

1937

Present : Soertsz J.

## THE KING v. GUNASEKERE

14-16—D. C. (Crim.) Negombo, 4,281.

*Arrest without warrant—Person found committing an offence—Rescuing from lawful custody—Causing hurt to a public servant in order to prevent him from doing his duty—Excise Ordinance, No. 8 of 1912, s. 34—Penal Code, s. 323.*

The third accused, who was seen in the act of handing a cup of toddy to another man was arrested by an Excise Officer, and was rescued by the first and second accused, who assaulted the Excise Officer in doing so.

The first and second accused were charged with rescuing the third accused from lawful custody, and under section 323 of the Penal Code with causing hurt to a public officer in order to prevent or deter him from doing his duty.

*Held*, that the arrest was illegal because it could not be said that at the time of his arrest the third accused was found committing an offence within the meaning of section 34 of the Excise Ordinance.

*Held further*, that although the charge under section 323 of the Penal Code could not be sustained, the accused were guilty of the offence of causing hurt under section 314 of the Penal Code.

**A** PPEAL from a conviction by the District Judge of Negombo. The first and second accused were charged with causing hurt to a public officer in order to prevent or deter him from doing his duty and with rescuing the third accused from lawful custody.

The third accused was charged with escaping from lawful custody.

*H. V. Perera K.C.* (with him *Colvin R. de Silva* and *G. E. Chitty*), for accused, appellants.—The third accused was neither committing an offence nor doing any act which could even raise a reasonable suspicion that an offence was being committed. Every one of his actions may well have been those of a man acting lawfully. The arrest was clearly illegal and the accused persons were entitled to act in defence in order to prevent it. This would be so despite the limiting provisions of section 92 of the Ceylon Penal Code. See in this connection *Canthapullai Odaiar v. Murugesu*<sup>1</sup> a case where the charge was brought under section 183 of the Ceylon Penal Code.

In the present case the Excise Officer was not making a lawful arrest and resistance was justified (see *Davis v. Lisle*<sup>2</sup>).

*Pulle, C.C.*, for the Crown.—The third accused in delivering the toddy to the person who ran away must be presumed, until the contrary was proved by him, to have “sold” the toddy. *Vide* definition of “sale” in the Excise Ordinance, No. 8 of 1912, and the presumption arising under section 50. The fact that the third accused was subsequently acquitted on a charge of sale of toddy does not show necessarily that he was not found committing an offence.

*Cur. adv. vult.*

July 28, 1937. SOERTSZ J.—

Whatever view one takes of the ruling in the recent case of *Ledwith v. Roberts*<sup>3</sup> which called in question, and over-ruled the view taken in the earlier case of *Hartley v. Ellnor*<sup>4</sup> in regard to the powers of Police Officers to arrest without a warrant in certain circumstances, one readily accepts the observations made by Lords Justices Greer, Greene, and Scott to the effect that those powers should be jealously scrutinized and that any act which is in excess of those powers should not be tolerated. Lord Justice Scott said: “I should like respectfully, but earnestly, to express the opinion that powers of arrest without warrant should be expressed in quite unambiguous and simple language, which any one can understand, and that the occasion for reliance on the Constable’s discretion should be defined in the case in any statutory provision conferring such a power”. Their Lordships were in that case interpreting the meaning of the words “suspected person” in the Vagrancy Act of 1824, in relation to a Police Officer’s power to arrest such a person without a warrant. But the observation is apposite to the question that arises in the present case. In accordance with it, I have to consider the plain meaning of the straightforward language of section 34 of Ordinance No. 8 of 1912. That section enacts as follows: “Any officer of the Excise, Police or Customs or Revenue Departments . . . and any other person duly

<sup>1</sup> *1 C. L. R. 90 (F. B.)*  
<sup>2</sup> (1936) *A. E. R. 213,*

<sup>3</sup> *Journal of Cr. Law, January, 1937, 135 et seq.*  
<sup>4</sup> *117 L. T. R. 304.*

empowered, may arrest without warrant any person found committing, in any place other than a dwelling house, any offence punishable under section 43 and section 44". It is not questioned that the officers with whom we are concerned in this case have been duly empowered to arrest without warrant, but the contention for the defence is that they are limited to arresting any person found committing in any place other than a dwelling house, an offence punishable under sections 43 and 44. The admitted facts in this case are that the third accused was arrested by these officers, when he gave to another man a cup full of toddy. That was all that had taken place between the third accused and the other man at the time the arrest was effected. The case for the Excise Officer was that third accused was arrested because they took the view that the third accused had sold the toddy to the other man and had by so doing committed an offence under section 43 (b) of the Ordinance. Now, in my view, it is impossible to hold on the facts we have here that a sale had taken place. No consideration of any kind passed from the other man to the third accused. This is said to have happened at about 7.30 P.M. on a festival day in the Boralupitiya Church and it might well be that the third accused was treating a friend to a drink. To say the least, it was an equivocal transaction, not an unambiguous sale and therefore, the occasion contemplated by section 34 for an arrest without a warrant had not arisen.

Mr. Pulle for the complainant-respondent maintains, however, that a sale must be deemed to have taken place in view of section 50 of the Ordinance.

That section provides that "in prosecutions under section 43, it shall be presumed, until the contrary is proved, that the accused person has committed an offence under that section in respect of: (a) Any excisable article; or (b); (c); for the possession of which, or for his conduct in connection with which, he is unable to account satisfactorily". In my opinion this section does not help Crown Counsel at all. The presumption arises only when the prosecution stage is reached and it is a presumption a Court is required to draw. The officers referred to in section 34 are not empowered to act upon any presumption that an offence is being committed. They are empowered to arrest in the one and only event of their finding a person actually committing an offence, and not merely doing something, which they have reason to believe is an offence, and which is later proved to be an offence. As a matter of fact in the present case, if the matter is tested by the result of the case that arose from this incident, the third accused cannot be said to have been committing an offence at the time of his arrest, for he was acquitted after trial. But, I wish to make it clear that in my view, the result of the case is not necessarily decisive of the question. I, therefore, reach the conclusion that the third accused is not guilty of the charge preferred against him in the third count of the indictment, namely, escaping from the lawful custody of Excise Guard Perera. The custody was not lawful.

In regard to the first and second accused, they were charged: (1) With causing hurt to a public servant in order to prevent or deter him from doing his duty; (2) with rescuing the third accused from lawful custody. It follows from the finding I have already reached in regard to the third

accused, that the second charge against the first and second accused necessarily fails. So far as the other charge against these accused is concerned, I do not think section 92 (1) of the Penal Code applies, for the reason that the act against which the right of private defence was being exercised was an unlawful act not merely one that was not strictly justifiable by law. But I am of opinion, in the circumstances of this case, that it was not necessary for these accused to assault the Excise Officers to achieve their purpose. Therefore, although their convictions under section 323 of the Penal Code cannot be sustained because it cannot be said that the Excise Officers were acting in the lawful discharge of their duty, see *Davis v. Lisle*<sup>1</sup>, none the less they are guilty of an offence under section 314 of the Penal Code. I vary their convictions accordingly and sentence each of them to pay a fine of Rs. 50, in default six weeks' rigorous imprisonment. The third accused is acquitted and discharged.

*Varied.*

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