

Present : Jayewardene A.J.

1926.

BANDARAWELLA v. CAROLIS APPU.

78—*P. C. Badulla-Haldummulla, 19,311.*

Excise Ordinance—Search by Inspector without warrant—Failure to note grounds of belief—Ordinance No. 8 of 1912, s. 36.

Where an Excise Inspector, who had not complied with the requirements of section 36 of the Excise Ordinance, in effecting a search without a warrant, was allowed to enter a house without hindrance.

Held, that the evidence obtained under such entry was admissible.

A PPEAL from a conviction by the Police Magistrate of Badulla-Haldummulla. The accused was convicted under section 43 (a) of Excise Ordinance of being in possession of fermented toddy beyond the prescribed quantity. The evidence for the prosecution consisted of that of the Excise Inspector who entered and searched the house of the accused without a warrant and found the toddy. It was admitted that the Inspector had not in effecting

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the search complied with the requirement of section 36 of the Ordinance in recording his grounds of belief as to the necessity of a search. The learned Police Magistrate held that the entry was regularly made.

Rajapakse, for accused, appellant.

J. E. M. Obeyesekere, C. C., for complainant, respondent.

March 31, 1926. JAYEWARDENE A.J.—

In this case the appeal is founded on an objection to the admissibility of the evidence on which the conviction is based. The accused has been convicted of being in possession of fermented toddy over the prescribed quantity, an offence punishable under section 43 (a) of the Excise Ordinance, 1912. The evidence for the prosecution consisted of that of the Excise Inspector who stated that he entered and searched the house of the accused and found the toddy referred to in the plaint. The search, it was alleged, was under section 36 of the Excise Ordinance, which empowers an Excise Officer who has reason to believe that an offence under section 43 or 44 of the Excise Ordinance has been, is being, or is likely to be committed, and that a search warrant cannot be obtained without affording the offender an opportunity of escape or of concealing evidence of the offence *after recording the grounds of his belief* to enter and search any place, &c. It was contended in the Court below, and it is contended before me, that the entry and search cannot be regarded as made under that section, because the Inspector had not complied with its requirements. The learned Magistrate held that the search was regularly made. In view however, of the admission of the Inspector, that he had not recorded "the grounds of his belief," I do not think that the entry can be regarded as one under section 36. The recording of "the grounds of his belief" is a condition precedent to the exercise of the right of entry and search conferred by that section: *Zilva v. Sinno*.¹ I would, therefore, hold that the requirements of section 36 have not been complied with, and the entry cannot be justified under that section. Then the question arises whether the evidence obtained by such an entry is admissible in law. The object of section 36 is to give Excise Officers power to enter and search houses without a warrant in circumstances of urgency. It protects them against resistance and obstruction in so doing if they comply with its requirements. If an officer enters without such compliance and is resisted or obstructed, he is without remedy as his entry is illegal, but if he is allowed to enter and search without objection can it be said that his evidence of what he heard, saw, or

¹ (1914) 17 N. L. R. 473.

found is admissible? Section 36 itself does not exclude evidence obtained under such circumstances, and I know of no provision of the law requiring its exclusion. A similar objection was taken in *Silva v. Hendrick Appu*,¹ but the point was not decided as there was other evidence to support the conviction, and Wood Renton C.J. said: "I am clearly of opinion, however, that a contravention of the provisions of section 36 does not invalidate proceedings like the present in which there is ample independent evidence of the illicit sale." *Zilva v. Sinno (supra)* was also cited in this connection but it has no bearing on the question of the admissibility of an Excise Officer's evidence. I might, however, refer to an Indian case under the Madras Akbari Act, the equivalent of the local Excise Ordinance, in which a Magistrate acquitted an offender arrested by an Inspector outside his circle or jurisdiction, although he believed the evidence for the prosecution, on the ground that an Inspector's powers of arrest were restricted to his circle and the proceedings were unwarranted. The High Court set aside the acquittal remarking that the question whether the officer who effected the arrest was acting within or beyond his powers in making the arrest did not affect the question whether the accused was, or was not, guilty of the offence with which he was charged: *Emperor v. Ravalu Kesigadu*.² Reference has also been made to the provisions of "The Gaming Ordinance, 1889," but I do not think that any argument can be based on them, as by section 59 of the Police Ordinance, 1865, Police Officers are authorized to enter and inspect gaming houses without a warrant. But it is argued, however, that if evidence obtained without complying with the requirements of section 36 be held to be admissible, the provisions of that section would be reduced to a nullity, particularly in view of the fact that as a general rule the villager here does not dare to oppose a uniformed officer even when he attempts to enter a house for the purpose of searching it. I am not prepared to say that villagers, specially those engaged in committing excise offences, are so docile as to allow their houses to be searched without protest. But, however, that may be, there is no rule of law requiring the rejection of such evidence and commonsense commends its admission.

I come to the conclusion that the evidence objected to has been rightly admitted, and dismiss the appeal.

Appeal dismissed:

¹ (1917) 4 C. W. R. 232.

² (1902) 26 Mad. 124.

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