1951 *Present* : **Dias S.P.J., Gunasekara J. and Pulle J.**

RAJAPAKSE (Excise Inspector), Appellant; *and*
FERNANDO, Respondent

S. C. 16—M. C. Kegalle, 29,444

Evidence—Prosecution for illicit sale of arrack—Evidence obtained in course of unlawful search—Admissibility of such evidence—Excise Ordinance, s. 36—Evidence Ordinance, s. 100—Evidence of agent provocateur—Public policy.

Where, in a prosecution under the Excise Ordinance, an excise officer tendered evidence which was discovered by him in the course of an illegal or irregular search—

Held, that such evidence was admissible. *Murin Perera v. Wijesinghe (1950) 51 N. L. R. 377, Andiris v. Wanasinghe (1950) 52 N. L. R. 83, and David Appuhamy v. Weerasooriya (1950) 52 N. L. R. 87 over-ruled.*

Held, further, (i) that the Evidence Ordinance is a Statute which consolidates and amends the law of evidence. Therefore, the Courts are precluded from refusing to admit admissible evidence on grounds of public policy. The Courts are not empowered to invent a new head of public policy.

(ii) that while it may be undesirable that *agents provocateur* and others should tempt or abet persons to commit offences, it is not open to a Court to acquit an accused person, where the offence charged is proved, on the sole ground that such evidence was procured by unfair means. Such considerations may affect the credit of the witness, but such evidence is not inadmissible and, therefore, when the offence charged has been proved on such evidence it is the duty of the trial judge to convict.

(iii) that the practice, which appeared to be prevalent, of excise officers making raids and searches without obtaining a search warrant or complying with the provisions of section 36 of the Evidence Ordinance was open to severe censure.

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

This case was referred to a Bench of three Judges, under section 48 of the Courts Ordinance, at the instance of Nagalingam J.

T. S. Fernando, Crown Counsel, with *H. A. Wijemanne*, Crown Counsel, for the Attorney-General.—The accused was charged with unlawfully selling arrack without a licence in breach of section 17 of the Excise Ordinance. The question for decision is whether evidence obtained illegally in the course of a raid carried out by an excise inspector is evidence upon which a conviction could be based. In *Murin Perera v. Wijesinghe* [1], *Andiris v. Wanasinghe* [2], and *David Appuhamy v. Weerasooriya* [3], Nagalingam J. took the view that where an unlawful entry into a dwelling house is made by an excise officer, evidence obtained in consequence of such entry is inadmissible. These cases are in conflict with *Karalina v. Excise Inspector, Matara* [4] and earlier decisions.

[1] *(1950) 51 N. L. R. 377.*
[2] *(1950) 52 N. L. R. 83.*
[3] *(1950) 52 N. L. R. 87.*
[4] *(1950) 52 N. L. R. 89.*

In *David Appuhamy v. Weerasooriya* [1], Nagalingam J. referred to *Zilva v. Sinno* [2]. That case is distinguishable. It was a case where the charge was one of obstruction of a public officer in the discharge of his duties, an offence under the Penal Code, and the question of lawful discharge of duties was one of the matters which the prosecution had to establish. The present question arose in *Silva v. Hendrick Appu* [3] but the judgment of Wood Renton C.J. shows that there was independent evidence of the illicit sale in that case. The question was considered by Jayawardene J. in *Bandarawella v. Carolis Appu* [4]. That judgment refers to an Indian case, *Emperor v. Ravalu Kesigadu* [5]. In *Murin Perera v. Wijesinghe* [6], Nagalingam J. refers to this Indian case and says that it has not the effect that Jayawardene J. gave it. *Bandarawella v. Carolis* [4] was followed by Garvin J. in *S. I. of Police, Mirigama, v. John Singho* [7] and *Silva v. Menikrala* [8]. Lyall Grant took the same view in *Almeida v. Mudalihamy* [9] and so did Drieberg J. in *Attorney-General v. Harthewyck* [10], and Macdonell C.J. in *Bastiansz v. Punchirala* [11]. The same view was taken by Wijeyewardene J. in *Ekanayake v. Deen* [12], a case under the Motor Car Ordinance, 1938, and in *Hendrick Appuhamy v. Price Control Inspector* [13]. See also the view of Basnayake J. in *Peter Singho v. Inspector of Police, Veyangoda* [14].

Indian cases support the view of Jayawardene J. See *Emperor v. Allahadad Khan* [15], where it was held that irregularity or illegality in the search can neither vitiate the trial nor affect a conviction. See further *Ali Ahmad Khan v. King Emperor* [16] ; *Abdul Hafiz Khan v. Emperor* [17] ; and *Chwa Hum Htive v. Emperor* [18].

