

1956

Present : T. S. Fernando, J.

R. A. DISSANAYAKE, Appellant, and D. C. A. SURAWEERA
(Police Sergeant), Respondent

S. C., 565—M. C. Colombo, 26,949/A

*Excise Ordinance—Section 44—Charge of possessing unlawfully manufactured liquor
("Cider")—Quantum of evidence.*

Where a liquid in a pot was found to contain 6.2% of alcohol within a fairly short interval of time after it was discovered—

Held, that it could be reasonably presumed that at the time of the detection itself there could have been no appreciable difference in the percentage of alcohol in the liquid.

Held further, that where the evidence establishes that the liquor is not an approved brand of imported liquor but is tea cider, no reasonable doubt can arise as to whether it is liquor manufactured in Ceylon.

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

C. de S. Wijeyeratne, for the accused-appellant.

I. F. B. Wickramanayake, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

September 12, 1956. T. S. FERNANDO, J.—

The appellant was convicted on a charge of possession of 2 gallons and 12 drams of unlawfully manufactured liquor called "Cider", punishable under section 44 of the Excise Ordinance. Counsel for the appellant did not canvass the finding of the learned magistrate on the question of possession, but argued that what the appellant was in possession of has not been proved to be a liquor within the meaning of the Excise Ordinance.

The detection was made at about 6.30 p.m. on 15th March 1956 and, according to the evidence, two bottles from the pot which contained nearly fourteen bottles were taken as samples, and to each of these two bottles were added 25 grains of salicylic acid in order to prevent fermentation. The salicylic acid was not available to be added at the place where the detection took place but only after the pot containing the liquor had been brought to the Police Station and its contents measured. The Analyst found the liquid in the bottle he examined to contain 6.2% of alcohol. He was satisfied that there was a sufficient quantity of salicylic acid to arrest further fermentation. There is no evidence as to the interval of time between the detection and the adding of the salicylic acid, and learned counsel argues that there is no proof before the court that the liquid in the pot at the time of detection had 6.2%

of alcohol. The burden of proving that this was liquor within the meaning of the Excise Ordinance being upon the prosecution, he contends that the prosecution has failed to discharge that burden and that the appellant should therefore have been acquitted. I am unable to agree with this contention. The detection was made in a coconut garden at No. 265, Nawala Road. As soon as the detection had been made and the appellant had been searched at the spot, the appellant and the pot were brought to the Welikade Police Station which is not a great distance away from the place of detection. The prosecution has proved that the liquid discovered in the appellant's possession has been found within a fairly short interval of time to contain 6.2% of alcohol. In this state of affairs it could reasonably be presumed that at the time of detection itself there could have been no appreciable difference in the percentage of alcohol in the liquid in the pot. I cannot also ignore the absence of any effort on the part of the defence to cross-examine the Analyst on the question of the likely percentage of alcohol at the time of detection. In the circumstances established in this case I am of opinion that the prosecution proved that the liquid found in the pot referred to above was liquor within the meaning of the Excise Ordinance.

The prosecution relied in this case on a report from the Government Analyst. The terms of this report are indistinguishable from the terms of the report of the Government Analyst produced in the case of *Ebert Fernando v. Goonewardene*¹ which came up for hearing before me and in which I ruled that the sole evidence of a report of the Government Analyst in these terms is insufficient to discharge the burden of proof that lies upon the prosecution in a case where the charge is one of possession of unlawfully manufactured liquor. In the present case, however, there is other evidence, viz., the evidence of Inspector Dharmaratne and Police Constable Wickramasekere, that the pot contained Tea cider. Tea cider is a liquor for the manufacture of which a licence can be obtained from the Excise Commissioner—vide Excise Notifications Nos. 419 and 420, published in *Gazette* 10,281 of 10.8.1951. Not only has the appellant no licence to manufacture liquor, but the evidence shows that no licence for the manufacture of tea cider has yet been issued to anyone. Neither Dharmaratne nor Wickramasekere was cross-examined on the question of their competence to express an opinion on the question whether the liquid was tea cider, and their evidence has been accepted by the learned magistrate. If this was tea cider, then there is no reason why any reasonable doubt should arise whether this was a liquor manufactured in Ceylon. The Analyst's report negatives this liquor being a liquor manufactured under a licence issued by the Excise Commissioner. The only reasonable conclusion one can therefore reach is that this was unlawfully manufactured liquor.

I dismiss the appeal.

Appeal dismissed.