1957 *Present :* H. N. G. Fernando, J.

S. PARAMANATHAN (Chief Preventive Officer, Excise Striking Force), Appellant, *and* GOONEWARDENE, Respondent.

S. C. 506—M. C. Kanadulla, 13,171

Charge of selling foreign liquor without licence—Plea of lawful sale after procurement for private use—Burden of proof—Evidence Ordinance, s. 105—Excise Ordinance, ss. 17 proviso (d), 43.

Where, in a prosecution under Section 17 of the Excise Ordinance for the sale of foreign liquor without a licence, the complainant proves the sale, the burden lies on the accused to prove the matters set out in paragraph (*d*) of the proviso to the Section if he seeks to rely on them.

Nair v. Saundias (1936) 37 N. L. R. 439, discussed.

APPEAL, with the sanction of the Attorney-General, from a judgment of the Magistrate's Court, Kanadulla.

A. C. Alles, Deputy Solicitor-General, with *Mervyn Fernando*, Crown Counsel, for the complainant-appellant.

R. A. Kannangara, with *M. Rafeek* and *G. L. L. de Silva*, for the accused-respondent.

Cur. adv. vult.

November 28, 1957. H. N. G. FERNANDO, J.—

This is an appeal with the sanction of the Attorney-General against the acquittal of the accused on a charge of having sold beer without a licence. Section 17 of the Excise Ordinance provides that no person shall sell foreign liquor without a licence ; and the relevant provisions of section 43 declare that any person who in contravention of the Ordinance sells any excisable article is guilty of an offence ; it is not disputed that beer is an excisable article.

In the course of giving evidence for the prosecution a Preventive Officer stated that there would be no evidence to prove that the beer had been procured either unlawfully or for a purpose other than the accused's private use. At this stage, the accused was acquitted, the Magistrate expressing the opinion that the burden lay on the prosecution to prove that the sale was of liquor procured either unlawfully or otherwise than for private use.

Section 17 contains four provisos, the fourth of which is —

" Provided that—

(*d*) nothing in this section applies to the sale of any foreign liquor legally procured by any person for his private use and sold by him or by auction on his behalf, or on behalf of his representatives in interest upon his quitting a station or after his decease. "

This proviso was construed in the case of *Perera v. Benedict* [1] where it was held that once the prosecution proves the sale of foreign liquor by a person who has no licence to sell, the burden lies on the accused to prove the matters set out in paragraph (*d*) of the proviso if he seeks to rely on them. Again in *Selliah v. de Silva* [2] it was held that the two categories of sale excepted by the proviso were firstly sale by a person upon his quitting his station, and secondly sale by the representatives in interest of a deceased person. I would respectfully agree with both these decisions, which are directly contrary to the view taken by the Magistrate in the present case.

Counsel for the respondent has relied very strongly on the decision of a Divisional Bench in *Nair v. Saundias* [3]. The provision there in question was section 80 (3) (*b*) of the Motor Car Ordinance of 1927 (now repealed) :—

[1] *(1946) 47 N. L. R. 519.* [2] *(1947) 49 N. L. R. 45.*
[3] *(1936) 37 N. L. R. 439.*

"80. (3)

(*b*) The owner of the motor car shall also be guilty of an offence, if present at the time of the offence, or, if absent, unless the offence was committed without his consent and was not due to any act or omission on his part, and he had taken all reasonable precautions to prevent the offence."

The argument for the prosecution was that the condition set in paragraph (*b*) was an exception or proviso in the law defining the offence and that accordingly section 105 of the Evidence Ordinance cast on the accused owner the burden of proving that the circumstances mentioned in the condition had in fact existed. The Divisional Bench however held upon an examination of paragraph (*b*) that the consent of the owner to the commission of the offence and his failure to take reasonable precautions to prevent it were essential ingredients of the offence defined in section 80 (3) and that the prosecution had therefore to establish the fact of such consent and of such failure as part of its case. The relevant portion of the judgment of Abrahams C.J., is not an attempt to ascertain the intention of the Legislature by an interpretation of the enactment, and his decision as to where the burden of proof lay is reached by first attempting to determine how a charge under the section should be framed.

