1931

Present : **Drieberg J.**

DE SILVA *v.* DE SILVA *et al.*

965-966—*P. C. Kalutara*, 38,161.

Excise Ordinance—Search warrant—Entry in Inspector's diary—Grounds of belief—Ordinance No. 8 of 1912, *s.* 36—*Penal Code, ss.* 198, 219,220 A.

Where an Excise Inspector, who proposed to make a search without obtaining a warrant, made the following entry in his diary :—"One William states to me that he has been drinking toddy from one James Silva of Etagama ",—

Held, that there had not been a sufficient compliance with the provisions of section 36 of the Excise Ordinance as the entry did not disclose that an offence had been committed or contain a record of the grounds of belief as required by the section.

Section 198 of the Penal Code does not apply to a case where a person causes the disappearance of evidence of an offence committed by himself.

APPEAL from a conviction by the Police Magistrate of Kalutara.

February 20, 1931. DRIEBERG J.—

The appellants have been convicted of offences said to have been committed in the course of an entry by Excise Inspectors into the house of the first accused appellant. Having made an entry in his diary as required by section 36 of the Excise Ordinance No. 8 of 1912, Excise Inspector Dahanayake with the assistance of Inspector de Silva sent William with a marked coin to buy toddy from the first accused appellant at his house. The Inspectors followed and when they were about to enter they saw William in a room of the house with a cup in his hand and the first appellant making for the back entrance with a pot of toddy which he threw down and broke when he got to the compound. The first appellant was then seized and taken into the house struggling. While Inspector de Silva and Guard Jinadasa were holding him, the second appellant pushed them off; the first appellant when he was free armed himself with a katty and threatened to assault the Excise officers.

The learned Police Magistrate held that the entry in the diary did not comply with the requirements of section 36 as the Inspector had not noted the grounds of his belief, and further, that the circumstances did not relieve the Inspector from the duty of applying for a search warrant, the information having been given to him when he was within a short distance of the Court which was sitting at the time.

The sale is said to have taken place in a room which communicates with the main building and is used as a kitchen and for taking meals. The learned Magistrate held rightly that this was a dwelling house and therefore the Inspector had no right under section 36 to arrest the first appellant if he was found committing the offence of sale there. He held however that the arrest was justified under section 34 in that it was effected outside the house when he was in unlawful possession of toddy. He convicted the first appellant under section 219 of the Ceylon Penal Code of escaping from lawful custody and under section 198 of the Penal Code of having destroyed the pot of toddy and thereby causing evidence of the commission of an offence to disappear. The second appellant was convicted under section 220A of the Penal Code of rescuing the first appellant from lawful custody.

Mr. Crossette Thambiah contended that the learned Magistrate was wrong in holding that the entry in the diary did not justify the Inspector entering the house. The entry is as follows :—"One William states to me that he has been drinking toddy from one James Silva of Etagama, he cannot read or write. Therefore I recorded his statement as overleaf. Inspector Silva and myself are now proceeding to search the house of James Silva of Etagama on the above information which we believe.

" We also believe that a search warrant cannot be obtained without giving the offender an opportunity of escape or of

concealing the evidence of the offence. We shall therefore search the house of James Silva under section 36 of Ordinance No. 8 of 1912. "

(Sgd.) B. R. DE SILVA.
C. DAHANAYAKE ".

I have examined the diary ; Inspector Dahanayake first wrote " I have recorded his statement as above." ; he then struck out the word " above " and wrote " overleaf". There is no record of what William said beyond what appears in P3. These words occur on the second line of page 30 of the diary ; the reference to William's information was on page 29, the other face of the same leaf. It appears to me that the writer thought the words " as above " not suitable as the matter referred to was not on the same page, and so substituted " as overleaf ".

It cannot be said that the entry has a record of the grounds on which Inspector Dahanayake believed that an offence under section 43 or 44 of the Ordinance had been, was being, or was likely to be committed. James Silva, the first appellant, committed no offence under the Excise Ordinance in giving William toddy to drink unless he sold it to him or had with him more than the permitted quantity of toddy. If the Inspector had applied under section 35 of the Excise Ordinance to a Police Magistrate for a search warrant he would have had to state to the Magistrate his information and the grounds for his belief. Section 37 of the Excise Ordinance provides that the provision of the Criminal Procedure Code relating to search warrants shall apply to all action taken in the matter of search warrants under the Excise Ordinance. When a search warrant is applied for on the ground that any place is used for the commission of certain offences, section 70 of the Criminal Procedure Code provides that a Police Court can issue a search warrant if "upon information and after such inquiry as it thinks necessary it has reason to believe " that the place is so used. An Excise Officer is permitted to search without a warrant when the object of the search would be defeated by the delay in obtaining a warrant, in which case, before making the search, he has to record the grounds of his belief regarding the commission of an offence. It follows therefore that the grounds upon which he acts must be such as would entitle him to apply to a Court for a search warrant ; further, the learned Magistrate has held that he could have had no reason to believe that the delay in getting the search warrant would render it useless. If the entry was lawful the Inspectors would have been justified in arresting the first appellant if they believed he was guilty of an offence under section 43 or 44 even though he was not found committing one. But as it was not lawful the prosecution could only justify the arrest under section 34 if he was found committing an offence in any place other than a dwelling house. The first appellant could not be arrested for the offence of selling toddy as that offence is said to have been committed within the dwelling house. So far as the offence of unlawful possession is concerned, it is sufficient that such possession was not unlawful unless the quantity exceeded half a gallon and that there is no proof of what the quantity was.

Mr. Crossette Thambiah contended that under section 50 of the Ordinance it was for the first appellant to prove that there was not more than half a gallon of toddy, but this liability only arises in a prosecution for an offence under section 43 where proof has been given of the possession of more than the permitted quantity and this must be presumed to be unlawful unless the accused could justify his possession of it.

The Inspectors were not entitled to arrest him for this reason and he cannot therefore be convicted of escaping from lawful custody. For the same reason the second appellant cannot be convicted of rescuing him from lawful custody.

The conviction of the first appellant under section 198 of the Penal Code is bad. This section does not refer to cases where a person causes the disappearance of evidence of an offence committed by himself.

I allow the appeal.

The conviction of the appellants is set aside and they are acquitted.

Set aside.