1961 *Present :* **Basnayake, C.J.**

MITRADASA FERNANDO, Appellant, *and* SUB-INSPECTOR OF POLICE, KALUBOWILA, Respondent

S. C. 950/60—M. C. Colombo, 33015/B

Excise Ordinance (Cap. 42)—Sections 14 (a) (e), 43 (b) (e), 44 (1) (2)—Charge of possession of unlawfully manufactured liquor—Proof—Opinions of "specially skilled persons"—Evidence Ordinance, s. 45.

The accused-appellant was charged under the Excise Ordinance with illegal possession of unlawfully manufactured liquor. The prosecution sought to establish that the liquor was not manufactured at any authorised place by the evidence of a Sub-Inspector of Police who claimed to be an expert. The witness described himself as a Sub-Inspector of Police who had gone through a special course of training in the Excise Department to identify excisable articles. He said that he had given evidence in more than 250 cases of this nature.

Held, that the opinion of the Sub-Inspector of Police was not relevant inasmuch as he did not come within the class of specially skilled persons contemplated in section 45 of the Evidence Ordinance.

Held further, that inasmuch as the integrity of the police was assailed in the present case, it was the duty of the Court to have given sufficient consideration to the conduct of the prosecuting police officer (*a*) in not sending the productions to the Government Analyst after an order in that behalf had been made, (*b*) in sealing the bottles in such a way that they could be tampered with, and (*c*) in detaining in the Police Station for 10 days without producing in court the productions taken in the raid.

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

K. Shinya, with *Nimal Senanayake*, for Accused-Appellant.

A. A. de Silva, Crown Counsel, for Attorney-General.

March 15, 1961. BASNAYAKE, C.J.—

The appellant has been convicted of the following charges :—

" 1. That at Nawagamuwa on 12th April 1960 he did manufacture an excisable article unlawfully to wit : 624 drams of arrack without a licence granted in that behalf by the Government Agent, Western Province, in breach of section 14 (*a*) of Chapter 42 L.E.C. and thereby committed an offence punishable under section 43 (*b*) of Chapter 42 L.E.C.

" 2. That at the same time and place aforesaid he did use utensils and apparatus to wit : (1) One empty glass jar, (2) One copper coil wire, (3) One funnel, (4) One sealing apparatus, (5) One copper pipe, (6) One large barrel, (7) One large barrel used for cooling purposes, (8) One large barrel where base and soda are kept, (9) Empty 8 dram bottles for the purpose of manufacturing an excisable article to wit : Pot arrack without a licence granted in that behalf by the Government Agent of the Western Province in breach of section 14 (*e*) of Chapter 42 L. E. C. and thereby committed an offence punishable under section 43 (*e*) of Chapter 42 L.E.C.

" 3. That at the same time and place aforesaid he did without lawful authority have in his possession 624 drams of liquor called " Pot Arrack " an excisable article which had been unlawfully manufactured in breach of section 44 (1) (2) of Chapter 42 L.E.C. as amended by Excise Amendment Act No. 36 of 1957 and thereby committed an offence punishable under section 44 (1) (2) of Chapter 42 L.E.C. as amended by the Excise Amendment Act No. 36 of 1957."

Proceedings were instituted on a report under section 148 (1) (*b*) of the Criminal Procedure Code by Police Sergeant U. K. Elwin. After the charges had been read out and on the application of the Sub-Inspector of Police, Kalubowila, the Magistrate made order that the productions be sent to the Government Analyst for examination and report, but the productions were not in fact sent to the Government Analyst. Instead of producing a report from the Government Analyst the prosecution sought to establish that the liquor was not liquor manufactured at any authorised manufactory by the evidence of a Sub-Inspector of Police called Sahib who claimed to be an expert. He described himself as a Sub-Inspector of Police who had gone through a special course of training in the Excise Department to identify excisable articles. He says that the contents of the bottles marked P1A and P1B are in his opinion pot arrack and not Government arrack. The opinion of Sub-Inspector Sahib is not relevant unless he comes within the class of persons contemplated in section 45 of the Evidence Ordinance. That section provides :—

" When the Court has to form an opinion as to foreign law, or of science, or art, or as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, the opinions upon that point of persons specially skilled in such foreign law, science,

or art, or in questions as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, are relevant facts."

In the instant case the evidence does not show that Sahib is specially skilled in any science or art which qualifies him, as in the case of the Government Analyst, to express an opinion on the question whether the bottles P1A and P1B contained Government arrack or pot arrack. He says that he has given evidence in more than 250 cases of this nature. That does not bring him within the ambit of section 45 of the Evidence Ordinance and his opinion as to the contents of the liquor in the bottles marked P1A and P1B is not relevant and cannot be acted on.

Apart from that, the fact that the liquor was at the Police Station from the 12th of April to the 22nd of April and the following further facts lend support to the suggestion made by the defence that this is a false case. Among the productions brought into court were two glass jars each said to contain 176 drams of "pot arrack". Two bottles were drawn from each of the jars to serve as specimens. One set was marked P1A and the other P1B. They were said to be sealed with the seal bearing the initials of the Sub-Inspector and the thumb impression of the accused. The accused's thumb impression appeared on a side of the bottles. The Sub-Inspector admitted that there was nothing to prevent the four bottles being tampered with without displacing the thumb impression because the accused's thumb impression had been placed on a side of each bottle and not on the top. When he was asked why the thumb impression of the accused was put on a side of the bottles he gave the following unconvincing explanation :—

"The thumb impression of the accused was not put at the mouth of the bottles for the reason when those bottles are sent to the Government Analyst that seal is broken."

The accused gave evidence on his own behalf and he called the headman and two others Sediris Singho and Don Gunasekara. The learned Magistrate has not only based his finding on the irrelevant evidence of Sub-Inspector Sahib, but he has also failed, in a case where the integrity of the police has been assailed, to give sufficient consideration to the conduct of Sub-Inspector, Kalubowila—

(*a*) in not sending the productions to the Government Analyst after an order in that behalf had been made,

(*b*) in sealing the bottles in such a way that they can be tampered with and

(c) in detaining in the Police Station for 10 days without producing in court the productions taken in the raid.

Apart from the above omissions he has also failed to give sufficient consideration to the evidence called by the defence.

I set aside the conviction and acquit the accused-appellant.

Appeal allowed.