor in question did not fall within the categories of (1) approved brands of imported liquors and (2) liquors manufactured under licences issued under the Excise Ordinance.

¹ *The King v. Radich (1952) N. Z. L. R. 193.*

² *R. v. Neal (1919) 2 All E. R. 438.*

Held, that the Government Analyst's report was not sufficient to prove beyond reasonable doubt that the liquor in question was unlawfully manufactured.

APPPEAL from a judgment of the Magistrate's Court, Colombo South.

S. B. Lekamge, for the accused appellant.

P. Weerasinghe, Crown Counsel, for the Attorney-General.

Cur. ad. vult.

August 21, 1956. T. S. FERNANDO, J.—

The appellant was convicted in the Magistrate's court on a charge of possession of 1½ gallons of unlawfully manufactured liquor in breach of section 44 of the Excise Ordinance. The question of possession is not contested on this appeal, but learned counsel for the appellant argues that there was no proof before the Magistrate's court that the liquor produced there and marked P.2 was unlawfully manufactured. The burden of establishing that the liquor was unlawfully manufactured lay upon the prosecution, and to discharge this burden it relied upon a report of the Government Analyst, the relevant portions of which are reproduced below :—

"The analytical characteristics of P.2 indicate that P.2 is a fermented liquor but not a distilled spirit.

The characteristics of P.2 are not similar to those of samples of either approved brands of imported liquors or liquor manufactured under licences issued under the Excise Ordinance.

In my opinion P.2 is a liquor which does not fall under the following categories :—

- (1) *Approved brands of imported liquors.*
- (2) *Liquors manufactured under licences issued under the Excise Ordinance."*

The prosecution had to exclude the possibility (a) that P.2 was a liquor lawfully manufactured in the Island and (b) that it was foreign liquor, i.e., liquor manufactured outside the Island and imported here. The Analyst's report excludes possibility (a) referred to above, but does it exclude possibility (b)? The report shows that the liquor in question was not of an "approved brand" of imported liquor. What is meant by "approved" is not explained in the Analyst's report or in the oral evidence in the case. It has been suggested in the course of the argument before me that "approved" means approved by Government, and that it is only approved brands of foreign liquor that may lawfully be imported into the Island. It is not fanciful, however, to suggest that there may be in this country imported liquor that is not of an "approved" brand in the sense suggested at the argument. For example, there may certainly be liquor of an unapproved brand smuggled into this country. Such

liquor would not be unlawfully manufactured liquor as contemplated in the Excise Ordinance. Whatever offence a person may be committing by possessing such liquor he cannot be said to be possessing unlawfully manufactured liquor.

Learned Crown Counsel referred me to the decision of my brother Sansoni in the case of *Fernando v. Goonewardena*¹ where a report of the Government Analyst similar to that produced in this case was the only evidence relied on by the prosecution to establish a charge of possession of unlawfully manufactured liquor. In that case the point that has now been taken was not raised, and my brother was not called upon to consider it.

For the reasons indicated above, I am of opinion that the prosecution failed to discharge the burden that lay upon it to establish beyond a reasonable doubt that the liquor in question was unlawfully manufactured, and I therefore set aside the conviction and sentence and direct that the appellants be acquitted.

Appeal allowed.

¹ (1955) 57 N. L. R. 17.