In England evidence improperly obtained is not necessarily inadmissible.—*Halsbury* (*Hailsham ed.*) Vol. 13, p. 534; *Phipson on Evidence*, 8th ed., p. 187 ; *Archbold*, 32nd ed., p. 1163 ; *Caicraft v. Guest* [19] ; *Lloyd v. Mostyn* [20] ; *R. v. Leatham* [21].

No appearance for the accused respondent.

G. E. Chitty, with *Vernon Wijetunge* and *J. C. Thurairatnam*, as *amicus curiae*, at the instance of the Court.—Evidence illegally obtained should be excluded on grounds of public policy. When a Court applies a principle of public policy it is not applying a rule of evidence but a wider principle that a Court should not be made an instrument for condoning illegality. Nagalingam J. in *Murin Perera v. Wijesinghe* [6] did not lay down a principle of evidence but a general principle of public policy. As he stated, " where an unlawful entry is made by an excise officer it will be setting at nought the salutary provisions of the Excise Ordinance framed in that behalf to invest with legality that evidence ".

[1] *(1950) 52 N. L. R. 87.*
[2] *(1914) 17 N. L. R. 473.*
[3] *(1917) 4 C. W. R. 232.*
[4] *(1926) 27 N. L. R. 401.*
[5] *(1902) I. L. R. Madras 124.*
[6] *(1950) 51 N. L. R. 377.*
[7] *(1926) 4 Ceylon Times L. R. 71.*
[8] *(1928) 9 C. L. Rec. 78.*
[9] *(1929) 7 Ceylon Times L. R. 54.*
[10] *(1932) 1 C. L. W. 280.*
[11] *(1931) 1 C. L. W. 281.*
[12] *(1940) 41 N. L. R. 556.*
[13] *(1947) 48 N. L. R. 521.*
[14] *(1949) 42 C. L. W. 15.*
[15] *(1913) 14 Cr. L. J. 236.*
[16] *(1924) A. I. R. Allahabad 214.*
[17] *(1926) A. I. R. Allahabad 188.*
[18] *(1933) A. I. R. Rangoon 146.*
[19] *(1898) 1 Q. B. 759.*
[20] *(1842) 10 M. and W. 478.*
[21] *(1861) 8 Cox 498.*

See *Burrows' Words and Phrases*, Vol. IV, P. 433; (*1950*) *Journal of Criminal Law*, Vol XIV, pp. 81, 302; *Friedman's Legal Theory*, 2nd ed. p. 291.

It is further submitted that the Excise Ordinance, together with the Criminal Procedure Code and the Evidence Ordinance, created a closed system in regard to prosecutions under the Excise Ordinance. The law provides the manner in which evidence should be obtained and placed before the Court. The cases cited for the prosecution do not support the proposition that however the evidence is obtained and however it is tainted with illegality it must be admitted.

T. S. Fernando, Crown Counsel, in reply.—As regards the effect of a consolidating statute, see *Maxwell : Interpretation of Statutes*, 9th ed., pp. 26, 27. On the question of public policy see *Janson v. Driefontein Consolidated Mines, Ltd.* [1].

Cur. adv. vult.

May 24, 1951. DIAS S.P.J.—

This case comes before us on a reference by his Lordship, the Chief Justice, under s. 48 of the Courts Ordinance, the question for our determination being formulated thus: " Whether evidence obtained illegally in the course of a raid carried out by an Excise Inspector is evidence upon which a conviction could be based ? ".

The facts which gave rise to this reference are simple. The accused was charged with unlawfully selling arrack on June 17, 1950, without a licence in breach of s. 17 of the Excise Ordinance (Chapter 42). Excise Inspector Rajapakse gave a decoy a marked rupee note and told him to go to the boutique of the accused and buy a rupee's worth of arrack. The decoy did so and was engaged in drinking arrack when the Inspector raided the place. The Magistrate says " The evidence of the bogus customer is corroborated by that of the Excise Inspector, and I cannot say that story is false. On the facts I am satisfied that the prosecution has proved that the accused did sell arrack to the bogus customer on the day in question ". The Magistrate, however, acquitted the appellant on the ground that the premises raided were a dwelling house, and the Excise Inspector admittedly had no search warrant. The Magistrate said " In similar circumstances it was held in the case reported in *51 N. L. R. 377* by Justice Nagalingam that where an unlawful entry into a dwelling-house is made by an excise officer, the evidence obtained by such entry is inadmissible. . . . It is not for me to say that that decision is wrong. I am bound by it. The evidence, therefore, in this case obtained by the Inspector becomes inadmissible. I accordingly acquit the accused ". The complainant appealed with the sanction of the Attorney-General, and the case now comes before this Court.

Although this question has been raised in a prosecution under the Excise Ordinance, it appears to have a wider application. For example— X with the intention of committing theft may break into and enter the house of Y. X while engaged in the burglary may witness Y committing the murder of his wife Z. At the trial of Y for murder, does the evidence

[1] (*1902*) *A. C. 484.*

of X become *inadmissible* because he obtained the information which he is capable of making known to the Court while he was engaged in an unlawful or illegal act after an unlawful entry? To take another illustration—under the Criminal Procedure Code certain rules are laid down to be observed by officers conducting a search under the Code. Supposing a public officer in defiance of those rules conducts a search and obtains unequivocal evidence of the commission of some offence by the householder, does that illegality make the evidence of that offence inadmissible?

