1958 *Present :* T. S. Fernando, J.

F. R. P. C. BULATSINGHALA and another, Appellants, *and* L. A. T. FERNANDO, Respondent

S. C. 186A-B—M. C. Avissawella, 28,227

Excise Ordinance (Cap. 42)—Section 55—" Medical practitioner "—Term not applicable to an ayurvedic physician—Indigenous Medicine Ordinance of 1941—Medical Ordinance (Cap. 90), s. 35.

An ayurvedic physician registered as a practitioner of indigenous medicine by the Board of Indigenous Medicine constituted by the Indigenous Medicine Ordinance of 1941 is not a medical practitioner within the meaning of section 55 of the Excise Ordinance.

Wadood v. Cooray (1956) 58 N. L. R. 234, not followed.

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

J. C. Thurairatnam, for the Accused-Appellants.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 30, 1958. T. S. FERNANDO, J.—

This appeal raises a point which has more than once in recent years received the attention of this Court.

The 1st and 2nd accused, master and servant respectively, have been convicted on three charges, viz. (1) of manufacturing an excisable article, to wit, 123 gallons of a liquor popularly known as "Top", without a licence in contravention of section 14 of the Excise Ordinance and punishable under section 43 of the same Ordinance, (2) of possessing without lawful authority this unlawfully manufactured excisable article, punishable under section 44 of the same Ordinance, and (3) of bottling without a licence a quantity of this liquor for sale in contravention of section 14 and punishable under section 43 of the same Ordinance. This appeal hinges on the question which is of current interest to the Excise Department, viz., whether persons like the 1st accused in this case are included in the expression "medical practitioner" occurring in section 55 of the Excise Ordinance.

The 1st accused who described himself in evidence as an ayurvedic physician is registered as a practitioner of indigenous medicine by the Board of Indigenous Medicine constituted by the Indigenous Medicine Ordinance which I shall hereinafter refer to as the 1941 Ordinance. He has been in practice as a practitioner of indigenous medicine since 1951. He is in addition a lecturer at the College of Indigenous Medicine. He has 4 dispensaries, including one at Humbaswalana. This dispensary was "raided" on 27th May 1957 by a party of excise officers, and the leader of that party claimed that in one of its rooms the 2nd accused was found bottling some liquor, with the 1st accused standing beside him supervising the process of bottling. In the room were found some barrels which the Excise Inspector described as containing a locally brewed liquor known to its patrons as "Top", while in the compound and in the kitchen was found evidence of manufacture of the same liquor. Samples were taken of this liquor and sent for analysis to the Government Analyst whose report shows (1) that the alcoholic content thereof was 7% by volume and (2) that the liquor was not an approved brand of imported liquor or a liquor manufactured under a licence issued under the Excise Ordinance.

The manufacture, possession and bottling of this liquor were admitted by the accused. The 1st accused claimed that he was entitled to manufacture this liquor which he said was a specific for diabetes—an *arista* called *Amurtha Meha Arista*—manufactured in accordance with a patent bearing registered number 4286 duly issued to him on 3rd December, 1955, under the provisions of the Patents Ordinance (Cap. 123). He claimed that some 28 ingredients are used in the manufacture of this *arista*. It may be mentioned that the prosecution made no attempt to establish that the liquor found in the 1st accused's dispensary was not the *arista* which it was claimed to be. The entire defence was based on section 55 of the Excise Ordinance, the relevant part of which is reproduced below :—

> "Nothing in the foregoing provisions of this Ordinance applies to the import, manufacture, possession, sale or supply of any *bona fide* medicated article for medicinal purposes by medical practitioners, chemists, druggists, pharmacists, apothecaries or keepers of dispensaries ;"

The learned Magistrate who convicted both accused persons was willing to consider the 1st accused a medical practitioner within the meaning of section 55, but he has held that the liquor in question was not a *bona fide* medicated article for medicinal purposes for two reasons, (*a*) that the 1st accused was unable to repeat correctly under cross-examination the full list of ingredients appearing in the specification attached to the letters patent, and (*b*) that no receipts were issued in respect of and no records were kept of the sales of the bottles of the *arista*. I am in agreement with the argument of counsel for the accused that these reasons do not bear examination. They have, quite understandably, not been relied on by Crown Counsel who seeks to sustain the conviction on the ground that the learned Magistrate was in error when he held that the 1st accused was a medical practitioner within the meaning of section 55 of the Excise Ordinance.

It must be conceded that the learned Magistrate had the authority of the case of *Wadood v. Cooray*[1] for the interpretation of section 55 which he followed. In that case Sinnetamby J. held that a practitioner of indigenous medicine duly registered as such by the Board of Indigenous Medicine is a medical practitioner within the meaning of section 55. If the opinion expressed by Sinnetamby J. is correct, then undoubtedly the appeals in the present case must be allowed. A contrary opinion was, however, expressed by K. D. de Silva J. a few weeks later in the case of *Kone v. Illukkumbura*[2]. It does not appear that the decision in *Wadood v. Cooray* (*supra*) was brought to the notice of De Silva J. In these circumstances, while the question has naturally arisen whether the point should now be reserved by me for consideration by a fuller Bench, I have for the reasons which I shall endeavour to set out below reached the conclusion that such a course is not necessary and that I should apply the decision of this Court in *Kone v. Illukkumbura* (*supra*).

