1931

Present: **Drieberg J.**

NICHOLAS *v.* FERNANDO *et al.*

291,292—P. C. Panadure, 7,750.

Search warrant—Failure to make a list of things found—Not a fatal irregularity—Oral evidence admissible—Criminal Procedure Code, s. 75.

The failure of an Excise officer, making a search under a search warrant issued by a Police Magistrate, to make a list of the articles found, in accordance with section 75 of the Criminal Procedure Code, is not a fatal irregularity in a conviction for unlawful possession of liquor, provided oral evidence of what was found is satisfactory. It is the duty of an officer executing such a warrant to take possession of the things found and bring them before the Court at the earliest opportunity.

APPEAL from a conviction by the Police Magistrate of Panadure.

Ranawake, for accused, appellants.

Pulle, C.C., for the Crown, respondent.

June 17, 1931. DRIEBERG J.—

The first accused appellant is the Secretary of the Panadure Liberty League, the second accused is the Treasurer, and the third accused appellant is the caretaker of the house occupied by the League.

They were charged with unlawfully selling arrack and with possession of more than the permitted quantity of arrack. The second accused was acquitted on both charges, and the first and third accused appellants were convicted on the charge of unlawful possession of thirteen bottles of arrack.

The defence that this is a *bona fide* club and that even if this quantity of arrack was found there it would not be an offience under the Ordinance, but that as a matter of fact, what was found and taken by the Excise officers was not arrack but beer, the possession of which was not an offence.

The first accused appellant is the organizing Secretary of the League, the objects of which are the establishment of a provident fund for members, the election of a fitting member to represent the electoral division of Panadure in the State Council, and the promotion of the production and distribution of country liquor and the advancement of internal trade. It was also intended to start a money-lending bank, to open free schools for the children of members, and to provide a place where food and drinks would be supplied at cost price. It is described as a mutual benefit club.

On December 30 last the League, which was formed in 1928, opened a social club canteen, and it was announced that " By sanction of Government authorities liquor and arrack will be available for the use of members "—P 2. The foundation for this was a letter (A 3) by the Superintendent of Excise of December 19, 1930, informing the 1st appellant that " a licence was not necessary for the use of liquor in ordinary social clubs ".

The Excise officers seized and produced in Court the books and papers found on the premises. The first appellant says that there were other books which were not produced. The membership roll (P 20) shows that members were first enrolled on December 30 last, when the social club canteen was opened; one member was enrolled on the 30th, eighteen on the 31st, and members were admitted in increasing numbers until the search on January 30, 1931. The first appellant says there are now between 800 and 1,000 members. Anyone resident within the electoral division of Panadure and qualified as a voter is entitled to be a member; any qualified person is entitled on application, which has not to be supported by another member, to life membership on payment of one sum of 25 cents. The first appellant says that among the members are police officers, Kachcheri clerks, headmen, and that the club " is a place where most of the highest men meet "; not one member has been called to support the first appellant and say that this is a *bona fide* club.

The first appellant has given a confused account of how liquor is supplied to members; members, he says, get drinks on presenting coupons which are either bought for cash or given on credit and so marked on the coupon and its counterfoil. I take this to mean that liquor would be sold to members and the first appellant admitted that food and drinks were supplied to members at cost price. If this was a *bona fide* club the appellants would be within the law in providing drink but the first appellant has put forward an incredible story of his method; he said that he never allowed more than the permitted quantity of two bottles of arrack in the club at a time, and that if a member brought two bottles and thereafter another member brought two bottles with him he would ask the latter to take away his liquor and keep it elsewhere until the first two bottles had been consumed, and he would then be asked to bring in his liquor. If this is so there could be no question of sale of arrack to

members or any necessity for cash or credit coupons, and so far as arrack was concerned the only privilege a member enjoyed was to take two bottles to the club and consume it there himself or give it to other members. This was his endeavour to explain the documents P 25. In his statement at the commencement of the proceedings he said that he had given instructions that only one bottle of arrack was to be kept at the bar and that drinks were not to be sold to other than members. The object of the Excise party was to obtain proof of sale to the decoys who were not members. There are five documents marked P 25; each is a declaration by a member that he has purchased two bottles of arrack on his own account and risk and that he retains possession of them within the club premises for his private use " or for the use of members of this club "; each paper is marked as approved by the first appellant as Secretary. These are all dated January 21. It has not been explained how liquor brought in by a member at his expense could be available for the use of other members. I do not believe that the bottles of arrack were brought into the club by members as stated in P 25, but that this was a device by which he was able to lay in a stock of arrack by purchasing it in lots of two bottles in the names of different members.

I accept the finding of the learned Police Magistrate that this is not a *bona fide* club and I believe the arrack was brought to the club for sale, membership of the club being merely a pretence; the small sum of 25 cents was little payment to make for the convenience of obtaining liquor in what is called a dry area.

The charge of sale to the decoys has failed for reasons which I need not set out, but the verdict on that charge does not in any way affect the finding of the Magistrate on the charge of unlawful possession.