The English Law, which is the Common Law, on this point is clear: In *13 Halsbury's Laws of England* (*Hailsham edition*) *pages 533-534*, the rule is stated thus: "Although it is the duty of the Court to reject evidence which is not legally evidence, the fact that evidence has been obtained improperly does not necessarily render such evidence inadmissible."—See also *Phipson on Evidence* (*8th edition*) *pages 187-188*, where it is pointed out that even privileged evidence which has been obtained by illegal means would be admissible, for it has been said the Court will not inquire into the methods by which the parties have obtained their evidence—see also *Calcraft v. Guest* [1] and *R. v. Leatham* [2]. There is a right to search a person arrested, and to seize articles or documents in his possession which will form material evidence against him or anyone else on a criminal charge. The interests of the State will excuse a seizure which would originally have been unlawful, if subsequently it should appear that the articles or documents are evidence of a crime committed by anyone—*Archbold* (*32nd edition*) *p. 1163*.

Under the Excise Ordinance (Chapter 42), there is no provision which enacts that evidence observed or discovered during an illegal raid or search should be withheld from the Court of trial. Therefore, if such a rule exists, it must be sought for elsewhere than in the Excise Ordinance. There is nothing in the Evidence Ordinance which shuts out such evidence. The Evidence Ordinance makes special provision for cases where certain types of evidence are to be excluded—e.g., see ss. 24-26, 30 (confessions), 54 (bad character of an accused), s. 120 (2) (the spouse of the accused as a witness for the prosecution), ss. 121-131 (privilege), &c. Subject to such special restrictions, under our law of evidence, relevant evidence cannot be shut out when tendered by a party to the proceedings through the mouth of a competent and compellable witness. Provided relevant evidence is not barred by some positive rule of statute law, and provided it is given by a competent and compellable witness, can such evidence be shut out as being inadmissible merely because that evidence was obtained illegally or by illegal means? Such facts may affect the *credibility* of the evidence, but do they also affect its *admissibility*?

The question which has been submitted to us for decision has been before our Courts previously.

In *Silva v. Hendrick Appu* [3], Wood Renton C.J. said: "I am clearly of opinion, however, that a contravention of the provisions of

[1] *(1898) 1 Q. B. 759.* [2] *(1861) 8 Cox Crim. Cases 498.*
[3] *(1917) 4 C. W. R. at p. 233.*

S. 36 of the Excise Ordinance does not invalidate proceedings like the present in which there is ample independent evidence of the illicit sale. It merely deprives the officer who omits to act in accordance with the provisions of the section of the right to complain that any obstruction that he may meet with in the course of the search is illegal ". This case, however, is distinguishable from the present case, in that in the case before us there is no independent evidence as there was in *Silva v. Hendrick Appu* [1].

Bandarawella v. Carolis Appu [2] is more in point. There, as here, the excise raid was illegal. Jayawardene (A. St. V. J.) said: "Then the question arises whether the evidence obtained by such an entry is admissible in law. The object of s. 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 found is admissible ? Section 36 itself does not exclude evidence obtained under such circumstances, and I know of no provision of law requiring its exclusion ". The learned Judge then referred to *Silva v. Hendrick Appu* (*supra*). He also referred to the case of *Zilva v. Sinno* [3]. This is a decision of a bench of two Judges, but I respectfully agree with Jayewardene J. that that case has no bearing on the question of the admissibility of the excise officer's evidence, which is the sole point we have to decide. In *Zilva v. Sinno* [3] an excise inspector who made an illegal search was resisted and obstructed. The accused were charged under s. 183 of the Penal Code, and a bench of two Judges held that such resistance and obstruction were not illegal and acquitted the accused. I draw attention to this case, because it seems to me that its scope and effect have not been fully appreciated in the later case of *David Appuhamy v. Weerasooriya* [4] which I shall deal with presently. In *Bandarawella v. Carolis Appu* [2], Jayawardene J. proceeded as follows: "But it was argued, however, that if evidence obtained without complying with the requirements of s. 36 be held to be admissible, the provisions of that section would be reduced to a nullity, particularly (and this be it noted was counsel's argument, and not an expression of the learned Judge's view) 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 common sense commends its admission ". The *ratio decidendi* of that decision is plain, namely, that in the absence of an express prohibition against the admission of such evidence, both law and common sense commend its admission. It is in my opinion incorrect to say that Jayawardene J. based his judgment on the Indian

[1] *(1917) 4 C.W. R. at p. 233.*
[2] *(1926) 27 N. L. R. 401.*
[3] *(1914) 17 N. L. R. 473.*
[4] *(1950) 52 N. L. R. 87.*

case of *Emperor v. Ravalu Kesigadu* [1]. The judgment shows that Jayawardene J. reached his conclusions quite independently of the Indian case which he cited.

