1931

Present : Maartensz A.J.

SILVA *v.* SILVA.

970—*P. C. Kalutara*, 38,160

Excise ordinance—Conduct in connection with excisable article—Presumption—Evidence of decoy—Corroboration—Ordinance No. 8 *of* 1912, *s.* 50.

To enable the presumption created by section 50 of the Excise Ordinance to be drawn from the conduct of an accused person in connection with an excisable article, such conduct must amount to a breach of section 43 of the Ordinance.

The evidence of a decoy need not be corroborated in every material particular.

APPEAL by the complainant from an order of acquittal.

M. F. S. Pulle, C.C., for complainant, appellant.

H. V. Perera (with him *Rajapakse*), for accused, respondent.

March 25, 1931. MAARTENSZ A.J.—

This is an appeal by the complainant with the sanction of the Solictor-General against a judgment of the Police Magistrate of Kalutara acquitting the accused.

The accused was charged with selling an excisable article, to wit, fermented toddy, without a licence in breach of section 17 of Ordinance No. 8 of 1912, an offence punishable under section 43 (*h*) of that Ordinance.

The evidence against the accused was that William Singho, the decoy, was sent with a marked 25-cent piece to buy fermented toddy from the accused. The decoy was followed first by Guard Fernando and later by Exise Inspectors Silva and Dahanayake and three Exise guards. As they rushed into the house the accused rushed out of the room in which he was with the decoy, took a pot of toddy and threw it over the fence. They found the decoy in the room with a cup in his hand which smelt of fermented toddy. Inspector Dahanayake and Guard Jinadasa seized the accused and handed him over to Inspector Silva. He was rescued by his nephew Simon. The accused, after his release, picked up an axe and threatened the Exise officers and they went away and informed the headman. On the headman's advice the officers did not return to the accused's house. The decoy was followed to the accused's house by Guard Fernando who had him in sight until he entered the house, so that he had no opportunity of introducing toddy into the house. The decoy's evidence was that he went to the accused's house and asked for toddy and gave him the marked 25-cent piece, and the accused handed him a cup of toddy. As he finished drinking the toddy the Excise officers entered and the accused threw away the pot containing the toddy, and it got smashed.

The marked coin was not found as the Excise officers had no opportunity of searching the accused. Guard Baron who is said to have found another pot of toddy in the house was not a witness in the case, and the finding of this pot of toddy is not evidence against the accused.

The learned Magistrate accepted the evidence of the Inspector as to what he saw on entering the house and as to what happened, but acquitted the accused on the ground that the evidence of the conduct of the accused and the

presence of the cup in the decoy's hands did not necessarily mean that a sale had taken place.

It was submitted in appeal (1) that the evidence of the Excise Inspectors if accepted afforded sufficient corroboration of the decoy to establish that a sale had in fact taken place and (2) that the presumption created by section 50 threw on the accused the burden of accounting satisfactorily for his conduct. The second contention may be disposed of first.

Section 50 enacts that in prosecutions under section 43 it shall be presumed, until the contrary is proved, that the accused person has committed an offence under that section in respect of (*a*) any excisable article (I need not read (*b*) and (*c*), for the possession of which or for his conduct in connection with which he is unable to account satisfactorily. This section reproduces section 53 of the Bombay Abkari Act No. 5 of 1878 with the exception of the words " or for his conduct in connection with which ". It was argued that these words raised the presumption that the accused committed the offence with which he was charged in the absence of any satisfactory explanation for his conduct in throwing away the pot of toddy, pulling down a rack and subsequently threatening the Excise officers. I am unable to accept this argument. The conduct must in my opinion amount to a breach of section 43. Thus where the accused was seen pouring toddy into a tin held by a woman and there was no evidence to show whether the toddy was given for a consideration or not, it was held that the burden of proving that the transfer was by way of gift was in view of the provisions of section 50 of the Excise Ordinance on the accused (*Lockhart v. Fernando* [1]).

In support of the first contention it was argued that sufficient facts had been proved by the evidence of the Inspector to establish the truth of the decoy's evidence that a sale had in fact taken place, On the other hand it was argued that the decoy's evidence of the sale had not been corroborated as the marked coin was not found on the accused and there was no toddy found. in the cup held by the decoy.

The respondent relied on the case of *Caldera v. Pedrick* [1] where the Excise Inspector was delayed and met the decoy returning from the house of the accused. The Inspector went on to the accused's house and found the marked note which had been handed to the decoy to buy the toddy in the accused's possession. Garvin J. held that the finding of the note was not sufficient corroboration of the evidence of the decoy that a sale had taken place. If I may say so I entirely agree with this decision, but it is of no assistance in the present case. In my opinion the question whether the evidence of a decoy has been corroborated or not must be decided on the facts of each case. It is not a question which can be decided by the view taken with regard to other facts in other cases. It is now well established that a person should not be convicted on the uncorroborated testimony of a decoy. The decoy is placed on the same footing as an accomplice, and I think that the principles which have been laid down with regard to the evidence of accomplice's are applicable to the evidence of a decoy.

The general principle laid down is that when corroboration is required it is not necessary that an accomplice should be cooroborated in every material particular, because if such evidence could be found it would be unnecessary to call the accomplice ; but he must be confirmed in such and so many material points as to satisfy the Court or jury

[1] (1925) 27 *N. L. R.* 229.

[1] (1927) *Times of Ceylon L. R.* 70.

of the truth of his story (*R. v. Gallagher*[1]; *R. v. Barnard*[2]; *R. v. Boyde*[3]).

The learned Magistrate has acquitted the accused on the ground that the evidence of the decoy has not been corroborated in every particular. The particular in which corroboration is lacking is the evidence that the accused handed a cup of toddy to the decoy on payment. In no other respect is his evidence uncorroborated. The facts show that the accused and the decoy were in the same room, that the decoy had a cup smelling of fermented toddy in his hand, and that the accused threw away the pot containing the toddy.

The only inference to be drawn from the conduct of the accused was that he wanted to destroy the evidence that there was toddy in the house, which was not necessary unless he had committed some offence under the Excise Ordinance. What that offence was can be inferred from the cup in the hand of the decoy. It was suggested that the decoy might have picked up the cup from which the accused had just drunk, but that is not the explanation offered by the accused. I do not think that the fact that the cup was empty makes any difference. If there was some toddy in the cup the explanation could have been offered that the accused had put down the cup before drinking all the toddy. I am of opinion that the facts accepted by the Magistrate sufficiently corroborate the evidence of the decoy that the accused sold toddy to him on the day and at the time in question.

I accordingly set aside the order acquitting the accused and remit the case to the Magistrate to pass such sentence as he might think appropriate.

Set aside.

[1] 15 *Cox C. C.* 291.
[2] 1 *C. and P.* 88.
[3] 1 *B and H. S.* 311, 320.