

1953

Present : Nagalingam A.C.J.

E. DON SEEMON, Appellant, and H. DIAS (S. I. Police),
Respondent

S. C. 1160—M. C. Colombo, 32,000

Excise Ordinance (Cap. 42)—Possession of excisable article—Difference between s. 43 (a) and s. 44—Misjoinder of charges.

The charge against the accused was that he had in his possession seven bottles of unlawfully manufactured arrack in breach of section 43 (a) of the Excise Ordinance, but the penal section under which the offence was punishable was stated to be section 44 of the Ordinance.

Held, that sections 43 (a) and 44 created two distinct and separate offences, and that the reference to these two sections in respect of one and the same charge had the effect of a joinder of two separate charges.

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

C. S. Barr Kumarakulasinghe, with *Malcolm Perera*, for the accused appellant.

A. C. de Zoysa, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 26, 1953. NAGALINGAM A.C.J.—

The question in this appeal is whether there is a misjoinder of charges which is said to arise in this way : The charge was that the appellant had in his possession seven bottles of unlawfully manufactured arrack in breach

of section 43 (a) of the Excise Ordinance, but the penal section under which the offence was punishable was stated to be section 44 of the Ordinance. It will be seen on a reference to section 43 that that section itself prescribes the penalty for an offence committed thereunder.

Both before the learned Magistrate and me it has been contended on behalf of the appellant that sections 43 (a) and 44 create two distinct and separate offences, and that the reference to these two sections in respect of one and the same charge has the effect of a joinder of two separate charges. It is true that under both sections 43 (a) and 44 possession of an excisable article is punishable but the nature and the circumstances of possession are different under the two sections. If the two sections referred to possession of an excisable article of an identical character and under identical conditions, it must then necessarily follow that there has been unnecessary repetition on the part of the legislature, an inference which would not lightly be drawn unless there is no escape from such a conclusion.

It seems to me, however, that the two provisions are intended to govern two separate categories of cases. Section 43 penalises an act which is done in contravention of the provisions of the Ordinance or of any rule made thereunder, that is to say, an act done in the excess or contrary to what is permitted to be done by the Ordinance, such, for instance, as the possession by a person of more than two bottles of lawfully manufactured arrack. A perusal of the earlier sections 9 to 31 would show that they permit the importation, exportation, possession, and so on, of various classes of excisable article, subject to the conditions either express or implied therein, and section 43 prescribes the penalty where a person contravenes those provisions or any rule, licence or permit made or issued thereunder, while section 44 does not punish a contravention of the provisions of the Ordinance but penalises an act which it regards as an offence in itself.

I have not lost sight of the fact that section 44 has the qualifying words "without lawful authority" but those words are not intended to indicate that any authority is granted to any person under the Ordinance to possess an excisable article of the nature referred to therein, but rather to confer immunity on a person such as a carrier or a customs officer who may in the exercise of his calling or of his duties have possession of such prohibited excisable article. It is also to be noted that section 44 deals with the offence of possession alone. Possession of unlawfully manufactured excisable articles as, for instance, pot arrack, cannot be punished under section 43 as it is not an offence which is in contravention of any provision of the Ordinance other than section 44 itself.

I am therefore of opinion that section 43 cannot be said to extend to cases of possession of unlawfully manufactured arrack. The contention, therefore, advanced on behalf of the appellant is entitled to succeed.

The next question for consideration is whether an amendment of the charge should be permitted at this stage. The point was expressly raised by the defence, and it was open to the prosecutor or even to the Magistrate when the point was taken to have amended the charge and to have recalled the witnesses so as to enable them to be cross-examined as required

by law. But where the prosecutor, relying upon his view of the propriety of the charge, has made no such application before the Magistrate, I do not think I should accede to any such application at this stage, for the result of granting such an application would be to remit the case to the learned Magistrate for a fresh trial, which I think would be unsatisfactory in the circumstances.

I therefore set aside the conviction and acquit the accused.

Appeal allowed.
