1950 *Present :* **Nagalingam J.**

MURIN PERERA, Appellant, *and* WIJESINGHE (Excise Inspector, Kesbewa), Respondent

S. C. 119—M. C. Panadure, 7,797

Excise Ordinance—Search without warrant—Inadmissibility of evidence thus obtained—Excise officer's powers of arrest—Cap. 42, sections 34, 35, 36.

Where an unlawful entry into a dwelling-house is made by an excise officer, evidence obtained in consequence of such entry is inadmissible.

Bandarawela v. Carolis Appu (1926) 27 N.L.R. 401 not followed.

Obiter : The powers of arrest given to an Excise Officer under section 34 of the Excise Ordinance are limited to a case where he finds a person committing an offence in his presence. This section does not cover a case where a decoy is employed for the purpose of obtaining evidence of the commission of an offence.

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

A. B. Perera, with *R. S. Wanasundera*, for accused appellant.

S. S. Wijesinha, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

June 1, 1950. NAGALINGAM J.—

The appellant in this case was charged with and convicted of having sold arrack without a permit and sentenced to pay a fine of Rs. 750 in addition to imprisonment till the rising of Court.

The case for the prosecution may be said to be a simple and straightforward one. That case is that a decoy was after search sent by the Excise Inspector with a marked rupee note to make purchase of arrack at the premises of the accused and to continue to sip it till the Inspector's arrival. The decoy says that he carried out the instructions, that while yet he was sipping arrack the Inspector and his men went up in a car, got down, took charge of the glass from which he was imbibing the liquor and questioned him, when he admitted that he had been sold liquor by the accused.

There is a discrepancy in the prosecution evidence which has not been explained as to how the Inspector recovered the marked rupee note. According to the Inspector and the decoy, the accused it was who reluctantly gave the rupee note to the Inspector ; but the Excise guard definitely states that when the accused was questioned the accused said that she did not have the money but dropped the money on the floor from where it was retrieved by the Excise Inspector. Now, it is impossible to disregard this discrepancy, especially where the defence denies that any money was taken from or dropped by the accused but states that it was the accused's sister, a young girl, who had received the money

from the decoy in payment of the sale to him of biscuits and that as she had no change the rupee note was handed to a textile dealer, from whom the Excise Inspector obtained it. The accused and her sister both gave evidence and their story was supported by the textile dealer, who was called ; the latter affirmatively testified to the decoy having been sold biscuits by the sister of the accused and that the decoy had made payment by tendering the rupee note and that it was the sister of the accused who gave him the rupee note for change, which he did, and that the Inspector subsequently obtained the note from him. The learned Magistrate dismissed the evidence of the textile dealer with the observation that such evidence is easily procurable. But this observation does not grapple with the difficulty presented by the conflict of testimony on the point given by the prosecution witnesses themselves. Nor has the learned Magistrate in his judgment discussed this contradiction and I am quite unable to say that the prosecution evidence should in these circumstances receive all the credit which it otherwise might have received.

There is another circumstance to which I must allude, and that is that the Inspector says that when he smelt the mouth of the decoy before he sent him out on his errand, the decoy was smelling slightly of liquor. He, no doubt, goes on to say that after he entered the premises of the accused he found the decoy smelling strongly of arrack. If a decoy is already smelling of liquor, belching may produce a far greater smell at a later stage, and this would by itself be no proof that he had consumed any further quantity of liquor.

There is a more fatal objection to the conviction in this case, and that is that inadmissible evidence prejudicial to the accused has been admitted by the learned Magistrate. The decoy in giving evidence testified to the fact that he had taken arrack that day at about 10 a.m. from the boutique which had been shown to him by Excise Guard Fernando, meaning thereby that it was the boutique of the accused, from where he had purchased, earlier that day, arrack. He went on to say further that he had drunk arrack for fifty cents in the morning in the same premises. It is true that this evidence was given in cross-examination but nevertheless it is inadmissible evidence reflecting as it does bad character insofar as it shows that the accused had committed a similar offence earlier in the day. The Excise Guard, however, when he gave evidence in chief, himself said that the Inspector asked the bogus customer to go to the place where he (the bogus customer) drank arrack earlier that day. This evidence, too, was clearly inadmissible. There can be little doubt that this evidence too must have influenced the Magistrate to take a view adverse to the accused in this case.

The prosecution becomes far more intriguing when one addresses one's mind to a circumstance of no little import. There was sworn testimony that the husband of the accused had been charged with having assaulted an Excise guard called Cooray and there was also evidence given by the Excise Inspector himself that guard Cooray also accompanied him on this raid. The case against the husband of the accused was yet pending. Now, the suggestion on behalf of the defence was that while no special

eason could be given by the accused, so far as she was concerned, for eing made the target of a prosecution, there was ample material suggesting hat the prosecution against the wife was in retaliation for something lone by the husband. In the light of this suggestion, the conduct of he Excise party undoubtedly lends itself to the very severe criticism t has been subjected to in Court, suggesting that the whole case is a fabrication to support which, breaches of the provisions of the Ordinance have been committed by the Excise party.

It is conceded on behalf of the prosecution that there was no warrant in the possession of the Excise Inspector before he raided the premises of the accused. He, however, sought to justify his action by a reference to section 34 of the Ordinance which empowers a place other than a dwelling house to be searched without a warrant, and as the place he searched was a boutique, he was lawfully entitled to make a search without a warrant. In the first place, the evidence shows that on the verandah of the building is a glass show case in which biscuits and sweets were exposed for sale. This seems to be the only *indicia* for treating the verandah as a boutique, and this may be sufficient, but there is other evidence in the case which shows that the rest of the building is used for human habitation and that in the strict sense of the term it is a dwelling house. Had the Inspector made a search of the verandah alone, one might have agreed with him, but when he says he made a search of the room behind the verandah and found something under a bed, one certainly fails to appreciate his explanation.

