1956 *Present : T. S. Fernando, J.*

SIRIMANIS PEIRIS, Appellant, *and* P. THAMOTHERAM PILLAI, Respondent

S. C. 653—M. C. Chilaw, 13,608

Excise Ordinance—Section 44—Charge of possession of unlawfully manufactured arrack—Quantum of evidence—Manufacture of arrack—Is it a Government monopoly ?

In a prosecution for possession of unlawfully manufactured arrack in breach of section 44 of the Excise Ordinance, the Court will not take judicial notice that any arrack that is not what is called Government arrack is unlawfully manufactured arrack.

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

A. C. Alles, Crown Counsel, with *P. Weerasinghe*, Crown Counsel, for the Attorney-General.

K. C. de Silva, with *V. C. Gunatilaka*, for the accused-respondent.

Cur. adv. vult.

August 21, 1956. T. S. FERNANDO, J.—

The complainant appeals to this Court with the sanction of the Attorney-General against the acquittal of the accused who was tried on a charge of possession of 7 drams of unlawfully manufactured arrack in breach of section 44 of the Excise Ordinance.

The learned Magistrate has accepted the evidence of the witnesses for the prosecution in regard to the possession by the accused of the arrack, but has acquitted him on the ground that there was no "strict proof" that the arrack was unlawfully manufactured. The evidence relied on by the prosecution to discharge the burden that lay upon it to establish beyond a reasonable doubt that the liquid produced in court in bottle P. 1 was unlawfully manufactured arrack was a report of the Government Analyst. The relevant part of this report reads as follows :—

> "The physical and chemical characteristics of the contents of P. 1 were not similar to those of any variety of Government arrack. *In my opinion* P. 1 contained arrack, but not any variety of Government arrack as issued from Government Warehouses."

This report proves that the contents of P. 1 were arrack and that this arrack was not Government arrack as issued from Government Warehouses. Does it also prove that the arrack was unlawfully manufactured ? Or can I say that what is not Government arrack as issued from Government Warehouses must be unlawfully manufactured arrack ? The appeal really turns on the answer to one or other of these two questions.

I regret I am unable to take judicial notice that any arrack that is *not* what is called Government arrack is unlawfully manufactured arrack. Mr. Alles has referred me to the following observations of Soertsz J. in *Yoganathan v. Mudiyanse* [1] in dealing with an argument that what is *not* Government arrack is not necessarily unlawfully manufactured arrack.

> "The manufacture of arrack is a Government monopoly in the Island. The arrack manufactured by the Government has certain characteristics. Therefore all arrack can be sub-divided into two, and only two, classes for the purposes of the Ordinance, and a valid proposition stated as follows that arrack that is not Government arrack must be unlawfully manufactured arrack."

If the manufacture of arrack is a Government monopoly in this Island I would, with great respect, agree with the observation that what is not Government arrack is unlawfully manufactured arrack. As stated earlier, however, I am not prepared to take judicial notice that such a Government monopoly exists. These observations of Soertsz J. were made in 1938, and without evidence I am not prepared to say that there has been no change in Government policy on this question all these eighteen years. Moreover, if the manufacture of arrack is a Government monopoly today, it is surely not a difficult matter, and certainly not one outside the resources of the Excise Department, to establish that fact in evidence at the trial.

Another case [2] recently decided by Weerasooriya J. was also cited to me in support of this appeal. In that case there was not only evidence that the liquor produced was not Government arrack, but also specific evidence to satisfy the court that manufacture of arrack was being done (a) under licence and only at nine specified distilleries in the Island and (b) at the Government distillery at Seeduwa. That case is therefore clearly distinguishable from the one now before me. Indeed, if evidence had been led in this case to establish to the satisfaction of a court that the manufacture of arrack is a Government monopoly, the prosecution would have been in no difficulty in discharging the burden that lay upon it to establish that the liquor in P.1 was unlawfully manufactured arrack.

As a final argument, Mr. Alles brought to my attention the fact that two witnesses for the prosecution had stated in evidence that P.1 contained unlawfully manufactured arrack. Mr. de Silva argued that the evidence of these witnesses on this point cannot be accepted as they have not stated what experience they had to enable them to distinguish one kind of arrack from another. It is true that the witnesses were not cross-examined on the point, but as the learned Magistrate's judgment is silent on the question of this evidence there appears to have been an implied refusal by him to act on this evidence. Moreover, it is quite apparent that in preferring this appeal reliance was placed by the complainant really on the Government Analyst's report and not on the evidence of

[1] *S. C. No. 1002/P. C. Kuruvegala 55,816—S. C. Minutes of 2. 3. 1938.*
[2] *S. C. No. 1587/M. C. Chilaw 7,113—S. C. Minutes of 8. 7. 1956.*

these two witnesses. The prosecution might have been permitted to make use of this evidence if it had been attempting to maintain a conviction entered by the Magistrate; but different considerations should weigh in the present circumstances where an accused person has been acquitted and the real question upon which the appeal turned has been answered against the prosecution. It would not be fair to permit the prosecution to revive this evidence at this stage, and this appeal must therefore be dismissed.

Appeal dismissed.