1971 *Present :* Sirimane, J.

P. WANIGARATNE, Appellant, *and* S. PALAPITIYA (S. I. Police), Respondent

S. C. 529/70—M. C. Negombo, 16535

***Excise Ordinance** (Cap. 52)—Section 47—Charge of illegal possession of an excisable article—Requirement of strict proof of the identity of productions.*

In a prosecution for illegal possession of an excisable article, it is the duty of the prosecuting officer to ensure that there can be no doubt whatsoever in regard to the identity of the productions in the case.

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

E. H. C. Jayetileke, for the accused-appellant.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

March 15, 1971. SIRIMANE, J.—

The appellant has been convicted under Section 47 of the Excise Ordinance for having had in his possession 80 drams of unlawfully manufactured distilled spirits.

Counsel for the appellant in this case has very strongly urged that the production sent to the Government Analyst for examination was not part of the distilled spirits found with the appellant, even assuming that the appellant did have some spirits in his possession. In cases of this kind it is the duty of prosecuting officers to ensure that there can be no doubt whatsoever in regard to the identity of the productions in the case.

An examination of the evidence shows that a Sub-Inspector of Police had raided the house of the appellant, and (according to his evidence) had found 80 drams of spirits in a large bottle which was kept inside the kitchen. He says that he extracted some 8 drams out of this quantity and poured it into a separate bottle marked P2, which he sealed in the usual manner.

On 17.2.66 he had presented to Court a report under Section 148 (1) (*b*) of the Criminal Procedure Code dated 10.2.66 in which he had set out in his list of productions :—

> "a large bottle containing 72 drams UDS (P1), another bottle containing 8 drams UDS (P2), one gunny bag (P3)."

He had not given evidence and formally produced them in Court. I presume that they were handed over to the record room.

Thereafter summons had been issued on the accused and on 7.4.66 after the accused appeared in Court and pleaded, the learned Magistrate had made an order to forward P2 to the Government Analyst. This order had not been carried out till about a year later, for, according to the evidence of the record keeper and a constable who took the production to the Government Analyst a bottle P2 was packed and sealed on 27.3.67 and taken to the Government Analyst.

Knowing the state of disorder in the over-crowded production rooms in practically all Magistrates' Courts, this long delay is most unsatisfactory. The chances of error or substitution are high.

The formal covering letter of the Magistrate forwarding the production to the Government Analyst describes the production as "a sealed bottle containing 8 drams of U.D.S.", and marked P2. It is very significant that the Government Analyst in his report had described what he had examined as a sealed bottle "*marked P2 in my laboratory*". He had deliberately scored off the printed words "*as described in the covering letter*". I agree with the contention of counsel for the appellant that there is at least some doubt as to whether the contents of the bottle examined by the Government Analyst were part of the spirits alleged to have been found with the appellant. It would appear that the bottle which was handed to the Government Analyst had no label on it.

Another feature in this case shows a very careless attitude towards the productions. At the trial which took place on 25.11.68 the sub-inspector had stated that the productions P1 and P3 were destroyed on the orders of the Court. There is in fact no order made by Court to that effect up to that date. The only order to destroy productions—presumably referring to the bottle produced at the trial—was made on 19.12.68 long after the sub-inspector gave evidence.

The conviction is quashed and the appellant is acquitted.

Appeal allowed.