

1956

Present: K. D. de Silva, J.

P. R. KONE, Appellant, and L. ILLUKUMBURA (S. I. Police)
Respondent

S. C. 539—M. C. Kurunegala, 21, 125

Excise Ordinance (Cap. 42)—Section 55—Ayurvedic physician—Is he a "medical practitioner" ?—Indigenous Medicine Ordinance, No. 17 of 1941, s. 9—Medical Ordinance (Cap. 96), ss. 32, 35—40, 63.

A practitioner of indigenous medicine registered under section 8 of the Indigenous Medicine Ordinance is not a medical practitioner within the meaning of that term as used in section 55 of the Excise Ordinance.

APPPEAL from a judgment of the Magistrate's Court, Kurunegala.

K. C. Nadarajah, for the accused-appellant.

P. Weerasinghe, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 20, 1956. K. D. DE SILVA, J.—

The accused appellant was convicted of two charges under section 44 of the Excise Ordinance (Cap. 42) and sentenced to pay a fine of Rs. 50. The first charge was that he did possess an excisable article to wit 3,600 drams of "Jeewanamirtha Asawam" an unlawfully manufactured liquor without a licence. The second charge related to the transport of the said 3600 drams of "Jeewanamirtha Asawam" without lawful authority. This quantity of "Jeewanamirtha Asawam" was contained in 600 bottles. The possession and transport of these 600 bottles were admitted by the appellant. He however contended that "Jeewanamirtha Asawam" is a recognized tonic prepared by Ayurvedic practitioners according to prescriptions set out in text books on Ayurvedic Medicine. It was the case of the appellant that the "Asawam" in question was manufactured by the witness Krishnan who is a registered practitioner of Indigenous Medicines under Ordinance 17 of 1941. It was so set out on the labels which were affixed to the bottles in question. That evidence stands uncontradicted. Krishnan also stated that this was a bona fide medicated article manufactured by him for the treatment of rheumatic troubles, piles and nervous disorders. The Registrar of the College of Indigenous Medicine deposed to the fact that Krishnan appeared before the Board of Examination set up under Ordinance 17 of 1941 and was registered as a practitioner. The learned Magistrate held that the "Asawam" in question was a bona fide medical preparation.

On an analysis of a sample of this "Asawam" the Government Analyst found that it contained 5.8 per cent. by volume of alcohol. Therefore it is an excisable article as defined by provisions of the Excise Ordinance. It is conceded by the defence that no licence or permit was obtained from the proper authority to manufacture or transport the "Asawam" in question. But it was argued that this was not an excisable article inasmuch as it was a bona fide medicated article to which section 44 does not apply. The appellant seeks to avail himself of the 1st part of section 55 which reads:—

"Nothing in the foregoing provisions of this Ordinance applies to the import, manufacture, possession, sale, or supply of any bona fide medicated article for medicinal purposes by medical practitioners, chemists, druggists, pharmacists, apothecaries or keepers of dispensaries."

The learned Counsel for the appellant argued that Krishnan who manufactured this bona fide medicated article was a medical practitioner or at least a keeper of a dispensary as contemplated by section 55. If that contention is correct the appellant cannot be held to have committed an offence. The learned Crown Counsel submitted that the "Medical Practitioner" contemplated by section 55 is a Medical Practitioner registered under the provisions of the Medical Practitioners, Pharmacists and Midwives Ordinance (Cap. 90). Section 32 of that Ordinance provides *inter alia* that no person shall be registered as a Medical Practitioner unless he,

- (a) is registered or qualified to be registered under the Medical Acts, or
- (b) holds a Diploma in Medicine and Surgery issued by the College Council.

The Medical Acts referred to here means the Medical Act (21 and 22 Viet. c. 90) of the Imperial Parliament, and any Act amending that Act while the "College Council" refers to the Ceylon Medical College Council. Therefore Krishnan is not a person who is entitled to be registered as a Medical Practitioner under this Ordinance (Cap. 90). But the term used in section 55 of the Excise Ordinance is "medical practitioner" and not a registered medical practitioner. Therefore one is tempted to argue that section 55 of the Excise Ordinance covers a wider category of medical practitioners than that contemplated by the Medical Practitioners, etc. Ordinance (Cap. 90). Sections 36, 37 and 39, however refer to a medical practitioner but the next section, i.e. section 40 provides :—

"Nothing in this Ordinance shall make it unlawful for a *vederala* to practise medicine or surgery according to the indigenous or ayurvedic systems or prevent him from recovering his charges for services rendered or medicine or goods supplied by him in the course of his practice."

This section would have been superfluous if the term "medical practitioner" contemplated by sections 36, 37, 38 and 39 included a "*vederala*" who is a practitioner of Ayurvedic medicine. In fact the interpretation section No. 68 states that "medical practitioner" means a person who is registered as a medical practitioner under the Ordinance. Section 35 provides :—

"In any written law, whether passed or made before or after the commencement of this Ordinance, the words "legally-qualified medical practitioner" or "duly qualified medical practitioner" or "registered

medical practitioner" or any words importing a person recognized by law as a practitioner in medicine or surgery shall be construed as meaning a medical practitioner registered under this Ordinance."

It was held by a bench of three Judges (De Sampayo A. J. dissenting) in *Amarasekera v. Lebbe*¹ that a "vederala" is not a medical practitioner within the meaning of that term as used in section 55 of that Ordinance. In that case it was further held that "chemists, druggists, apothecaries or keepers of dispensaries" applied only to persons dealing with drugs according to modern scientific methods and not to vederalas. That authority is binding on me sitting alone. In *Fernando v. Goonewardene*² Syan J. held that a "vederala" is not entitled to claim the exemption under section 55 of the Excise Ordinance. Krishnan who manufactured this "Asavam" or "Arishta" is only a practitioner of indigenous medicine registered under section 9 of the Indigenous Medicine Ordinance 17 of 1941 but he is not a medical practitioner contemplated by section 55 of the Excise Ordinance. Hence the Magistrate rightly found the appellant guilty of the charge framed against him.

It is indeed very ludicrous that the bona fide manufacture of an "Arishta" in this country is penalised by law. It is recognised by all persons who are even a little acquainted with the Ayurvedic system of Medicine as practised in this country that "Arishta" forms a very important item of its pharmacopoeia. It is widely prescribed in the treatment of various kinds of diseases. Fermentation is a necessary part of the preparation of "Arishta" as stated by Dr. Wickramasinghe, the Registrar of Practitioners of Indigenous Medicine, and consequently alcohol is present in it. Therefore whenever an Ayurvedic practitioner, however eminent he may be, prepares an "Arishta" he commits a breach of the Excise Ordinance. That this should be so is most unfortunate in a country where from the dawn of its history, Ayurveda has held sway for many centuries. Mahavamsa records that King Pandukabhaya (Circa 246 B. C.) built a lying-in home and a hospital in the city of Anuradhapura. Can one doubt that "Arishta" was freely prescribed in those institutions? But now the manufacture and possession of this article of medicine contravene the law of the land. Legislation alone can put an end to this anomalous situation. Undoubtedly effective safeguards for the prevention of the manufacture of spurious "Arishtas" are also necessary.

In the circumstances of this case it would be sufficient to impose a nominal fine on the appellant. Accordingly I affirm the conviction and reduce the fine to Rs. 5.

Conviction affirmed.

Sentence reduced.

¹ (1914) 17 N. L. R. 321.

² (1953) 56 N. L. R. 238.