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*Present : Ennis, De Sampayo, and Porter JJ.*MISSO *v.* PERERA.*P. C. Gampaha, 33,076.*

*Excise Ordinance—Sale of arrack for a higher price than that appearing on the signboard at the tavern—Prosecution for breach of condition—Is proof of strength of arrack necessary?*

Accused sold arrack at a rate higher than that appearing on the signboard exhibited in the tavern and was charged for breach of condition 3 (3) of the General Conditions applicable to all Excise Licenses (Excise Notification No. 133 ; *Gazette* of May 25, 1923).

*Held*, that it was not necessary for the prosecution to prove the strength of the arrack sold.

THE Itinerating Police Magistrate of Colombo stated a case under section 353 of the Criminal Procedure Code as follows :—

Case stated by the undersigned under the provisions of section 353 of the Criminal Procedure Code, 1898.

At the Itinerating Police Court of Colombo, held at Gampaha, before the undersigned on February 20, 1924, J. Paul Perera, the above-named defendant, was charged as follows :—

That he did on October 25, 1923, at arrack tavern, Weligampitiya, sell arrack at a higher rate than the current rate appearing on the signboard, to wit, at Rs. 15·14 a gallon, whereas the rate appearing on the signboard was Rs. 13·92 a gallon, in breach of condition 3 (3) of the General Conditions applicable to all Excise Licenses appearing in Excise Notification No. 133 and published in the *Government Gazette* No. 7,330 of May 25, 1923, read with section 24 of Ordinance No. 8 of 1912, and thereby committed an offence punishable under section 43 (h) of the Excise Ordinance, No. 8 of 1912.

At the hearing of the said charge it was proved that the accused did sell arrack at a rate higher than that appearing on the signboard exhibited in the tavern of which he is a tavern-keeper. The current rate of sale appearing on the signboard was Rs. 13·92 per gallon of arrack, and in a gallon there are 76,800 minims or drops of arrack. The accused sold a certain quantity of arrack for 75 cents, which, when measured by the complainant then and there, was found to contain only 3,805 minims or drops. The rate as worked out from this brought the price at Rs. 15·14 per gallon of arrack, which was about 9 per cent. higher than the current price as exhibited on the signboard. I considered that this excess was far too much to be accounted for by the loss of arrack in the process of transferring from cask to bottle at the sale or from the bottle in which it was sold into the measuring glass or bottle at time of measurement, and that only about 2 or 3 per cent. should be allowed for this loss and any error in calculation.

2. It was thereupon contended on the part of the defendant that it was incumbent on the part of the complainant to prove the strength of the arrack sold, and that inasmuch as he did not test the strength of the

arrack sold or exhibited for sale by Syke's hydrometer, and was, therefore, not in a position to state what the strength of the arrack sold was, the case must fail, and the defendant acquitted of the charge against him.

In support of this contention the judgment of His Lordship the Chief Justice in P. C. Hatton, case No. 9,652 (S. C. No. 661), was cited, and also the decision of His Lordship Mr. Justice Porter in a case in appeal from this Court.

3. But I being of opinion that the judgment in P. C. Hatton, case No. 9,652, was not applicable to this case inasmuch as this prosecution was for an infringement of general condition 3 (3) applicable to all excisable licenses for the year 1923-24, whereas the prosecution in the Hatton case was for an infringement of condition 23 of the Arrack Rent Sales Conditions, held that proof of the strength of arrack sold was not necessary. The two conditions are entirely different. Under the latter condition the sale price of arrack is fixed with reference to its strength, and therefore proof of strength is necessary when a prosecution is launched for an infringement of this condition. But under the former general condition 3 (3) there is no reference whatever to the strength of arrack. It is an offence to sell arrack at a rate higher than that appearing on the signboard, irrespective of the strength of the arrack sold or exhibited for sale. It will be noted that it is an offence under general condition 2 to omit to have a signboard containing various particulars including the current rate of sale.

4. This was the opinion I held in case No. 33,074 of this Court, where the facts are the same as in this case, and which is forwarded herewith,\* but in appeal His Lordship Mr. Justice Porter held that the case was covered by the judgment of His Lordship the Chief Justice referred to above, and set aside the conviction.

Since then my attention has been drawn to a judgment of His Lordship Mr. Justice Ennis dated January 15, 1924, in P. C. Colombo, case No. 1,814 (S. C. No. 748), which entirely supports the view I have taken in case No. 33,074 above referred to. I accordingly convicted the defendant in this case, and sentenced him to pay a fine of Rs. 25.

5. The question for the opinion of this Court is whether the said determination in this case was correct in point of law, and what should be done in the premises.

February 20, 1924.

V. COOMARASWAMY,  
Itinerating Police Magistrate,  
Western Province.

The conditions referred to in the judgment were as follows :—

[Extract from the "Ceylon Government Gazette," No. 7,330 of May 25, 1923.]

THE EXCISE ORDINANCE, NO. 8 OF 1912.

*Excise Notification No. 133.*

**General Conditions applicable to all Excise Licenses.**

2. A signboard must be affixed to the front of each licensed distillery, brewery, wholesale warehouse, arrack renter's storehouse, bottling warehouse, or tavern (including beer and porter) showing the number and nature of the license, the name of the licensee, and, in the case of country liquor taverns, the current rate of sale. These particulars must be legibly printed in English or the local vernacular. The license

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and a printed copy of these conditions must be hung up in a conspicuous place within all licensed premises. In the case of taverns the license must show the names of the salesmen.

