1964 *Present :* **T. S. Fernando, J.**

THE SOLICITOR-GENERAL, Appellant, *and*
M. P. DHARMASENA, Respondent.

S. C. 718 of 1964—M. C. Kurunegala, 21137

Sale of arrack without licence—Burden of proof—Excise Ordinance, s. 18—Evidence Ordinance, ss. 105, 106.

In a prosecution under section 18 of the Excise Ordinance for sale of an excisable article, the provisions of sections 105 and 106 of the Evidence Ordinance throw the burden of proof on the accused to show that he had a licence.

APPEAL from a judgment of the Magistrate's Court, Kurunegala.

V. S. A. Pullenayegum, Crown Counsel, for the appellant.

No appearance for the accused-respondent.

Cur. adv. vult.

October 28, 1964. T. S. FERNANDO, J.—

The accused-respondent was charged in the Magistrate's Court with selling arrack without a licence from the Government Agent in contravention of section 18 of the Excise Ordinance. After taking the evidence tendered by the prosecution, the learned Magistrate, without calling upon the accused for a defence, made order discharging him. In the course of that order, the Magistrate stated as follows :—

"The accused is charged for selling arrack without a licence. No where in the evidence of the witnesses is there any statement to show that the accused had no licence. If the accused had a licence then he would be entitled to an acquittal. The prosecution must depend on the strength of its own case.

The failure to produce any evidence that the accused had no licence, therefore, casts no burden on the accused to prove that he had a licence.

The prosecution has to prove every material point in the charge. The fact that the accused had no licence is the very basis of the prosecution."

It is clear from a perusal of the proceedings including the Magistrate's own order that the prosecution had tendered all the evidence it intended to tender or, in other words, that the prosecution had closed its case. In those circumstances the Magistrate must have intended to acquit the accused, and it is a matter for regret that he did not say so but stated that he was discharging the accused.

Turning, however, to the question of the correctness of the order of acquittal, it is apparent that the learned Magistrate has seriously misdirected himself on the question of the burden of proof. This question arises daily in a large number of cases that come up for disposal in Magistrates' Courts. Indeed, the point is now so well settled that it is a matter for surprise that an experienced Magistrate appears to be unaware of the correct position at law.

Chapter IX of our Evidence Ordinance itself provides the answer to the question that is raised on this appeal. Section 106 enacts that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) to that section deals with a situation analogous to that in the case that came up for decision before this Magistrate. Where A is charged with travelling on a railway without a ticket, the Evidence Ordinance there indicates that the burden of proving that A had a ticket is on him.

A similar point was settled over fifty years ago in our Court by a Bench of Three Judges in the case of *The Mudaliyar, Pitigal Korale North v. Kiri Banda*[1]. It was held there that, on a prosecution under section 20 of the Forest Ordinance, the burden of proving that the forest in which the offence was alleged to have been committed is " not included in a reserved or village forest " lay upon the accused. The Bench of Three Judges held that the words " not included in a reserved or village forest " are in the nature of an exception within the meaning of section 105 of the Evidence Ordinance. Hutchinson C.J. stated that these words are merely another way of saying " unless it is included in a reserved or village forest." Grenier, A.J. stated that " once the Crown proves that a person has broken up the soil, or cleared, or set fire to .....any forest, the onus is clearly on that person to justify his act, and claim immunity from it by proof that the land is included in a reserved or village forest. If he can produce a permit, or if he can show that the land is his private property, there will be an end to the prosecution. Such positive proof is directly in his power to adduce, and he

[1] *(1909) 12 N.L.R. 304.*

ought to be able to adduce it instead of calling upon the prosecution to establish a negative ; and I think the words of section 105 threw the burden of proof on the person charged to show the existence of circumstances which would exonerate him from the legal consequences of his act."

While the question before me can be disposed of by a reference to our own Evidence Ordinance, it is of some interest to note that even under the English law of evidence where, generally speaking, the burden of proof of a criminal charge lies upon the prosecution, the position is that there are some facts so peculiarly within the knowledge of the accused that the prosecution is not required to give even *prima facie* evidence on the point. *R. v. Oliver* [1] dealt with the case of a person charged with having sold sugar as a wholesaler without the necessary licence, in contravention of a Sugar (Control) Order made in pursuance of powers conferred by the Defence (General) Regulations. The Court of Criminal Appeal of England there held that the prosecution was under no necessity of giving *prima facie* evidence of the non-existence of a licence. The case of *R. v. Oliver* (supra) was applied by the Queen's Bench Division in the case of *John v. Humphreys* [2] which held that, where a person was charged with a contravention of section 4 (1) of the Road Traffic Act of 1930 which enacts that a person shall not drive a motor vehicle on a road unless he is the holder of a licence, the burden of proof that the defendant had a licence lay on him because that fact was peculiarly within his own knowledge, and in the absence of proof on his part that he had a licence the justices ought to have convicted. Whether it be in England or in Ceylon, where a person is charged with driving a motor vehicle on a highway without being the holder of a certificate of competence, it would be an intolerable situation for the prosecution to have to call evidence from a number of sources, all potential grantors of certificates of competence. Numerous other illustrations could be furnished to show the unreasonableness of the view that appears to have been upheld by the Magistrate from whose decision the present appeal has been taken.

The appeal is allowed for the reasons I have given above, and the order of 8th April 1964 acquitting the accused is hereby set aside. In ordinary circumstances the case could have been remitted for the trial to be continued before the same Magistrate so that he may now call upon the accused for his defence and thereafter proceed according to law. The Magistrate who made the order appealed from has, however, been transferred to another court, and it is not therefore expedient to direct that he should continue with the trial. In the special circumstances, the convenient course now to take is to direct that the accused be retried before the present Kurunegala Magistrate, and I accordingly so direct.

Appeal allowed.

[1] *(1943) 2 A.E.R. 800.*

[2] *(1955) 1 A.E.R. 793.*