The question whether the arrack was in the possession of the appellants was debated at some length in the Police Court. I am unable to see how there was room for argument, for in the room where the arrack was found there was a notice, P 28, in English and Sinhalese signed by the first appellant, that he had authorized the second appellant to " retain in his charge all liquor and arrack belonging to this club and distribute them among the members in exchange for tickets ". It was not possible for the appellants in the face of this notice to deny that the arrack was in their possession. This notice further shows that arrack was held by the appellants and given to members in exchange for " tickets ", as the coupons are called, these coupons being given for cash received or on credit for later payment.

But the first appellant says that the 13 bottles were beer of the Barrel Brand with crown corks. The bottles produced by the Excise officers are labelled arrack and have ordinary corks with the distillery seal. The first appellant says that having information of the intended search by the Excise officers he thought of what he says was a ruse; he wanted to play a practical joke on the Excise officers so he put up the beer in paper parcels each containing two bottles; two bottles being the permitted quantity he thought the officers would assume that they contained arrack and take them away without examining the contents. He says that the Excise officers did not open any of the parcels. He must have known that the Excise officers had taken the parcels to the

Police Station for he says that he went there the next morning to tell them of his ruse, but that as the parcels were not there he did not tell the Police anything as he thought that no case would be filed against him. But the Magistrate has accepted the evidence of Mr. Nicholas, the Superintendent of Excise, and of Inspector Ekanayake that between them they examined every parcel on the premises and noted the bottles as arrack and I find it impossible to believe that they would not have done so.

I think it necessary to draw attention to the disregard by the Excise officers of the requirements of the law regarding searches. The entry in this case was under a warrant issued by a Police Magistrate and the provisions of the Criminal Procedure Code are applicable to it. Section 75 of the Code requires the person executing a search warrant to make a list of all things seized in the course of the search and of the places in which they are respectively found and to sign the list. The search was made at about 7 P.M. on Friday, January 30, and the written complaint was made to Court on the Monday following, February 2; in it is stated that a list of the productions is annexed. There is a list of productions filed in the record but it is not signed by anyone; it is entitled " List of articles seized " and contains no reference to its connection with a search warrant; it bears no date. Mr. Nicholas says he made a list of the articles found and gave a copy of it to the first appellant. Inspector Soyza too speaks to Mr. Nicholas making a list and Inspector Attapattu making a copy of it, but no one has identified the list in the record as the list made at the time of search.

The premises of the League consist of a large room as one enters, then another room running, like the first, the whole width of the house and behind it two rooms. No note was made on this list as required by section 75 of the place where the articles were found.

It was held by Jayewardene J. in *Excise Inspector, Point Pedro v. Thankamma* [1] that the requirements of section 75 are imperative and it was contended that the failure to observe them in this case is fatal to the prosecution; but Jayewardene J. did not base his judgment on that reason but on the ground that the grave irregularities in the conduct of the search seriously affected the credit to be attached to the evidence of the discoveries. In this case I see no reason to doubt the evidence of Mr. Nicholas and the other officers that the 13 bottles produced in Court were found by them in the Liberty League rooms and I cannot acquit the appellants merely on the ground of this irregularity.

Mr. Pulle has drawn my attention to Indian cases where oral evidence has been allowed of the finding of articles not entered in the list (*Elamanathan v. Emperor*[2] and *Solai Naik v. Emperor*[3]) and that oral evidence can be given of the articles found though the search was not conducted and the list made as required by law (*Public Prosecutor v. Sarabu Chennaya*[4]).

There are two other matters which call for comment. The warrant directed the officer executing it to take possession of any excisable articles or any papers relating thereto and to take into custody any person found

[1] *(1925) 26 N. L. R. 307.*
[2] *(1910) 33 Madras 416.*
[3] *(1920) 34 Madras 349.*
[4] *(1899) 33 Madras 413.*

guilty of certain offences and forthwith to bring before the Court the things taken possession of, returning the warrant with an endorsement certifying what had been done under it immediately upon its execution. It was the duty of the officer to have made his return to Court on the earliest opportunity thereafter, which was Saturday morning. Instead of doing this he took a bail bond from the appellants to appear in Court on Monday, the 2nd, and filed his complaint in Court on the 2nd. He did not return the warrant with the endorsement until the 4th. From the time of their removal until the 2nd the articles were kept at the Wadduwa Excise Station a few miles away. It is said that the appellants said that Saturday would not be convenient for them but I do not think that this was any reason for the officers not making their return on the Saturday.

The other point is that the Excise officers did not, as they might easily have done, immediately take the appellants with the productions to the Police Station and have them examined. The Police Station was close by, and in fact Mr. Nicholas went there with the intention of leaving the production there, but he says the officer in charge was busy recording a complaint, so he went to the Wadduwa Excise Station and left them there. I do not think this satisfactory. I have had to observe before this that Excise officers should whenever possible have corroborative evidence from others than members of their own department. If they had immediately taken the appellants to the Police Station and had the parcels examined and left there, we should probably never have heard this defence of the beer bottles which has taken so much time in the lower Court. By not leaving the bottles at the Police Station and keeping them in the custody of the Excise officer at Wadduwa Mr. Nicholas at once left himself and his officers open to the charge that they substituted arrack for beer.

The appeals are dismissed.

Appeals dismissed.