The facts of *Emperor v. Ravalu Kesigadu* [1] are as follows: This was a prosecution under the Madras Akbari Act which is the equivalent of the local Excise Ordinance. An inspector of Circle P. received information that illicit tapping and distillation were going on in a village in Circle K. He therefore entered Circle K. and arrested the accused who was in the vicinity of a still secreted in some bushes. That inspector handed the accused over to the inspector of Circle K. The Magistrate accepted the evidence, but was doubtful whether an officer of Circle P. had been empowered by law to enter Circle K. and detect a case there. In appeal it was held " The question whether the officer who effected the arrests was acting within or beyond his powers in making the arrest does not affect the question of whether the accused were guilty or not guilty of the offence with which they were charged." It is true that the question as to whether the evidence of the excise officer was admissible or not is not expressly stated in the judgment. But the judgment when fairly read implies that such evidence would be admissible, otherwise, how could the guilt of the accused be established unless the officer who detected the offence gave evidence ? Had there been independent evidence, one would expect the Indian Court of Appeal to say so, as Wood Renton C.J. did in *Silva v. Hendrick Appu* [2]. As I have pointed out, Jayawardene J. in *Bandarawella v. Carolis Appu* [3] decided the case independently of the Indian case. The Indian case does not assist the accused respondent in this case. If anything it is against him.

In *S. I. of Police, Mirigama v. John Singho* [4] the same question came up for decision before Garvin J. In that case, before any evidence had been recorded, the Magistrate discharged the accused. Garvin J. said: " It may be that he (the inspector) entered legally for another purpose, and that it was only incidentally that the discovery of ganja was made. It may be that the entry may be justified upon other grounds; but I agree that under whatever circumstances the entry was made, it was the plain duty of the officer who made the discovery to bring that fact to the notice of those entrusted with the administration of the Excise Ordinance. I agree also that a prosecution otherwise properly constituted is not vitiated by the mere fact that the discovery was made by a person who, if that was the case, entered the premises otherwise than in accordance with the provisions of the Excise Ordinance." Garvin J. did not expressly deal with the question whether the evidence of the officer, assuming his entry and search were irregular would be inadmissible. That question became unnecessary because the appeal of the Attorney-General was dismissed on another ground. Therefore, the words of Garvin J. I have quoted are really *obiter*.

The same question, however, directly arose again before Garvin J. in *Silva v. Menikrala* [5] when he said " Presumably the impression of the Magistrate is that evidence which has been discovered as a result of

[1] *(1902) Madras 124.*
[2] *(1917) 4 C. W. R. at p. 233.*
[3] *(1926) 27 N. L. R. 401.*
[4] *(1926) 4 T. L. R. 71.*
[5] *(1928) 9 C. L. Rec. 78.*

a search which was irregular . . . could not be admitted or received in support of the charges laid against the accused. But this is a mistaken view. *Evidence which is legally admissible does not cease to be admissible merely because that evidence was discovered by an excise officer who did not comply with the requirements of s. 36 when searching premises without a warrant.* The attention of the Magistrate is invited to the case of *Bandarawella v. Carolis* [1]." The acquittal was set aside and the case was sent back for trial in due course.

The question next arose before Lyall Grant J. in *Almeida v. Mudalihamy* [2]. The learned Judge followed *Bandarawella v. Carolis* [1] and the acquittal was set aside and the case sent back for a new trial. In *Attorney-General v. Harthewyck* [3] Drieberg J. following *Almeida v. Mudalihamy* [2] held that a Court cannot for the reason that the entry is illegal, discharge the accused, for if an offence has been committed, the illegality of the entry and search is no bar to a conviction. Drieberg J. also suggested that the Magistrate should report the conduct of the Inspector to the head of his department.

In *Ekanayaka v. Deen* [4] a similar question arose under the Motor Car Ordinance, 1938. Section 111 (6) of that Ordinance empowered a police officer not below the rank of sergeant to stop a motor bus in order to ascertain whether an offence under that section has been committed. A motor bus was stopped by a police constable and an offence was discovered. Wijeyewardene J. said: "Disregard of the provisions of s. 111 (6) by a police constable may, perhaps, amount to an offence under s. 150 of the Ordinance or some other provisions of the law, *but cannot possibly affect the competency of the officer in question as a witness in a case under s. 111 of the Ordinance.*" This is a decision of importance because the learned Judge, without any reference to the foregoing authorities, independently reached the same conclusion in a case quite unconnected with the Excise laws. The same learned Judge came to the same conclusion in a case under the Defence Regulations for selling rice above the controlled rate in *Hendrick Appuhamy v. Price Control Inspector* [5]. Wijeyewardene J. said: "It may be that the accused could have resisted any person, other than an authorized officer, trying to enter his premises . . . It does not follow that, because such a person could be resisted, *the evidence given by that person regarding a sale detected by him is not admissible.*"

