

1954

*Present : Nagalingam S.P.J.*

P. RAMASAMY KONE *et al.*, Appellants, and GINIGATHENA  
POLICE, Respondent

*S. C. 1,056-1,059—M. C. Nawalapitiya, 9,913*

*Excise Ordinance—Section 44—Possession of unlawfully manufactured liquor—  
Proof.*

In a prosecution under section 44 of the Excise Ordinance for possessing unlawfully manufactured liquor the Excise Commissioner or the proper licensing authority must furnish evidence excluding the possibility of the liquor seized having been manufactured under a licence.

**A**PPEAL from a judgment of the Magistrate's Court, Nawalapitiya.

*A. B. Perera*, with *J. C. Thurairatnam*, for the accused-appellant.

*E. H. C. Jayatileke*, Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*

November 25, 1954. NAGALINGAM S.P.J.—

This is an appeal by the four accused-appellants from their convictions under Section 44 of the Excise Ordinance for that they had in their possession 600 bottles of a liquor described as "Jeevanamirtha Asavam" which the prosecution contends comes under the category of an excisable

<sup>1</sup> (1951) 1 Ch. D. 808 at 823.

article and that it had been unlawfully manufactured. The point taken on their behalf is that there is no proof that the liquor in the bottles was unlawfully manufactured.

Under Section 44 of the Excise Ordinance, it is for the prosecution to establish, firstly, that the excisable article, possession of which is the subject of the charge, is liquor containing alcohol, and secondly, that that liquor had been manufactured without a permit from the proper authority.

The evidence before Court in regard to these elements was furnished by a report of the Government Analyst. The Government Analyst states that the liquor in the 600 bottles found in the possession of the appellants contains 5.8 per cent. by volume of alcohol. The first element, therefore, is clearly established, namely, it is an excisable article in that it is a liquor containing alcohol. In regard to the second element, namely, that the liquor was manufactured unlawfully, there are no facts established from which a Court can say that the liquor was unlawfully manufactured. The report of the Government Analyst merely states further that the bottles of liquor seized do not fall under any one of the following categories:—

- (a) Approved brands of imported liquors.
- (b) Arrack.
- (c) Gin.
- (d) Toddy.
- (e) Beers, Wines, Polpala decoction and Tea Ciders manufactured under licence issued by the Excise Commissioner.

The report of the Government Analyst does not go further and say that it is not a liquor which has been manufactured under licence issued by the Excise Commissioner. It may be true to say that it is not a Beer, Wine, Polpala decoction or a Tea Cider manufactured under licence issued by the Excise Commissioner, but that does not negative that it may be a liquor which is neither a Beer, nor a Wine, nor a Polpala decoction, nor a Tea Cider that had been manufactured under licence granted by the Excise Commissioner. When the Government Analyst said that the liquor seized is not manufactured under licence issued by the Excise Commissioner, he is giving utterance to some information which he has probably obtained from the Excise Commissioner himself. The Government Analyst cannot say of his own knowledge what licences have been issued by the Excise Commissioner. It is possible that the liquor seized may have been manufactured under a licence of which the Government Analyst may be ignorant. The Excise Commissioner or the proper licensing authority should have been called to furnish evidence excluding the possibility of the liquor seized having been manufactured under a licence, so that in the result there is a total absence of any evidence that the liquor seized was unlawfully manufactured.

I find that my brother Swaraj also arrived at a similar conclusion in *Surabiel v. Ekanayake*<sup>1</sup> in which he observed that "the Analyst has not been called and there is no apparent reason why he has excluded only certain liquors and beverages". This difficulty was attempted to be

<sup>1</sup> (1954) 56 N. L. R. 167.

solved by suggesting there may be regulations or notifications specifying the various categories of liquor for the manufacture of which licences had been issued. Learned Crown Counsel stated that there were no such regulations and no document published from which it could be gathered as to what liquors had been authorised to be manufactured. In the absence of any such evidence, the observations I have made stand firm, namely, that there is no proof that the excisable article, namely, that the bottles of liquor seized had been unlawfully manufactured.

In this view of the matter, the convictions must be set aside, which I do hereby, and I acquit the accused.

*Appeal allowed.*

