[FULL BENCH.]

1914.

Present : Wood Renton A.C.J., Pereira J., and De Sampayo A.J.

AMERASEKERA *v.* LEBBE.

602—P. C. Panadure, 46,403.

Excise Ordinance (No. 8 of 1912), ss. 16 and 55—Medical practitioner—Is vedarala a medical practitioner?—Possession or sale of "lagium"—Ganja.

Per WOOD RENTON A.C.J. and PEREIRA J. (*dissentiente* DE SAMPAYO A.J.)—A vedarala is not a medical practitioner within the meaning of that term as used in section 55 of the Excise Ordinance (No. 8 of 1912).

The possession or sale of *lagium*—an article containing ganja—by a vedarala is not protected under section 55 of the Ordinance.

Per Full Court.—Notification No. 26 published in the *Gazette* of February 13, 1914, does not take away the privilege given to medical practitioners under section 55.

THIS was an appeal against an acquittal. The facts are set out in the judgment of Wood Renton A.C.J.

van Langenberg, K.C., S.-G. (with him *Mahadeva, C.C.*), for the appellant.—The notification No. 26 published in the *Gazette* of February 13, 1914, prohibits absolutely the possession of any article containing ganja.

The notification refers to all persons. Medical practitioners are not excluded.

[Wood Renton A.C.J.—The notification is made under section 16 (3) of the Excise Ordinance, and not under section 55.] It is not necessary to quote the section at all in the notification. The latter part of section 55 refers to all notifications under the Ordinance.

The larger prohibition involved in notification No. 26 must include the less.

When the notification says that no article containing ganja may be possessed or sold, it includes medicated articles as well.

[Wood Renton A.C.J.—Section 55 refers to the prohibition of medicated articles under certain conditions, and not absolutely.] There is nothing to prevent the Government putting an almost impossible condition and thus making it an absolute prohibition.

A vedarala is not a medical practitioner. The term "medical practitioner" is not defined in the Ordinance. If vedaralas are to be classed among medical practitioners, then apothecaries, &c., who have been refused registration, will claim to be medical practitioners for the purposes of this Ordinance. The term "medical

1914.

Amerasekera v. Lebbe

practitioner " is used in the section along with chemists, druggists, apothecaries, &c., and should be given a meaning to suit the context. We do not hear of chemists and druggists among those practising or manufacturing native medicine.

Counsel referred to *Jansz v. Usubu Lebbe.*[1]

A. St. V. Jayewardene (with him *Talaivasingham*), for the respondent.—[Their Lordships wished to hear counsel for the respondents on the question whether a vedarala is a medical practitioner.] In Ordinance No. 4 of 1878, section 13, the term " medical practitioner " is used, and the term was interpreted in *Jansz v. Usubu Lebbe* [1] to include a vedarala. Where the Courts have given an interpretation to a word, that meaning must be given to that word in a subsequent enactment. *Maxwell 46,433.*

The term " medical practitioner " should not be taken to mean a " registered medical practitioner." A vedarala is defined in the Opium Ordinance as a person who practises medicine according to native methods.

Counsel cited *Encyclopædia of the Laws of England, vol. IX., p. 176; Halsbury's Laws of England, vol. XX., para. 846;* 406—P. C. Batticaloa, 36,274.[2]

Cur. adv. vult.

August 5, 1914. WOOD RENTON A.C.J.—

This is an appeal by the Solicitor-General against the acquittal in the Police Court of Panadure of the accused, the respondent. on charges of having been in possession of, and of having sold, *lagium* in contravention of section 16 (3) of the Excise Ordinance, 1912 (No. 8 of 1912), and Excise Notification No. 26, published in the *Gazette* of February 13, 1914. The appeal came before me originally sitting alone. But in view of the difficulty and importance of the questions raised by it, I thought it right to have it re-argued before a Bench of three Judges.

Section 16 (3) of the Ordinance of 1912 provides that " the Governor in Executive Council may by notification prohibit the supply to, or possession by, any person or class of persons either throughout the whole Island, or in any local area, of any excisable article, either absolutely or subject to such conditions as he may prescribe."