Turning to the Indian cases. In *Emperor v. Allahadad Khan* [6] it was held that in a case under s. 63 of the Excise Act of 1910, where it is necessary to search a house, a search warrant should be obtained beforehand. But even if the search is illegal, the occupier of the house searched can be convicted under s. 63 for the unlawful possession of an excisable article. In *Ali Ahmad Khan v. King Emperor* [7] it was held

[1] *(1926) 27 N. L. R, 401.*
[2] *(1929) 7 T. L. R. 54 ; 10 C. L. Rec. 148.*
[3] *(1932) 12 C. L. Rec. 56.*
[4] *(1940) 18 C. L. W. 60.*
[5] *(1947) 48 N. L. R. 521.*
[6] *(1913) 14 Crim. Law Journal Reports, 236.*
[7] *(1924) Allahabad 214.*

that where the discovery of articles showing the guilt of the accused and found at a search has been proved by direct evidence, any irregularity or illegality in the search can neither vitiate the trial nor affect a conviction. The same principle was reaffirmed in *Khan v. Emperor* [1] and in a Rangoon case, *Chwa Hum Htive v. Emperor* [2].

It is in the light of the foregoing principles and with this body of case law as a background that we have to consider the case of *Murin Perera v. Wijeysinghe* [3] which is the case cited by the Magistrate in his judgment acquitting the accused respondent.

The facts of this case are that an excise inspector sent a decoy with a marked currency note to purchase arrack. He thereafter made an irregular and illegal raid and stated in evidence that he had detected the accused in the act of committing the offence. My brother Nagalingam set aside the conviction of the accused. Thereafter in two subsequent cases the learned Judge set aside the convictions of two other accused persons—*Andiris v. Wanasinghe* [4] and *David Appuhamy v. Weerasooriya* [5]. These three cases are in conflict with the case of *Kavalina v. Excise Inspector, Matara* [6] where my brother Gratiaen came to a different conclusion, and held that evidence obtained without the authority of a search warrant and in contravention of the provisions of s. 36 of the Excise Ordinance is not inadmissible for the purpose of securing a conviction under the Excise Ordinance. It is with the object of resolving the difficulties created by these conflicting decisions that this case has been referred to a Divisional Bench.

What was the *ratio decidendi* in *Murin Perera v. Wijesinghe* [3]? Nagalingam J. concluded his judgment in that case with the following words: "Having regard to all these circumstances, I think the conviction cannot be sustained, which I, therefore, set aside, and acquit the accused". What are those reasons? There were no less than eight reasons which caused the learned Judge to reach the conclusion which he did—(1) In view of the contradictions in the evidence he was "quite unable to say that the prosecution evidence should in these circumstances receive all the credit which it otherwise might have received". (2) The fact that the decoy was "strongly smelling of arrack" would by itself be no proof that he had consumed arrack at the alleged sale. (3) He held that inadmissible evidence regarding the bad character of the accused had been admitted. (4) That there existed grounds for the view that the whole case for the prosecution was a fabrication as a retaliation by the excise officer for something done by the husband of the accused. (5) That whereas the prosecution stated that it was the verandah of the accused's house that was searched without a warrant, the whole house had been searched. (6) Apart from this attempted justification, the learned Judge was of the view that s. 34 of the Excise Ordinance does not cover the case of a decoy—but he expressed no final view on this point. (7) As the bottle containing the alleged arrack had not been sealed, a difficult question arose as to what weight should be attached to the evidence given by the inspector with regard

[1] *(1926) Allahabad 188.*
[2] *(1933) Rangoon 146.*
[3] *(1950) 51 N. L. R. 377.*
[4] *(1950) 52 N. L. R. 83.*
[5] *(1950) 52 N. L. R. 87.*
[6] *(1950) 52 N. L. R. 89.*

to his search and discovery of the bottles in the house of the accused. (8) Where an unlawful entry into a dwelling house is made by an excise officer, the evidence obtained in consequence of such entry is inadmissible.

With regard to point (8) the learned Judge considered the case of *Bandarawella v. Carolis Appu* [1] which had been followed in the later cases of *Silva v. Menikrala* [2] and *Almeida v. Mudalihamy* [3]. He held that "the first of these cases was decided by Jayawardene A.J. who was influenced in his view by the Indian case of *Emperor v. Ravalu Kesigadu* [4] ". I have already stated my reasons for saying with the greatest respect that it is incorrect to say that Jayawardene J. either based his judgment upon or was entirely influenced by this Indian case. Furthermore, I have pointed out that although the judgment in appeal in *Emperor v. Ravalu Kesigadu* [4] does not expressly decide whether the evidence of the excise inspector was admissible or not, the judgment when fairly read implies that such evidence would be admissible, for if the evidence of the officer who detected the offence and made the arrest was withheld from the Court, the prosecution would not be able to establish the charge. Nagalingam J. disposes of the other two local cases with the observation " The local cases cited are all based upon this Indian decision, and the soundness of the views laid down in these cases may have to be reconsidered in an appropriate case ".

