Present: Wood Renton J.

1913.

SETHUKAVALAR *v.* MUTTUVELU *et el.*

461-463—P. C. Batticaloa, 34,561.

Sale of arrack under proof—Liability of renter for act of salesman.

Where a salesman in a tavern sold arrack containing less than 27 per cent. of proof spirit—

Held, that the renter was guilty of an offence under section 33 of Ordinance No. 12 of 1891, although he had no knowledge of the condition of the arrack.

THE facts appear from the judgment.

A. St. V. Jayewardene, for first and second accused, appellants.

H. J. C. Pereira, for the third accused, appellant.

No appearance for respondent.

July 14, 1913. WOOD RENTON J.—

The first and second accused-appellants have been convicted as salesmen, and the third accused-appellant has been convicted as renter, of the sale of spirituous liquor containing less than 27 per cent. of proof spirit, in contravention of section 33A of Ordinance No. 12 of 1891. I will deal first, and briefly, with the case of the salesmen. That they were salesmen at the tavern in question and that they were selling under-proof arrack are facts as to which there is no serious contest. Their main defence at the trial and here in appeal has been that they acted without *mens rea*, and that the under-proof character of the arrack was due to the fact that the tavern had been inundated for several days by floods, and that the barrel containing the arrack in question had, without any fault on their part, been saturated with water. The learned Police Magistrate has rejected this defence on the evidence, and I am not prepared to say that he is wrong. The evidence does not show that the barrel in question was exposed to water under circumstances which can account for the under-proof condition of the spirit contained in it. Moreover, the peon who seized the barrel said that it was perfectly whole at the time of its seizure. Between the time of its seizure and the subsequent proceedings in Court it had in some way been perforated. There is also the circumstance that, although the floods had abated by the middle of January, and

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the barrel was not seized till the middle of March, it contained the under-proof arrack still. The appeals of the first and second accused must fail.

As regards the third accused, the case stands in a somewhat different position. He is the renter, and the Police Magistrate has found that he had no knowledge of the condition of the arrack, and that so far as he was concerned there had been no wilful misconduct. Does that circumstance operate as a defence? The Police Magistrate has answered that question in the negative, and I think that he is right. It has been held by the Supreme Court in the case of *Peries v. Perera*,[1] and the decision is spported by numerous English authorities, that while the master is generally not criminally liable for the act of his servant, such a liability may be imposed by the Legislature, and has been imposed by the language of section 40 of Ordinance No. 10 of 1844, which provides that " it shall not be lawful for any person to draw any toddy " in certain specified ways. Section 33A of Ordinance No. 12 of 1891 commences with a prohibition of the same character. It says that " it shall not be lawful for any person to sell, or to expose or to keep for sale," under-proof spirit. Mr. H. J. C. Pereira, however, who argued the appeal, sought to distinguish these two enactments on the ground that section 33A deals only with a mode of adulteration, while sections 31, 32, and 33, which deal specifically with adulteration, clearly recognized good faith as a defence. This is an ingenious argument, and it impressed me considerably at first. But when section 31 is closely examined, it will be seen that the defence of good faith is recognized only on behalf of the person who sells or keeps or exposes for sale the adulterated liquor. The word " knowingly " is not inserted in the clause which deals with the actual adulteration. In section 33A the Legislature, with section 31 before it, has omitted the word " knowingly," and has expressly and without qualification prohibited the thing itself. Moreover, there is reason for the distinction. It would be very hard to hold that a person who had taken no part in the actual adulteration of liquor—an adulteration which might not be capable of being immediately and readily tested—is responsible for what he had not sanctioned. On the other hand, the clear object of section 33A is to prohibit under-proof spirit from being sold, and the renter has at his disposal means of ascertaining whether or not that prohibition is being given effect to in the taverns under his control. It is impossible here to ignore the fact that, while this under-proof spirit was on sale in the tavern in question by the middle of January, its contents remained undetected till it was seized in the middle of March. I hold that the appeal fails as regards the third accused also.

Appeal dismissed.

[1] *(1912) 15 N. L. R. 197.*