Excise Notification No. 26, made by the Governor in Executive Council under section 16 (3), " prohibits absolutely throughout the whole Island the possession by any person of ganja ..... and every preparation and admixture of the same." Section 55 of the Ordinance, however, enacts that nothing in its foregoing provisions " applies to the import, manufacture, possession, sale, or supply of any *bona fide* medicated article for medicinal purposes by medical Practitioners, Chemists, Druggists, Apothecaries, or Keepers of

[1] *1 C. L. R. 90.*

[2] *S. C. Crim. Mins., June 19, 1914.*

dispensaries; but the Governor in Executive Council may by notification prohibit throughout the Island or within any local area the import, manufacture, possession, supply, or sale of any such article, except under such conditions as he may prescribe, and the provisions of this Ordinance shall thereafter apply to any article so prohibited."

The respondent is a native vedarala. For the purposes of his profession he possesses and sells *lagium*, which contains "ganja," an excisable article, the possession or sale of which is absolutely prohibited by Excise Notification No. 26. The respondent has therefore committed the statutory offences with which he is charged, unless he can bring himself within the benefit of the exception in section 55 in favour of "the possession (or) sale of any *bona fide* medicated article for medicinal purposes by a practitioner." The learned Police Magistrate has held that the respondent is entitled to the benefit of this exception, and has acquitted him. The Solicitor-General appeals. Crown Counsel, in arguing the appeal before me in the first instance, did not contest (and the Solicitor-General on the second argument adopted the same attitude) the finding of the learned Police Magistrate, on the evidence, that the article with which we are here concerned is "a *bona fide* medicated article possessed and sold by the respondent for medicinal purposes." The contentions on the part of the Crown were, (1) that the respondent is not a "medical practitioner" within the meaning of section 55 of the Excise Ordinance, 1912; and (2) that, even if he were, Excise Notification No. 26 had absolutely prohibited the possession or sale of any preparation containing ganja, even by medical practitioners.

I will deal with the latter of these objections first. Excise Notification No. 26 purports expressly to be made under section 16 (3) of the Ordinance, and not under section 55. I do not think that, where a notification under section 55 is necessary, its place can be taken by a notification under section 16 (3). This view is in accordance with the Indian practice under section 71 of the Madras Abkari Act (Act 1 of 1886), from which section 55 of Ordinance No. 8 of 1912 is derived. The notifications published under the Indian section appear, in every case that I have been able to examine, to contain an express reference to the proviso in the section itself, and to state that the Governor in Council is acting under the powers conferred upon him by that proviso.

Before leaving this part of the case, it may be worth noting, although it is unnecessary to decide the point—and I expressly abstain from giving an opinion upon it—that the question might well arise whether section 55 of Ordinance No. 8 of 1912 in its present form authorizes anything but a conditional prohibition.

I come now to consider whether the respondent can fairly be said to be a "medical practitioner" within the meaning of section 55

1914.

WOOD RENTON A.C.J.