I agree with the observations of my brother Nagalingam J. in *Andris v. Wanasinghe* [5] in regard to *Silva v. Hendrick Appu* [6]. That case is clearly distinguishable from the present case, because as pointed out by Wood Renton C.J. there was independent evidence apart from that of the excise inspector to support the conviction. I also am of the view that *S. I. of Police, Mirigama v. John Singho* [7] is of no weight, but not for the reasons given by Nagalingam J. I have already pointed out that Garvin J.'s judgment in that case is *obiter* because the appeal was decided on another point.

In *David Appuhamy v. Weerasooriya* [8] Nagalingam J. said " The question whether evidence should be placed before a Court establishing that the search was lawful came up for consideration before a bench of two Judges in *Zilwa v. Sinno* [9]. In that case too there was no evidence one way or the other as to the making of the record by an excise inspector as required by s. 36 of the Excise Ordinance. The accused in that case was acquitted on the sole ground that there was no evidence of the legality of the entry into the premises of the accused . . . . This case, then, is an authority for two propositions (1) that there must be positive evidence placed before the Court that the search by the excise officer was lawful, and (2) that in the absence of such evidence the conviction cannot be sustained. I have not been referred to any case in which this view has been doubted or dissented from ".

With great respect, while *Zilwa v. Sinno* [9] lays down a perfectly correct rule for the facts of that case, it is irrelevant to the question which we are now considering. In that case the accused was charged under

[1] *(1926) 27 N. L. R. 401.*
[2] *(1928) 9 C. L. Rec. 78.*
[3] *(1929) 7 T. L. R. 54, 10 C. L. Rec. 148.*
[4] *(1902) Madras 124.*
[5] *(1950) 52 N. L. R. 83.*
[6] *(1917) 4 C. W. R. at p. 233.*
[7] *(1926) 4 T. L. R. 71.*
[8] *(1950) 52 N. L. R. 87.*
[9] *(1914) 17 N. L. R. 473.*

s. 183 of the Penal Code with obstructing an illegal search by an excise inspector. The search being illegal, the resistance offered by the accused was perfectly justified. Therefore in such cases, the prosecution, unless it can prove that the entry and search were lawful, will not prevail and the prisoner must be acquitted. How does that decision govern the facts of the present case ? In my opinion *Silwa v. Sinno* [1] has been inadvertently misapplied.

Mr. Chitty, who kindly appeared as *amicus curiae* at the invitation of the Court to assist us, sought to support *Murin Perera v. Wijeysinghe* [2] and the connected cases on different grounds.

His first submission is that while we have to look to the Evidence Ordinance in regard to questions of evidence, nevertheless, it is incorrect to say that the principles of " Public Policy " do not form part of our law. Mr. Chitty contends that the power is inherent in the Courts of Justice when it is face to face with, what he calls, conduct which is contrary to public morality or fair dealing for the Courts, despite the strict rules of evidence, to apply to such cases the principles of public policy, and to hold that the admission of that evidence would cause greater harm than its rejection, and therefore to refuse to receive such evidence. He submits that the case we are considering is such a case. Where an excise officer in defiance of the rules laid down by the legislature to protect the subject, without a search warrant or complying with the provisions of section 36 of the Excise Ordinance, makes an illegal raid or search, and thereby discovers evidence against a person which would in strict law be admissible against the person charged, nevertheless this rule of public should cause the Courts to say that in such circumstances they will not receive such evidence.

With this submission I am unable to agree. It will be observed that Mr. Chitty has been unable to quote a single authority in support of his proposition. What authority there is appears to be against him. In *Janson v. Driefontein Consolidated Mines, Ltd.*,[3] Lord Halsbury L.C. said: " I do not think the phrase ' against public policy ' is one which in a Court of law explains itself. *It does not leave at large to each tribunal to find that a particular contract is against public policy.* If such a principle were admitted, I should very much concur with what Serjeant Marshall said . . . . a century ago: ' To avow or insinuate that it might, in any case, be proper for a Judge to prevent a party from availing himself of an indisputable principle of law in a Court of justice, upon the ground of some notion of fancied policy or expedience, is a new doctrine in Westminster Hall, and has a direct tendency to render all law vague and uncertain. *A rule of law, once established, ought to remain the same till it be annulled by the Legislature, which alone has power to decide on the policy or expedience of repealing laws, or suffering them to remain in force.* What politicians call expedience often depends on momentary conjunctures, and is frequently nothing more than the fine-spun speculations of visionary theorists, or the suggestions of party and faction. If expedience, therefore, should ever be set up as a foundation for the judgments of Westminster Hall, the necessary consequence must be that a Judge would be at full liberty to depart tomorrow from the precedent he has himself established today, or to apply the same

