1953 *Present :* **Swan J.**

D. E. F. FERNANDO, Appellant, *and* E. L. GOONEWARDENE (Excise Inspector), Respondent

S. C. 855—M. C. Panadure, 22,497

Excise Ordinance (Cap. 42)—Section 55— Is a Vedarala a " medical practitioner " ?— Medical Practitioners Ordinance (Cap. 90), ss. 35, 40.

Where, in a prosecution under the Excise Ordinance, the accused, who was a Vedarala, pleaded that as a " medical practitioner " he was entitled to rely on the provisions of section 55 of that Ordinance—

Held, that a Vedarala was not a " medical practitioner " within the meaning of that term in section 55 of the Excise Ordinance.

Amarasekera v. Lebbe (1914) 17 N. L. R. 321, followed.

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

H. W. Jayewardene, for the accused appellant.

N. Tittawella, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 9, 1953. SWAN J.—

The appellant was charged with having without a licence from the Government Agent, W. P., (1) manufactured an excisable article, (2) established and worked a brewery to manufacture an excisable article, (3) possessed materials, utensils, implements and apparatus for the purpose of manufacturing an excisable article, (4) bottled an excisable article for sale, (5) possessed an excisable article and (6) kept and exposed for sale an excisable article in breach of Sections 14 (*a*), 14 (*d*), 14 (*e*), 14 (*f*), 44 and 17 of the Excise Ordinance—offences punishable under Sections 43 (*b*), 43 (*e*), 43 (*f*), 43 (*h*), 44 and 43 (*g*), of the said Ordinance. He was found guilty after trial and sentenced to pay fines amounting to Rs. 400.

The offending liquor was a preparation called " Kamasan Jeewaneeya " which on analysis was found to contain 3 to 3·7 % alcohol. The facts were not denied, but it was contended on behalf of the appellant that he was entitled to prepare and sell this stuff as it was a medicinal preparation,

and that he was a medical practitioner within the meaning of that word as used in Section 55 of the Excise Ordinance. This creates an exemption in respect of bona fide medicated articles. The Section reads as follows :—

> " Nothing in the foregoing provisions of this Ordinance applies to the import, manufacture, possession, sale or supply of any bona fide medicated article for medicinal purposes by medical practitioners, chemists, druggists, pharmacists, apothecaries or keepers of dispensaries ; but the Governor may by notification prohibit throughout the Island or within any local area the import, manufacture, possession, supply, or sale of any such article either absolutely or except under such conditions as he may prescribe, and the provisions of this Ordinance shall thereafter apply to any article so prohibited. "

The learned Magistrate held that the appellant who is a vederala within the accepted meaning of that word did not act bona fide in the preparation of this so-called medicated article. I am unable to confirm the learned Magistrate's conclusion on this point. The evidence, in my opinion, proves the bona fide of the appellant. It was admitted by one of the prosecution witnesses that he was a vederala in practice for at least 12 years. In his evidence the appellant stated that he prepared this concoction according to an old prescription, and that he used yeast as a preservative. Unfortunately the learned Magistrate apparently drawing on his own knowledge thought that yeast was not a preservative but a basis or nucleus of alcoholic fermentation. The evidence also proved that the appellant had carried on the manufacture and sale of this medicated preparation quite openly for a number of years. In the circumstances I would hold that the learned Magistrate could not and should not have said that this " Kamasan Jeewaneeya " was not a bona fide medicated article. But can the accused claim exemption under Section 55 ? That is the crucial question which, however, the Magistrate did not consider.

Section 35 of the Medical Practitioners Ordinance (Cap. 90) provides :—

> " In any written law, whether passed or made before or after the commencement of this Ordinance, the words ' legally qualified medical practitioner ' or ' duly qualified medical practitioner ' or ' registered medical practitioner ' or any words importing a person recognised by law as a practitioner in medicine or surgery shall be construed as meaning a medical practitioner registered under this Ordinance."

It will be observed that a vederala does not come within the ambit of the term " medical practitioner ". Mr. Jayawardene, however, contends that under Section 40 a vederala can claim to be a " medical practitioner ". I do not think so. That Section only makes a concession in favour of vederalas. As the side note says it provides a " saving for vederalas ". If the Section is reproduced the point becomes obvious. I shall therefore do so.

> " Nothing in this Ordinance shall make it unlawful for a vederala to practise medicine or surgery according to the indigenous or ayurvedic systems or prevent him from recovering his charges for services rendered or medicine or goods supplied by him in the course of his practice. "

There is a case in point. In *Amarasekera v. Lebbe* [1] Wood Renton A.C.J. and Pereira J. (Sampayo J. dissenting) held that a vederala was not a "medical practitioner" within the meaning of that term as used in Section 55 of the Excise Ordinance. At that time the Medical Practitioners Ordinance No. 2 of 1905 was in force. Section 9 of that Ordinance provided as follows :—

> "The words 'legally qualified medical practitioner', or 'duly qualified medical practitioner', or any words importing a person recognized at law as a practitioner in medicine or surgery, where used in any Ordinance or regulation, shall be construed to mean a practitioner registered under this Ordinance."

The conviction is affirmed but in as much as I take the view that the appellant was acting bona fide in the preparation and sale of this medicated article I think a nominal punishment is sufficient. I would therefore reduce the sentences to Rs. 25 on count 1 in default 2 weeks' simple imprisonment—Rs. 15 on each of counts 2, 3, 4, 5 and 6 in default one week's simple imprisonment. Subject to this variation the appeal is dismissed.

Sentence reduced.

[1] *(1914) 17 N. L. R. 321.*