Amerasekera v. Lebbe

of the Excise Ordinance, 1912. The case for the respondent on this point may be put as follows. The evidence shows that he is a vedarala of 25 years' standing. The right of vedaralas to exercise their profession is expressly saved by section 20 of the Medical Registration Ordinance, 1905 (No. 2 of 1905), provided that they do not take or use any name or title calculated to induce the public to believe that they are qualified to practise medicine and surgery according to modern scientific methods. This right will be seriously interfered with if the possession or sale by vedaralas of medicines containing any admixture of an excisable article may be absolutely prohibited under the Ordinance of 1912. Section 55 of that Ordinance does not qualify the term " medical practitioner " by the use of any language suggesting that registration, or the capacity to be registered, under the Medical Registration Ordinance, 1905, is necessary. The respondent is a medical practitioner in fact, inasmuch as he is a person who practises medicine, and Burnside C.J., in the case of *Jansz v. Usubu Lebbe*,[1] held that a Moorman practising in native medicine came within the definition of the term in section 13 of the old Opium Ordinance (No. 4 of 1878), which provided that nothing in the Ordinance shall be held to prevent any medical practitioner from selling by retail or possessing opium or bhang *bona fide* for medicinal purposes. These consideration no doubt possess weight, and I was rather impressed by them during the first argument of the appeal. But there are counter considerations which, I think, are entitled to prevail. The respondent's counsel admitted to me that there is no enactment in which the term " vedarala " has been included by the Legislature in any definition of medical practitioner. In ordinary parlance I think that the words " medical practitioner " would not in this Colony include a vedarala. It is unnecessary to determine whether the case of *Jansz v. Usubu Lebbe* [1] was rightly decided. Since the date of that decision the Legislature has dealt both with medical practitioners and with vedaralas. The Medical Registration Ordinance, 1905, clearly excludes a vedarala from the category of medical practitioners for the purposes of that Ordinance. Moreover, the provisions of section 9 of Ordinance No. 2 of 1905 seem to me to have a direct and important bearing on the question before us. That section is in these term: " The words ' legally qualified medical practitioner,' or ' duly qualified medical practitioner,' or any words importing a person recognized at law as a practitioner in medicine or surgery, where used in any Ordinance or regulation, shall be construed to mean a practitioner registered under this Ordinance."

Whatever may have been the case prior to the Ordinance of 1906, since the date of that Ordinance the term " medical practitioner " has itself acquired a statutory significance. The status conferred on vedaralas by section 20 is of a limited character. It carries with

[1] *1 C. L. R. 90.*

it only the right to practise medicine or surgery according to native methods. But the decisive point appears to me to be this. The Legislature has again dealt with vedaralas in the Opium Ordinance, 1910 (No. 5 of 1910). That Ordinance provides for the registration of vedaralas, and confers on vedaralas so registered certain rights in regard to the possession and sale of opium. It expressly defines a vedarala as " a person who practises medicine or surgery according to native methods." I cannot but think that, with this statutory definition before it, if the Legislature had intended that vedaralas should be regarded as " medical practitioners " for the purpose of section 55, it would have said so in express language. The respondent's counsel naturally based a strong argument on the absence of the word " registered," or some equivalent term in the section in question. But the force of that argument is weakened by the fact that the section is taken bodily from the Madras Abkari Act (Act 1 of 1886), in which no such qualifying description appears. Both sides rely on the words which follow the term " medical practitioner " in section 55 of Ordinance No. 8 of 1912, namely, " chemists, druggists, apothecaries, or keepers of dispensaries." The Solicitor-General contended that these words show that only persons dealing with drugs according to modern scientific methods were meant to have the benefit of the exception created by the section. The respondent's counsel, on the other hand, maintained that as neither chemists, nor druggists, nor apothecaries, nor keepers of dispensaries are required under the existing law to be registered, it was obvious that the Legislature intended these words to be interpreted in their widest sense, and he urged that the same rule of interpretation should be applied in the case of vedaralas. I agree on this point with the learned Solicitor-General. There are clear reasons of policy, as well as of law, in favour of the construction that I am putting on section 55 of the Ordinance. If the Legislature thinks fit to do so, it can easily remedy any hardship which the present law may cause to vedaralas by providing for their being registered under the Excise Ordinance, as it has already enabled them to be registered under the Opium Ordinance.

The respondent's counsel at the original argument of this appeal before me took a preliminary objection, which I may notice, although it was properly not repeated at the second argument. He contended that the petition of appeal was irregular, on the ground that it was presented by the Solicitor-General, and not, as section 336 of the Criminal Procedure Code requires, at the instance, or with the written sanction, of the Attorney-General. I was indebted to the learned Solicitor-General himself for having called my attention as *amicus curiæ* to the proviso of section 393 of the Criminal Procedure Code, and to the fact that under that section the power of dealing with all matters of this kind has been expressly delegated by the Attorney-General to him.

1914.

WOOD RENTON A.C.J.