[1] *(1914) 17 N. L. R. 473.* [2] *(1950) 51 N. L. R. 377.* [3] *(1902) A.C. at p.491.*

decision to different, or different decisions to the same circumstances, as his notions of expedience might dictate '. *But I do not think the law of England does leave the matter so much at large as seems to be assumed.* In treating of various branches of the law, learned persons have analysed the sources of the law, and have sometimes expressed their view that such and such a provision is bad because it is contrary to public policy ; *but I deny that any Court can invent a new head of public policy* . . . ". Lord Davey said (at p. 500) " Public policy is always an unsafe and treacherous ground for legal decision ".

The case of *Fernando v. Ramanathan* [1] was not cited to us by either side at the argument. It is a decision of a Divisional Court and the case of *Janson v. Driefontein Consolidated Mines, Ltd.* [2] was referred to and considered. The following passage from the judgment of Wood Renton C.J., although it occurs in his dissenting judgment, is relevant : " The case of *Janson v. Driefontein Consolidated Mines, Ltd.* [2] shows that the grounds of ' public policy ' *at common law* should not be *extended by the Courts of Justice.* It is no authority against the creation of *statutory* grounds of ' public policy ', and the cases that I have examined or cited in the course of this judgment, which might be multiplied indefinitely, prove that these may be created *by the Legislature*, either expressly or by necessary implication ". What Mr. Chitty is inviting us to do now is precisely what Wood Renton C.J. pointed out a Court of Justice could not and must not do, namely, to expand the law of evidence by importing into it certain grounds of public policy to control or modify the statutory rules of evidence laid down by the Evidence Ordinance. This we cannot do as we possess no legislative powers. An examination of the provisions of the Evidence Ordinance shows that the Legislature when drafting the Evidence Ordinance had " public policy " in mind, and legislated in order to give effect to the principles of " public policy " of the kind Mr. Chitty refers to in certain cases. Thus the admission of confessions against persons accused of crimes was confined within very strict limits. The rules of evidence relating to privilege and the admission of privileged communications is another example of the Legislature giving effect to certain principles of public policy. The prohibition that the prisoner's spouse should be called as a witness for the prosecution save in very exceptional cases furnishes another example. I am, therefore, unable to agree with Mr. Chitty that, over and above this, there exists a nebulous and undefined residual power in the Courts to admit or reject admissible evidence brought before it by legally competent and compellable witnesses on grounds of "public policy ". Section 100 of the Evidence Ordinance provides that in the case of any *casus omissus* we are to have recourse, not to Scottish or American law, but to the principles of the English law alone. As I have pointed out, under English Law, relevant evidence which has been obtained improperly is not rendered inadmissible on that ground alone. If Mr. Chitty's contention is sound, the greatest confusion and uncertainty will be introduced into our law, and the grounds of " public policy " would vary according to the length of each Judge's foot. The following passage from the judgment of Pereira J.

[1] *(1913) 16 N. L. R. 337.*

[2] *(1902) A. C. at p. 491.*

in *Fernando v. Ramanathan* [1] is therefore apposite : " Public policy, according to an eminent Judge, is a very unruly horse, and when once you get astride it, you never know where it will carry you—*Richardson v. Mellish* [2]. It has also been observed that " public policy " does not admit of definition, and is not easily explained. It is a variable quantity, and it must vary with the habits, capacities, and opportunities of the public. There are certain time-honoured purposes which the Courts have always regarded as matters of public policy—such as the encouragement of trade, the repression of vice, immorality and lawlessness, &c., but in the presence of such conflicting opinions as now exist on questions as to what is best for the public good, what can be our guide in an attempt to discover *new matters and things that can be said to be matters of public policy?* ' To allow this ' (public policy) said Parke B . . . . ' to be a ground of judicial decision would lead to the greatest uncertainty and confusion ' ". I respectfully agree. This contention fails, and must be rejected.

The question can also be viewed from another angle. The Ceylon Evidence Ordinance is one to " consolidate, define, and amend the law of evidence ". Consolidation is the reduction into a systematic form of the whole of the statute law relating to a given subject as illustrated or explained by judicial decisions—*Craies on Statute Law, 3rd edition, p. 301.* In *The Bank of England v. Vagliano Brothers* [3]. Lord Halsbury L.C. said : " I am wholly unable to adopt the view that where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of the code another law prevailed ". In *Administrator General of Bengal v. Pram Lal Muttiah* [4] Lord Watson said : " The very object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act is passed ". In *Collector of Gorakhpur v. Palakdhari Singh* [5], Straight J. said : " The rules of evidence which we are bound to administer are contained in the Evidence Act (1 of 1872), and I say so because of the preamble to that enactment which shows that it is not merely a fragmentary enactment, but a consolidating enactment repealing all rules of evidence other than those saved by the last part of section 2 of that enactment. " If, therefore, our Evidence Ordinance contains the whole law and the sole law of evidence, except where the Legislature in other enactments has provided otherwise, I fail to see how, save in the case of a *casus omissus*, we can import into the Evidence Ordinance new principles based on public policy as contended for. I am clearly of opinion that we cannot do that.

