1938 *Present :* **Abrahams C.J.**

INSPECTOR OF EXCISE *v.* PALANIMUTTU.

44—P. C. Nuwara Eliya, 12,860.

Excise Ordinance, No. 8 of 1912—Illicit possession of arrack—Quantity in excess of what one may possess—Two inmates in house—Presumption regarding possession.

Where a person is charged with illicit possession of arrack he is not entitled to be acquitted merely because there are two persons in the house and the quantity of arrack found in it is within the amount permissible for two persons to possess.

Excise Inspector, Horana v. Mungo Nona (*9 C. L. W. 168*) followed.

Excise Inspector Holsinger v. Francina Fonseka (*1 Ceylon Law Weekly 225*) not followed.

APPEAL from a conviction by the Police Magistrate of Nuwara Eliya.

F. A. Tisseverasinghe (with *C. T. Olegasegaram*), for accused, appellant.

E. H. T. Gunasekera, C.C., for complainant, respondent.

Cur. adv. vult.

March 4, 1938. ABRAHAMS C.J.—

The appellant was convicted of the illicit sale of arrack and also of possessing a quantity of arrack beyond the amount permitted to one person. The principal witness for the Crown was the usual decoy, who was searched in order to see that he had none of the contraband article on him before starting on his expedition, given a rupee note, the number of which was taken by the Excise Inspector, and then sent off accompanied by an Excise Guard, who left him at the door of the appellant's house and returned to inform the Excise Inspector that his mission had been completed. The Excise Inspector then went to the house and discovered the decoy seated on a chair with a glass of arrack in his hand and the appellant standing by him. On seeing the Excise Inspector the appellant snatched the glass out of the hand of the decoy and flung the contents away. A search of the house led to the discovery of the rupee note concealed and also to the discovery of a quantity of arrack in excess of that allowed to a single person. The appellant's defence was that he was not there at all but the Magistrate disbelieved him and convicted him.

It is not contended that the Magistrate's finding of fact cannot be sustained but it is argued that the conviction ought not to stand because after the Excise Guard left the decoy outside the house of the appellant it was possible for the decoy to have gone off and obtained a supply of arrack from somewhere else which he introduced into the house of the appellant. It is sought to support this argument by a decision of Mr. Justice Dalton in an unreported case, No. 769, P. C., Colombo, 20,338 (S. C. M. of November 14, 1934), in which that learned Judge said that it was essential that the decoy should be searched before going

off on his mission in order to prevent his having some of the contraband article on his person. It is somewhat ingeniously argued that in the case before me the preliminary searched was nullified by the fact that the Excise Guard lost sight of the decoy after he had left him at the door of the house of the appellant. If Mr. Justice Dalton's decision means that in all cases where a search of the decoy is not made the accused is entitled to an acquittal irrespective of the facts of the case, then I must respectfully disagree with him. Evidence of the sale must be taken into consideration. If the decoy is apparently a truthful person then it may be that corroboration is called for but if he is deemed to be a truthful person, then it seems to me that the question of his search becomes immaterial unless the defence is that the decoy brought the contraband article in with him. In this case no such defence was raised. Therefore the Court has to see whether there is satisfactory evidence that a sale took place and that seems to have been the fact here. Apart from that the conduct of the appellant when the Excise Inspector entered the house is indicative of the fact that he had had an interest in the arrack which the decoy was in the act of drinking.

As regards the second charge, that of being in possession of arrack to a quantity larger than one person is entitled to possess, it is pointed out that the appellant's wife was also in the house and that she is entitled to have a quantity of arrack and that therefore husband and wife together were entitled to have a quantity which was not smaller than the amount that was found. That submission seems to amount to this, that if there are two persons in a house where arrack is found and one person is accused of being in possession of it, he is entitled to be acquitted if the amount to which both persons are entitled is not smaller than the amount that is found. In other words, it is a matter of arithmetic and not a question of possesson. Support for that argument was sought in a decision of Mr. Justice Akbar in the case of *Excise Inspector Holsinger v. Francina Fonseka*[1].

In that case three bottles amounting to 40 drams were found in a house and three persons were in occupation of that house—the accused, her husband, and her sister. According to the evidence given in the case these three persons were entitled to have 72 drams. Therefore the learned Judge quashed the conviction. The accuracy of that decision has been doubted by Mr. Justice Soertsz in the case of *Excise Inspector, Horana v. Mungo Nona*[2]. I agree with Mr. Justice Soertsz. In my opinion any arrack found in a house *prima facie* belongs to the owner of the house and in the absence of any evidence showing or tending to show that some other person possessed it in common with the owner or apart from him the presumption of possession seems to me to be conclusive.

I dismiss the appeal.

Affirmed.

[1] *1 Ceylon Law Weekly 225.*

[2] *9 Ceylon Law Weekly 168.*