Amerasekera v. Lebbe

I would set aside the acquittal of the respondent and send the case back to the Police Court, in order that the Police Magistrate may convict him and pass such a sentence as he thinks that the circumstances require.

PEREIRA J.—

I agree with my Lord the Chief Justice, and I need only add that the question involved in the preliminary objection taken by the respondent's counsel came before me for decision in a recent case (see *The Attorney-General v. Silva*[1]), and I there held that where, under section 393 of the Criminal Procedure Code, the Solicitor-General was given by the Attorney-General a direction, general or special, to exercise the power of appeal conferred on the Attorney-General by section 336, the petition of appeal in a case in which that power was exercised by the Solicitor-General should be in the name of the Solicitor-General, and be signed by him as such.

DE SAMPAYO A.J.—

I have had the advantage of perusing the judgment of my Lord the Chief Justice. I agree with him that the notification under section 16 (3) of the Excise Ordinance is insufficient, and that for the purposes of the provision in section 55 there should be a notification expressly purporting to be issued in exercise of the power thereby conferred on the Governor in Executive Council, and I share the doubt expressed by him as to whether any prohibition under section 55 can be other than conditional.

But I regret that I am unable to hold that the term " medical practitioner " in section 55 is intended to, or does in fact, exclude native medical practitioners. If that was the intention, nothing could be easier than to say so. In my view the Ordinance, while its policy is to prohibit general trade in and dealing with certain descriptions of drugs, intended to conserve the right use of them by professional men. As a matter of language the term " medical practitioner " does not imply the restriction of it to men pursuing any modern system of medical treatment, and I think the reasoning in *Jansz v. Usubu Lebbe*[2] is still applicable. The provision of section 9 of the Ordinance No. 2 of 1905 no doubt creates some difficulty, and requires consideration. That section enacts " the words ' legally qualified medical practitioner,' or ' duly qualified medical practitioner,' or any words importing a person recognized at law as a practitioner in medicine or surgery, where used in any Ordinance or regulation, shall be construed to mean a practitioner under this Ordinance." The words used in the Excise Ordinance are not " legally qualified medical practitioner " or " duly qualified medical practitioner," but simply " medical practitioner," and in

[1] *(1914) 17 N. L. R. 193.*

[2] *1 C. L. R. 90.*

my opinion the general words in the above section, "any words importing a person recognized at law as a practitioner," were intended to apply to a medical practitioner qualified in the same manner as a "legally qualified" or "duly qualified medical practitioner," when only he can be called a person "recognized at law as a practitioner in medicine or surgery." The mere words "medical practitioner" in the contemplation of the Ordinance itself has no such import. The whole object of the Ordinance is to provide a *system of registration* for persons practising European medicine. A native vedarala cannot be registered under the Ordinance, and in order to remove all doubt the Ordinance itself by section 20 provided that "nothing in this Ordinance shall be taken to limit the right of any person to practise medicine or surgery according to native methods, provided that he does not take or use any name or title calculated to induce the public to believe that he is qualified to practise medicine and surgery according to modern scientific methods." A vedarala by calling himself a vedarala does not take any such name or title, nor does he induce the public to believe that he is other than a native medical man. I cannot see how this recognition of native medical men can be in any way affected by the fact of their dealing with excisable articles. On the contrary, it seems to me that, with this recognition before it, if the Legislature had intended to exclude vedaralas from the exemption in section 55 of the Excise Ordinance, it would have expressly said so in plain terms. I perceive a practical difficulty in the carrying out of the provisions of the Excise Ordinance, since any one may start up and call himself a vedarala and deal in excisable articles; but this contingency has, I think, been already provided for in section 55, which speaks of "*bona fide* medicated articles for medicinal purposes." The Court in every case would be able to satisfy itself on that point, and also as to the accused person being a *bona fide* medical man. It will be further borne in mind that the Excise Ordinance is a highly penal enactment and should be strictly construed, especially in regard to those provisions which seriously affect the practice of professional men and the right of the public to their services.

For these reasons I would affirm the judgment of the Police Magistrate in this case.

Set aside.