Mr. Chitty next argued that altogether apart from the question of public policy, there is another principle of law that an accused person should not be compelled to give or furnish evidence against himself. I agree that it would be immoral and undesirable that *agents provocateur*

[1] *(1913) 16 N. L. R. 337.*
[2] *Bing 252.*
[3] *(1891) A. C. at p. 120.*
[4] *L. R. 22 Indian Appeals at p. 116.*
[5] *12 Allahabad at p. 35.*

and others should tempt or abet persons to commit offences ; but it is a question whether it is open to a Court to acquit such persons where the offence is proved, on the sole ground that the evidence was procured by unfair means. Such considerations may induce the trial Judge to disbelieve the evidence, but such evidence is not inadmissible, and, therefore, when the offence charged has been proved, it is the duty of the Judge to convict.

Furthermore, the authorities and the statute law show that a person may under certain circumstances be compelled to incriminate himself. Section 132 of the Evidence Ordinance shows that a witness is not excused from answering an incriminating question. Section 73 of the Evidence Ordinance entitles a Court to direct a person to supply specimens of his handwriting for purposes of comparison, and this rule has now been extended to finger impressions, palm impression, and foot-prints. Before the law was so amended, where a person was irregularly ordered to supply an impression of his foot, and where without objection he allowed this to be done, it was held that the evidence so obtained was admissible on the question of identity—*R. v. Carupiyah* [1]. This is an authority which is strongly against the contention now set up.

Finally, Mr. Chitty submitted that the Excise Ordinance, the Evidence Ordinance and the Criminal Procedure Code created a " closed system " in regard to prosecutions under the Excise Ordinance, and that the law was exhaustive and provided what evidence could be used in a prosecution under the Excise Ordinance. While I do not agree that any " closed system " has been created, I agree with Mr. Chitty that the law and procedure regulating a prosecution under the Excise Ordinance must be sought for in those three enactments. The argument may be summarised thus : (*a*) The evidence was obtained in this case by committing a breach of the law ; (*b*) therefore that evidence was illegally obtained ; (*c*) therefore the evidence is inadmissible. I do not think (*c*) necessarily follows from (*a*) and (*b*). If the provisions of the Evidence Ordinance are to guide us, the evidence, being relevant and having been brought before the Court by a legally competent and compellable witness, cannot be shut out. In order to shut that evidence out on the grounds contended we must fall back on the theory that the Courts have a residual power on grounds of public policy to shut such evidence out. For the reasons I have given, that contention is unsound.

For the reasons given I am of opinion that *Bandarawella v. Carolis Appu* [2] and the cases which follow it, and the cases of *Ekanayaka v. Deen* [3], *Hendrick Appuhamy v. Price Control Inspector* [4] and *Karalina v. Excise Inspector, Matara* [5] lay down the correct principle ; and that *Murin Perera v. Wijeysinghe* [6], *Andiris v. Wanasinghe* [7] and *David Appuhamy v. Weerasooriya* [8] have been wrongly decided and ought, therefore, to be over-ruled.

In my opinion the Magistrate having wrongly rejected the evidence in this case, the acquittal of the accused is wrong. As on the findings of the Magistrate it is clear that the respondent is guilty, I quash the

[1] *(1933) 35 N. L. R. 401.*
[2] *(1926) 27 N. L. R. 401.*
[3] *(1940) 18 C. L. W. 60.*
[4] *(1947) 48 N. L. R. 521.*
[5] *(1950) 52 N. L. R. 89.*
[6] *(1950) 51 N. L. R. 377.*
[7] *(1950) 52 N. L. R. 83.*
[8] *(1950) 52 N. L. R. 87.*

order of acquittal and convict the respondent of the charge framed against him. The case must, therefore, go back to the Magistrate's Court in order that sentence should be passed on him.

I cannot part with this record without condemning in the strongest terms the practice which appears to be prevalent of excise officers in making raids and searches without obtaining a search warrant or complying with the provisions of s. 36 of the Excise Ordinance. I approve and adopt the language of my brother Gratiaen in *Karalina v. Excise Inspector, Matara* [1] and trust that cases of this kind in the future will be the exception and not the rule.

I wish to record the grateful thanks of the Court to Mr. Chitty and his learned juniors for the counsel and assistance they so cheerfully rendered us at such short notice.

GUNASEKARA J.—I agree.

PULLE J.—I agree.

Appeal allowed.