

1950

Present : Nagalingam J.

ANDIRIS, Appellant, and WANASINGHE (Excise Inspector),
Respondent

S. C. 999—M. C. Anuradhapura, 4,542

Excise Ordinance—Search without warrant—Non-compliance with provisions of Section 36—Inadmissibility of evidence thus obtained—Cap. 42, ss. 33, 34, 36.

Evidence obtained as a result of an illegal search in contravention of the provisions of section 36 of the Excise Ordinance cannot be availed of by the prosecution in order to sustain a charge of unlawful sale of arrack.

A PPEAL from a judgment of the Magistrate's Court, Anuradhapura.

M. M. Kumarakulasingham, with *C. Jayawickreme*, for accused appellant.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 20, 1950. NAGALINGAM J.—

The appellant, a cook in what is described as a Railway Running Bungalow at Anuradhapura, appeals from his conviction under section 43 (g) of the Excise Ordinance (Cap. 42) on a charge of his having sold arrack without a licence from the Government Agent.

A point of law is raised against the validity of the conviction. The facts, so far as they are relevant for the purpose of determining the question raised are: The Excise Inspector, on receipt of information from a person designated in the course of these proceedings as the bogus customer, that sale of arrack was taking place at the Railway Running Bungalow, made an entry in his notebook, entered the premises and took into custody certain bottles of arrack and glasses. It is urged that the entry of the Excise Inspector into the premises was unlawful and that any evidence obtained in consequence cannot be led in Court so as to afford a foundation for the charge.

The Excise Inspector in giving evidence-in-chief did not testify to any circumstances establishing the legality of the entry into the premises. He spoke to the bare fact that he did enter the premises. The defence, however, pursued the question in cross examination and elicited the information that the Inspector had purported to act under section 36 of the Excise Ordinance by making an entry in his notebook before he set out from the station. Further interrogation revealed that the reason for his not having obtained a search warrant from the Court was that "the bogus customer was in a hurry to get back to Trincomalee".

Now, the question is whether the entry made by the Excise Inspector in his notebook in these circumstances afford a justification for his entry. Section 36 of the Ordinance requires that before an Excise Inspector can exercise the power vested in him under that section of entering and searching premises he must record the grounds for his belief in regard

to two circumstances, (a) that an offence under section 43 or 44 has been, is being or is likely to be committed, (b) that a search warrant cannot be obtained without affording the offender an opportunity either (i) of escape or (ii) of concealing evidence of the offence. The fact that the bogus customer was in a hurry to get away from Anuradhapura cannot therefore be regarded as a factor that confers on an Excise Inspector the necessary authority entitling him to make an entry in his notebook in order to enter the premises is clear. The entry, therefore, of the Excise Inspector into the premises was unlawful and was not justified by the provisions of the law.

This leads to the main question in the case as to whether evidence obtained as a result of illegal entry into premises can be legitimately placed before Court and a conviction based upon such evidence. I have had occasion in the case of *Murin Perera v. Wijesinghe*¹ to express the view that evidence obtained in such circumstances is inadmissible and I have referred therein to the local cases where a contrary view had been taken. Learned Crown Counsel referred to two other cases as having been decided anterior to the first of these cases, namely, that of *Bandarawela v. Carolis Appu*².

One is that of *Silva v. Hendrick Appu*³. It is in reality not a case which could be said to support the view expressed in *Bandarawela v. Carolis Appu* (*supra*). In that case the point was expressly taken that, inasmuch as the Excise Inspector had made a search without having first obtained a search warrant or recorded in writing the grounds that rendered an immediate search desirable, the proceedings were illegal. Wood Renton C.J. did not deal with the point raised but he did hold that "a contravention of the provisions of section 36 does not invalidate proceedings like the present in which there is ample independent evidence of the illicit sale". If it be permissible to draw any inference from the language used by the learned Chief Justice, this much is clear, that he did regard the non-compliance with the provisions of section 36 as invalidating the proceedings but that as there was other evidence of an independent character he did not regard the illegal search as a ground for not affirming the conviction; but I think that the true and proper method of construing the judgment is to say that the learned Chief Justice did not express his view on the question as to whether the proceedings should be held to be invalid because of the non-compliance with the provisions of section 36, for he was not called upon to discuss that question in view of the other evidence available and which rendered it unnecessary for him to grapple with the problem. Certainly, the case is no authority for the proposition that evidence obtained as a result of an illegal search could be availed of by the prosecution to sustain a charge.

The other case is that of *Mirigama v. John Singho*⁴. This is a case where the question that arose for determination was somewhat different. The point taken there was that a Police Officer—and, it must be noted, not an Excise Officer—who had entered the premises, not avowedly for the purpose of detecting an Excise offence but for certain other purposes, discovered, in the course of the search made by him in connection with

¹ (1950) 51 N. L. R. 377.

² (1926) 27 N. L. R. 401.

³ (1917) 4 C. W. R. 232

⁴ (1926) 4 T. L. R. 71

those other purposes, the existence of a certain quantity of ganja, and it was argued on behalf of the accused that the proceedings could not therefore be justified. Garvin A.C.J. rejected the contention on the ground that the entry having been lawful though not in pursuance of the provisions of the Excise Ordinance the prosecution was not thereby vitiated. It will be noticed that this case does not concern itself with a decision of the question as to whether evidence obtained as a result of an illegal entry upon premises is admissible.

