1930

Present : **Lyall Grant J.**

KING *v.* FERNANDO.

74--84—*D. C. (Crim.) Chilaw,* 3,834.

Excise Ordinance—Search by Excise Officer without warrant—Grounds of belief—Sufficiency of record—Ordinance No. 8 of 1912, *s.* 36.

An Excise Officer who was making a search without a warrant, purported to conform to the requirements of section 36 of the Excise Ordinance by making the following entry in his diary : " I have credible information that illicit distillation of arrack is going on in the house of . . . . I decide to search the house under section 36 of the Ordinance as there is no time to obtain a search warrant " and was resisted,—

Held, that there was a sufficient compliance with the requirements of the section to bring the case within the scope of section 92 of the Penal Code.

APPEAL from a conviction by the District Judge of Chilaw.

Iyer, for accused, appellant.

Crossette Thambiah, C.C., for respondent.

September 15 1930. LYALL GRANT J.—

This was an appeal by eight persons, who had been convicted of being members of an unlawful assembly, the common object of which was to overawe by criminal force an Excise Inspector in the exercise of his lawful power to enter and search the house of the first accused and of other offences.

The next three counts of the indictment charge offences under sections 141 and 145 of the Penal Code.

The fifth count charges the accused with voluntarily obstructing a public servant in the course of his duties, an offence punishable under section 183. The sixth count charges the first accused with threatening injury to the public servant, an offence punishable under section 186. The seventh count charges

all the accused with voluntarily causing hurt to a public servant, viz., an Excise Guard, in the discharge of his duties, an offence punishable under section 323. The eighth count charges all the accused with wrongfully confining two persons in the house of the first accused, an offence punishable under section 333. The ninth count charges the same accused with wrongfully confining for the purpose of constraining one of the persons, a Police Headman, to do an illegal act, viz., to fabricate false evidence by making a report containing false statements for use in a judicial proceeding, an offence punishable under section 338. The tenth count charges all the accused with causing hurt to one Podia and with causing hurt to one Don Peter.

The eleventh count charged is against the first accused for committing criminal intimidation by threatening the Excise Inspector with injury with intent that the Excise Inspector might omit to enter and search his house, an offence punishable under the section 486.

The facts which have been proved briefly are that the Excise Inspector in question received information that arrack was being illegally distilled in the house of the first accused.—He collected a fairly strong party, which included two Police Inspectors and a Police Headman, and went by car to the house in question. When he arrived and stated his business he was threatened by the first accused and a fracas took place. One or two of the Excise party were assaulted, though apparently not very seriously, by among others, the eight accused. The eight accused have been selected from a crowd who were present on that occasion as having each of them taken part in obstructing or assaulting the Excise party. The prosecution evidence goes on to say that a crowd gathered to an extent estimated variously at from 50 to 100 and the accused among whom the first accused was the most prominent insisted upon the Police Headman sitting down to write a report stating that the party had gone there for a totally different purpose. There is evidence that the Headman at first refused to write such a report, but both he and his companions were told that they would not be allowed to leave the place until a report satisfactory to the first accused was written. The first report written by the Headman under these circumstances after consultation with the Excise Inspector was not accepted by the first accused and the Headman was induced by threats to write another which the first accused took away to the Vidane Arachchi. Thereupon the Excise party were allowed to depart. When the disturbance began the case looked so threatening that one member of the party ran away to the Police Station, a distance of three miles, and reported the fact that the Excise party was being seriously interfered with. His report was so alarming that a sergeant proceeded to the spot with an armed guard.

The main objection taken to the conviction is that the accused were acting in self-defence and that the Excise party were acting illegally in trespassing on the first accused's compound and attempting to enter his house. The Inspector purported to act under section 36 of the Excise Ordinance, No. 8 of 1912, and a good deal of the argument turned on the meaning of the words of that section.

Section 36 provides that whenever a Government Agent or any Excise Officer has reason to believe that an offence has been, is, or is likely to be committed and that a search warrant cannot be obtained without affording the offender an opportunity of escaping or of concealing evidence of the offence, he may after recording the grounds of his belief at any time . . . . enter and search any building . . . . In the present case information was given to the Inspector that illegal distillation of arrack was

being carried on in the house in question, and before proceeding to the spot he entered in his diary the fact that he had received credible information to that effect and that there was no time to obtain a search warrant. Some attempt was made to show that the entry in the diary was in fact made after the raid but there was nothing to support this.

Ex facie the entry was made at 11.30 A.M. It was objected that the diary entry did not confirm to the provisions of the section inasmuch as it did not record the grounds of the Inspector's belief. The entry states : " I have credible information that illicit distillation of arrack is going on in the house of so and so. " It proceeds " I decide to search the house under section 36 of the Ordinance as there is no time to obtain a search warrant. "

Counsel were not able to refer me to any case which interprets the words " the grounds of his belief " used in this section, but I was referred to similar sections of the various Indian Excise Acts. No cases on these Acts, however, were brought to my notice. In *Silva v. Sinno,*[1] it was held that a Police Officer must make a record where he had not obtained a search warrant. In the present case there is no question of the existence of the record. The only question is of its sufficiency.

Counsel for the appellants referred me to cases which discuss the circumstances under which warrants may be issued under the provisions of other Ordinances, more especially the Gaming Ordinance. The case of *P. S. Tangalla v. Portinvu,*[2] decided that for the purpose of obtaining a warrant under section 7 of the Gaming Ordinance, No. 17 of 1889, general evidence to the effect that the informant had reason to believe that gaming was going on on the premises is not sufficient and that the issue of a search warrant under section 7 was irregular. Section 7 of the Gaming Ordinance, however, provides for the issue of search warrants by a Magistrate on written information on oath and any further inquiry which the Magistrate might think necessary. I do not think that decisions upon that section are of great assistance in the interpretation of section 36 of the Excise Ordinance.

I am inclined to the view that the record in the notebook that the Inspector had received credible information is sufficient., but it is unecessary in this case to give a final decision on that point. The case is covered by section 92 of the Penal Code, which provides that there is no right to private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt if done or admitted to be done by a public servant acting in good faith under colour of his office though that act may not be strictly justifiable by law.

Even if the act of the Inspector and of the other public servants were not strictly justifiable by law, there is nothing to show that they did not act in good faith under colour of their office or that they did any act which reasonably caused the apprehension of death or of grievous hurt. I think that the plea of self-defence must fail in this case. I agree with the view taken by the learned District Judge that the accused acted together with the common object of overawing the Excise party by criminal force or a show of criminal force.

The learned District Judge has gone into the evidence against the various accused in great detail and I see no reason to disagree with the view that he has taken of the evidence.

In all the circumstances I do not think that the sentences he has imposed are excessive, and the appeals are therefore dismissed.

Appeal dismissed.

[1] 17 *N. L. R.* 473. [2] 22 *N. L. R.* 163.