

Present : Jayewardene A.J.

1925.

LOCKHART *v.* FERNANDO.

689—*P. C. Kalutara*, 8,888.

*Excise Ordinance—Transfer of toddy otherwise than by way of gift—
Burden of proof—Ordinance No. 8 of 1912, s. 50.*

Where a toddy collector was charged under section 43 (*h*) of the Excise Ordinance with the transfer of toddy, and his defence was that the toddy was given by way of gift.

Held, that the burden of proving that the transfer was by way of gift was upon the accused under section 50 of the Excise Ordinance.

A PPEAL from a conviction by the Police Magistrate of Kalutara.

H. Peries, for accused, appellant.

Grenier, C.C., for the respondent.

December 15, 1925. JAYEWARDENE A.J.—

In this case a “toddly collector” has been convicted under section 43 (*h*) and 45 (*c*) of the Excise Ordinance, 1912, and sentenced to pay a fine of Rs. 15. He appeals on certain grounds of law. It is

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submitted for him that he cannot be convicted under section 45 (c) for wilfully doing or omitting to do anything in breach of any of the conditions of the permit or pass issued to him inasmuch as there are no conditions attached to the permit issued to him. The objection to his conviction under section 45 (c) is, in my opinion, sound and must be upheld. It is also contended that he cannot be convicted under section 43 (h) because he has not sold any excisable article, in this instance toddy, but has, if at all, given away toddy by way of gift. According to the facts proved in this case it appears that when the Excise peon went to the land where certain trees were being tapped for toddy he found the "collector," the accused, surrounded by a number of people and pouring toddy from a barrel into a tin which was held by a woman. Now there is nothing here to show whether the accused gave the toddy for a consideration or not. The terms "sale" or "selling" is defined in the Excise Ordinance, section 3, sub-section (12), and includes any transfer otherwise than by way of gift. There is no doubt that the accused was transferring an excisable article.

The question is whether he was doing so "otherwise than by way of gift." Section 50 of the Excise Ordinance requires that in any prosecution under section 43 it should be presumed until the contrary is proved that the accused person committed an offence under that section in respect of any excisable article for the possession of which, or for his conduct in connection with which, he is unable to account satisfactorily. The result of this section is to throw upon the accused the burden of proving that the transfer was by way of gift, if his contention is that the transfer was in fact a gift. The prosecution need only prove that there was a transfer of an excisable article and such a transfer would in law amount to a sale under the Ordinance. The accused has given evidence, and he denies that he was pouring toddy from a barrel into a tin at the time he is said to have committed the offence. He has not proved that the transfer was by way of gift.

I would therefore hold that the accused has committed an offence under section 43 (h), and that the conviction under that section is correct.

I would therefore dismiss the appeal.

Affirmed.