After the case of *Murin Perera v. Wijesinghe* (*supra*) was decided by me, my attention was drawn to an article in the Journal of Criminal Law¹ where the question whether evidence illegally obtained is admissible is discussed in reference to the Scotch case of *Lawrie v. Muir*. The full report of this judgment is not available but an excerpt from the judgment is set out in the article itself. This was a case which in view of the importance of the issue raised was heard before the High Court of Justiciary in Scotland by a Bench of seven Judges. The judgment of the Court delivered by Lord Cooper, Lord Justice-General, expresses so clearly and adequately the views I entertain on this subject that I cannot do better than quote his language and adopt it as my own :—

“ From the standpoint of principle, it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict—(a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities; and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action for damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods”.

The facts of the case were that the accused, a dairy keeper, had been convicted of the offence of using without permission a number of milk bottles belonging to St. Cuthbert's Co-operative Association Ltd., and the evidence led against her was that obtained as a result of a search of her premises made without authority. The Court held that the conviction could not stand for the reason summarised by the writer of the article as follows —

“ The Inspectors who exceeded their authority were not police officers enjoying a large residuum of common law discretionary powers. They were the employees of a limited company acting in association with the Milk Marketing Board. Their only powers were derived from the contracts between the Board and certain milk producers

¹ *January, 1950, at p. 81.*

and distributors, of whom the appellant was not one. Persons in such a special position should know the precise limits of their authority and should be held to exceed these limits at their peril. It was found that they acted in good faith but it was incontrovertible that they obtained assent to their search by a positive misrepresentation. ”

The writer of the article goes on to sum up the legal position in these words :—

“ The proper view was that there was no absolute rule, the question being one of circumstances. Whether an irregularity could be excused depended on its nature and the circumstances in which it was committed. It would be a material consideration that the departure from the strict procedure had been adopted deliberately to secure evidence by an unfair trick or *that the irregularity violated rules prescribed by statute*, as Food and Drugs cases. On the other hand, it would usually be wrong to exclude some highly incriminating production in a murder trial merely because it was found by a police officer in the course of a search authorised for a different purpose or before a proper warrant had been obtained.”

Under our law, there is no question of any common law powers being vested in the Police or, much less, in the officers of the Excise Department. In regard to serious crimes, which are all, one may say, included in the description of cognizable offences under the Criminal Procedure Code, powers of search are conferred on a Police officer by the Criminal Procedure Code itself to make search without obtaining a search warrant ; nor is there any provision in the Code which requires that a Police officer should make any entry in his notebook before he enters upon premises in order to make a search in the course of investigations into a cognizable offence. That the Legislature applied its mind to the question of whether similar powers should be vested in Excise Officers is manifest from a perusal of the provisions of section 33 of the excise Ordinance. The Legislature apparently took the view that Excise Officers should not be conferred such large powers as in the case of Police Officers, and hence by this section the Legislature enacted that where the Governor (now Minister of Home Affairs and Rural Development) by notification directs that an Excise Officer may exercise powers that may be exercised by a Police Officer under Chapter XII of the Criminal Procedure Code, such Excise Officer may in that event exercise such powers in regard to all offences under the Excise Ordinance which would include, therefore, a power of search without any previous formalities being observed by him, in that regard.

It is not suggested in this case that the Excise Inspector in question has been empowered to exercise the powers conferred on a Police Officer under Chapter 12 of the Criminal Procedure Code. The Excise Ordinance, however, permits of an Excise Officer making a search of premises either (a) if he has obtained a search warrant or (b) if he makes an entry in terms of section 36 of the Ordinance in his notebook before entering upon premises to make a search. Section 34 does not, it would be noted, enable an Excise Officer to enter upon premises to make a search.

The powers of an Excise Inspector, therefore, being purely statutory, his right to enter upon premises must be limited by the provisions of the Ordinance and, unless an Excise Officer can show that his entry was in pursuance of one of the provisions of the Ordinance, he has no powers of entry, and his entry otherwise would be illegal. Should it be held that the evidence obtained by an Excise Officer in contravention of the provisions of the Ordinance is admissable and legal, then the very object of the Legislature in trying to circumscribe the powers of an Excise Inspector in regard to search would be completely nullified, and the courts would then be conferring wide powers of search on an Excise Officer entirely unwarranted by the Ordinance,—a result which can upon no known canon of interpretation of Statute Law be sustained. It is not difficult to see that the view of the Legislature in so circumscribing the powers of an Excise Inspector was based upon the consideration that a citizen should be “protected from illegal or irregular invasions of his liberties by the authorities”, Looked at from this standpoint, it is apparent that the only way in which the object of the Legislature can be achieved and Excise Officers confined to exercise their powers within the limits permitted to them by law is by the Courts refusing to take cognizance of and disregarding evidence that may have been improperly or illegally obtained as a result of an unlawful or unauthorised entry upon premises.

In this view of the matter, it must follow that the entire evidence given by the Inspector and the guard must be rejected. The case, therefore, cannot be said to have been proved against the accused.

I therefore set aside the conviction and acquit the accused.

Appeal allowed.