This same question came up before the Court so long ago as 1914 when it was reserved by Wood Renton A.C.J. for decision by a Bench of three judges in *Ameresekera v. Lebbe*[3], and that Divisional Bench by a majority expressed the opinion that a vedarala is not a medical practitioner within the meaning of that term as used in section 55 of the Excise Ordinance. As I understand the decision of the majority of the Court in that case, the *ratio decidendi* was that a vedarala being a person who fell outside the category of medical practitioners referred to in the Medical Registration Ordinance, No. 2 of 1905, could not be considered a medical practitioner within the meaning of section 55 of the Excise Ordinance in view of the existence of section 9 of Ordinance No. 2 of 1905 reproduced below :—

> "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."

[1] *(1956) 58 N. L. R. 234.*
[2] *(1956) 58 N. L. R. 377.*
[3] *(1914) 17 N. L. R. 321.*

This same provision is still retained in substantially the same form in section 35 of the Medical Ordinance (Cap. 90) which is in the following terms :—

> " In any written law, whether passed or made before or after the commencement of this Ordinance, the words ' legally qualified medical practitioner', or ' duly qualified medical practitioner ' or 'Registered medical practitioner ' or any words importing a person recognised by law as a practitioner in medicine or surgery shall be construed as meaning a medical practitioner registered under this Ordinance."

I do not think the expression " medical practitioner " occurring in section 55 of the Excise Ordinance can reasonably be said to include anyone other than a person who is a legally qualified medical practitioner, a duly qualified medical practitioner, a registered medical practitioner or a person recognized by law as a practitioner in medicine or surgery. If so, the medical practitioner who enjoys the protection of section 55 of the Excise Ordinance must necessarily mean a medical practitioner registered under the Medical Ordinance. It is not disputed in the case before me that the 1st accused is not such a medical practitioner.

It may be mentioned that Swan J. in the case of *Fernando v. Goonewardene*[1] applied the decision in the Divisional Bench case and his judgment shows that he understood the *ratio decidendi* of the majority of the Court in *Ameresekera v. Lebbe* (*supra*) to be that which I have indicated above. No argument based on the 1941 Ordinance was apparently addressed to Swan J. and we may therefore assume that the vedarala convicted in that case was not a person registered under the 1941 Ordinance as a practitioner of indigenous medicine. But would the position have been at all different had the vedarala been a person so registered ? Sinnetamby J. in *Wadood v. Cooray* (*supra*) appears to have considered that the ruling in the Divisional Bench case is no longer binding on the class of persons registered under the 1941 Ordinance who, though they practise indigenous medicine, are to be distinguished from vedaralas in that they are holders of diplomas or certificates issued by the Ayurvedic Medical Council or similar body and are unlike other vedaralas entitled to registration under the 1941 Ordinance. I venture to think that registration under the 1941 Ordinance does not avail the practitioner of indigenous medicine in the question I am now considering as he is still practising indigenous medicine and is not entitled to practise medicine—to use the words of Wood Renton A.C.J.—" according to modern scientific methods" or—to use an expression in everyday parlance—according to Western methods.

In *Ameresekera v. Lebbe* (*supra*) Wood Renton A.C.J. stated that there are clear reasons of policy, as well as of law, in favour of the construction he placed on section 55 of the Excise Ordinance. He added that, if the Legislature thought it fit to do so, it could easily remedy any hardship which the law as it then stood may have caused to vedaralas by providing for their registration under the Excise Ordinance as had been done in their case under the Opium Ordinance. Over forty years have elapsed since

[1] *(1953) 56 N. L. R. 238.*

the decision of the Divisional Bench, but the Legislature has not thought it necessary and perhaps expedient to introduce any legislative measures to enable vedaralas to be so registered; nor did the Legislature think it necessary at the time the 1941 Ordinance was enacted to introduce any such provision for registration under the Excise Ordinance of practitioners of indigenous medicine. It is of interest to mention in this connection that the practical distinction between those registered as medical practitioners under the Medical Ordinance and vedaralas has been observed and preserved in the Poisons, Opium and Drugs Ordinance (Cap. 172) now in force since 1929. The 1941 Ordinance has not sought to affect this distinction so far as it concerns practitioners of indigenous medicine or confer on a registered practitioner of that system of medicine any greater right than that enjoyed by a vedarala.

For the reasons which I have indicated above I prefer to follow the decision in *Kone v. Illukkumbura* (*supra*) and I find myself, with great respect, unable to agree with the decision in *Wadood v. Cooray* (*supra*) that the 1941 Ordinance has altered the position in law of those practitioners of indigenous medicine who are not entitled to be registered under the Medical Ordinance but have obtained registration under the 1941 Ordinance.

As the 1st accused is not a medical practitioner registered under the Medical Ordinance, I am of opinion that he is not entitled to plead section 55 of the Excise Ordinance as affording him immunity from conviction on the the charges framed against him. I would therefore dismiss his appeal as well as the appeal of his servant, the 2nd accused.

As the 1st accused is the holder of a patent for the manufacture of an *arista* and as the prosecution did not show that the liquor seized was not *arista* manufactured according to the registered specification, I would, following the course adopted by De Silva J. in *Kone v. Illukkumbura* (*supra*), have been willing to reduce the fines imposed by the Magistrate on the accused but for the circumstance that the 1st accused has a previous conviction against him for a similar offence. If the 1st accused wants to continue the manufacture of this liquor he should, notwithstanding his patent, obtain the licences required by the Excise Ordinance.

Appeals dismissed.