Apart from this attempted justification, there is a far more serious objection to the conduct of the Excise party in this case. Section 34 of the Ordinance does not enable an Excise officer to arrest without a warrant a person who had already committed an offence and of the commission of which offence information may have been received or believed in by the officer. The powers of arrest given to an officer under this section, that is to say, power to arrest without first being armed with a warrant as required by section 35 or without first recording the grounds of his belief in regard to the commission of an offence as required by section 36, are conferred on him only in the exceptional circumstance where he *finds a person committing an offence*, that is to say, in his presence. To my mind, this section does not cover a case where a decoy is employed for the purpose of obtaining evidence of the commission of an offence, but I do not think I need express any final view in regard to this question; it is sufficient to say that in this case the evidence discloses at best that the decoy was sipping arrack from a glass. The Inspector did not himself see the commission of the offence which is alleged to be the sale of arrack by the accused. Section 34 cannot therefore be availed of by the prosecution to justify the various acts committed or performed by the Excise party. It is not without interest to note that this section confers primarily a power of arrest of the person found committing the offence, and then it goes on to provide that the officer may search "any person upon whom, and any vessel, vehicle, animal, package, receptacle or covering in or upon which he may have reasonable cause to suspect any such article (excisable article) to be". The omission of words such

as " building " or " premises " is significant. It seems to me that the search of at any rate a part of the building which was used solely for purposes of habitation was not authorised by section 34 of the Ordinance.

The defence asserts that the Inspector did carry away a sealed bottle of Government arrack from a box where it had been kept and which had been brought to the house for the confinement of the accused. But it denies that any empty bottle or a bottle having liquor partially was removed from the premises. A difficult question arises as to what is the weight to be attached to the evidence given by the Inspector with regard to his search and discovery of the bottles in the house of the accused.

In considering the provisions of section 36, it has been held by this Court in the case of *Bandarawela v. Carolis Appu* [1] that though an Excise Inspector had not complied with the requirements of section 36, nevertheless the evidence obtained by him as a result of such unlawful entry would be legally admissible. This case has been followed in two later cases—*Silva v. Menikrala* [2] and *Almeida v. Mudalihamy* [3].

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]. That was a case decided under section 34 of the Madras Akbari Act, No. 1 of 1886, which corresponds to section 34 of our Ordinance. The Indian provision, however, is that the officer " may arrest without warrant in any public thoroughfare or open place other than a dwelling house any person found committing an offence ". The facts were that an assistant Inspector found the accused in the vicinity of a still—an offence in respect of which arrest without warrant was permitted by section 34 of the Indian Act. The objection there taken was that by a government notification the jurisdiction of the assistant Inspector had been restricted to a certain area and that the arrest was affected by the officer outside the limits of his jurisdiction. The judgment of the Court consisting of Sir Arnold Wright C.J. and Benson J. shows clearly that they did not regard the arrest effected by the assistant Inspector to have been beyond his powers, but what they did hold was, to use the language of the learned Judges, " the notification in question did not and could not operate so as to limit the power conferred upon officers by section 34 of the Act ". Therefore, it will be apparent that what they did hold was that the officer acted within the scope of the powers conferred on him by section 34, and they had no occasion to consider the question whether if the officer had exceeded his powers and effected an arrest or made search evidence obtained in consequence thereof would have been admissible or not.

The local cases above 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. In the case of *Bandarawela v. Carolis Appu* [1] I notice it was urged that the provisions of that section (36) would be reduced to a nullity, particularly in view of the fact that as

[1] *(1926) 27 N.L.R. 401.*
[2] *(1928) 9 C.L. Rec. 78.*
[3] *(1929) 7 Times 51.*
[4] *I. L. R. 1902, 26 Mad. 124.*

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 search. But this contention was rejected by the learned Judge with the remark that he was not prepared to say that villagers, especially those engaged in committing an Excise offence, are "so docile as to allow their houses to be searched without protest". To say the least, this reasoning does not take into account at least that class of villagers against whom no presumption of being engaged in committing excise offences could be drawn. In my opinion, 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.

Having regard to all these circumstances, I think the conviction cannot be sustained, which I therefore set aside and acquit the accused.

Appeal allowed.

1950 *Present :* **Basnayake J.**

YOOSUF *et al.*, Appellants, *and* SUWARIS, Respondent

S. C. 103—C. R. Kandy, 3,342

Rent Restriction Act, No. 29 of 1948—Section 13—Landlord who is shareholder of a company—Cannot claim premises for purpose of company's business—Landlord's need must be immediate—Order giving unsuccessful tenant time to quit—Propriety of such order.

A shareholder who owns houses is not entitled to make use of the provisions of section 13 of the Rent Restriction Act in order to eject a tenant for the purpose of providing his company with a place of business.

A landlord's need must be immediate and present in order that the court may have jurisdiction to entertain his action to eject a tenant under the Rent Restriction Act.

Obiter : A landlord who succeeds in an action for ejectment is entitled to execute his decree immediately and time can only be given by consent of parties or, in the event of an appeal, where the execution of the writ would cause irreparable damage to the unsuccessful party.

APPEAL from a judgment of the Court of Requests, Kandy.

H. V. Perera, K.C., with *M. I. Mohamed*, for the defendants appellants.

E. B. Wikramanayake, K.C., with *Cyril E. S. Perera*, for the plaintiff respondent.

Cur. adv. vult.

May 3, 1950. BASNAYAKE J.—

This is an action instituted by one A. R. Suwaris against five persons who are carrying on business in partnership under the business name