With great respect I do not appreciate the validity of this test of formulating the form of a charge as a means of construing the intention of the Legislature: to my mind a charge can be correctly drafted only *after* the intention has been ascertained.

The judgment of Dalton S.P.J. proceeds on a quite different basis. He refers to the valued principle that the prosecution must always prove the ingredients of an offence and that section 105 is no real exception to this principle because the burden of proving an exception would only arise after the essential elements have been proved by the prosecution. He recites also the rule of construction in favour of the subject of a Statute which encroaches on the rights of subjects. Manifestly the right which Dalton, J. had in mind was the right that a person should not be made criminally liable for the act of another. From which it would follow that the prosecution would have to prove the owner's act or omission (that is his consent, or his failure to take precautions) before a case to answer could arise. Dalton, J. also pointed out that *mens rea* is with some exceptions an essential element in constituting a breach of the Criminal Law.

Having regard to the general principles as to burden of proof emphasized in his judgment, Dalton, J. reached the conclusion that there was nothing in section 80 (3) (*b*) to show by clear implication that the Legislature intended to effect any change in the general law. I would respectfully adopt this mode of approach to section 17 of the Excise Ordinance.

The Excise Ordinance considered as a whole contains a series of prohibitions and restrictions (in one view of an arbitrary nature) as to the manufacture, possession and sale of excisable articles. The effect of some of these provisions is that a foreign liquor cannot reach the hands of a private individual in a lawful manner unless it has first been imported, possessed and sold by a person or persons holding the requisite licences

from the Government, and it is quite reasonable to suppose an intention on the part of the Legislature to prohibit or control further dealings in such liquor by any such private individual. This indeed is precisely the intention which the first two lines of section 17 appear to express :— "No excisable article shall be sold without a licence." It seems obvious in the context of the Ordinance that the prohibition against sale (that is against "any transfer otherwise than by way of gift") is an absolute one and that no proof of *mens rea* would be required. It is in my opinion equally clear that no question of the protection of the rights of the subject can arise because the Ordinance constitutes a complete denial of any right of the subject to obtain possession of excisable articles otherwise than in accordance with a licensing system.

If then section 17 only consisted of the first two lines which I have cited, a case for the prosecution would be complete upon proof firstly that an article is an excisable article and secondly that it was sold, and no possible argument would be available that further proof of any other matter is necessary. But the section contains what is in form a proviso, paragraph (*a*) of which permits the sale of toddy by a *licensed drawer* of toddy to a licensed manufacturer of toddy or arrack. The only other relevant paragraph in the proviso is the paragraph (*d*) now under consideration.

Having regard to the construction placed on paragraph (*d*) in the case of *Selliah v. de Silva* [1] which recognises only an extremely restricted right on the part of a private purchaser of foreign liquor to sell that liquor, it should be clear that in so far as foreign liquor is concerned, cases such as those contemplated in paragraph (*d*) would be extremely rare. That being so it would be unreasonable to suppose that the Legislature intended to lay on the prosecution the burden of establishing that a particular sale does not fall with in the scope of the exception, because in that view the prosecution would be called upon to displace a possibility which will almost never be present.

In the rare case in which there has been a sale in the circumstances contemplated in proviso (*d*) it would be a simple matter for the accused to satisfy either the prosecuting authority or the Court of the circumstances of the sale and no hardship would be caused by imposing that burden on him. For these reasons and for the reason also that the form adopted in section 17 for this particular eventuality is that usually utilised by the Legislature in framing an exception to liability I would follow without hesitation the decision of this Court in *Perera v. Benedict* [2]. Although the case of *Nair v. Saundias* [3] is not referred to in that judgment, I am satisfied that it is not an essential element in a charge under section 17 that there should be disproof of the excusatory circumstances specified in proviso (*d*).

The verdict of acquittal and discharge is set aside and the case is remitted to the Magistrate for a fresh trial.

Acquittal set aside.

[1] *(1947) 49 N. L. R. 45.* [2] *(1946) 47 N. L. R. 519.*
[3] *(1936) 37 N. L. R. 439.*