3. (3) No licensee or renter and his tavern-keeper shall sell any liquor at a price higher than the current rate appearing on the sign-board.

[Extract from the "Ceylon Government Gazette," No. 7,362 of November 23, 1923.]

**Arrack Rent Sale Conditions, 1923-24.**

23. The grantee (a) shall not sell any arrack whether by dram or by the "bottle" or gallon at a lower price than at the rate of Rs. 9·60 per gallon at 32 underproof; and (b) shall not sell arrack in any one particular tavern at a cheaper rate by "bottle" or gallon than at the rate by the dram at which he sells arrack in that tavern. Nor shall the grantee sell any arrack at a higher rate than at the rate of Rs. 13·92 per gallon at 32 underproof, provided that the Government Agent may, for special reasons and on the application of the grantee, permit the sale of arrack at a rate higher than Rs. 13·92 per gallon at 32 underproof as the Government Agent may determine.

*V. M. Fernando, C.C.*, for the Crown.

*J. N. Sandarasegera*, for the accused.

March 26, 1924, ENNIS J.—

This is a reference by the learned Magistrate of Gampaha under section 353 of the Criminal Procedure Code. The learned Magistrate appears to have been under the impression that there was a conflict of decisions, and he accordingly made the reference. It appears that in a case before him the accused was charged under condition 3, sub-condition (3), of the General Conditions applicable to all Excise Licenses, published in the *Gazette* of May 25, 1923, with selling arrack at rates above the current rate appearing on the signboard. On the facts the learned Magistrate has found that the accused sold at a rate which worked out at Rs. 15·66 per gallon, while the rate on the signboard was Rs. 13·92 a gallon. The learned Magistrate convicted the accused, and that conviction is quite in order, for under condition 3, sub-condition (3), there is no occasion to prove the strength of the liquor sold: The learned Magistrate appears to have been under the impression that regulation 23 of the Arrack Rent Sale Conditions, published in the *Gazette* of November 23, 1923, had something to do with the case. There are a number of decisions of this Court to the effect that in a prosecution for a breach of that condition, the prosecution must prove the strength of the arrack. There is, however, no occasion to consider the question in the present case, as it is not applicable to the circumstances under review. The

learned Magistrate himself seems to have been of that opinion, but under pressure of a number of decisions appears to have made the present reference.

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The conviction of the learned Magistrate is right.

DE SAMPAYO J.—I entirely agree.

PORTER J.—I agree.

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The following are the judgments referred to by the learned Police Magistrate :—

661—*P. C. Hatton, 9,652.*

*R. L. Pereira*, for the appellant.

*Dias, C.C.*, for the Crown.

November 8, 1923. BERTRAM C.J.—

In this case I have no doubts as to the facts. I agree with the conclusions of the learned Magistrate. But Mr. R. L. Pereira has taken a technical point, and this I must allow. The charge against the accused was that he had infringed an Excise Regulation, No. 23 of the Arrack Rent Sale Conditions, 1922-23, published in the *Ceylon Government Gazette* of June 16, 1922. That regulation prohibits the grantee from selling at a higher price than at the rate of Rs. 9.60 per gallon at 32 degrees underproof. Mr. Pereira submits that in a criminal case the prosecution must prove every essential part of the charge, and he urges that it is essential to prove the strength of the arrack. This appears to be the case. Mr. Dias admits that it is the duty of the arrack seller to adjust his price to the strength of the arrack sold; that he is given a certain latitude, and he may sell arrack as weak as 35 degrees underproof, but if he does sell arrack at this low strength, he must either increase the quantity sold or decrease the price per dram. It seems to me, therefore, that when an Excise Inspector visits a tavern for the purpose of inspecting the rate at which the arrack is sold, he should test the strength of the arrack sold by Syke's hydrometer, and the case for the prosecution is not complete unless evidence of the strength of the arrack dealt with is given. No evidence of this sort was given in the present case. Mr. Dias urges me to send the case back, in order that the facts may be ascertained. But I think it is now too late to ascertain facts. Mr. Pereira's technical point, being therefore good in law, must be admitted. The appeal is accordingly allowed.

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748—*P. C. Colombo, 1,814.*

*De Jong and R. C. Fonseka*, for the appellant.

*Muttunayagam, C.C.*, for the respondent.

January 15, 1924. ENNIS J.—

This is an appeal from a conviction for the sale of arrack at a price beyond the current rate. The conviction is under sub-section (3) of condition 3 in the General Conditions applicable to all Excise Licenses, published in the *Gazette* of May 25, 1923. That sub-section reads :—

“ No licensee or renter and his tavern-keeper shall sell any liquor at a price higher than the current rate appearing on the signboard.”

It appears that “ liquor ” is defined for the purposes of the Ordinance as any liquor containing alcohol. Therefore, the only matter which it is necessary to prove for the purpose of conviction under this section would be that a certain quantity of “ liquor ” had been sold at a price beyond the day's price mentioned on the signboard. No question would arise as to the quantity of water in the liquor, but only as to the quantity of liquor sold in relation to the price. In the circumstances the conviction is right, and I see no reason to interfere with the conviction or sentence, and dismiss the appeal.