1931

Present : Maaretnsz A.J.

EXCISE INSPECTOR, HATTON
v. APPUHAMY.

215—*P. C. Hatton*, 10,279.

Excise Ordinance—Drawing fermented toddy—What constitutes offence—Ordinance No. 8 of 1912, s. 14 (c) and (d).

A person who draws toddy and allows it to ferment in a pot on the tree is guilty of drawing fermented toddy under section 14 (*c*) and (*d*) of the Excise Ordinance.

APPEAL from acquittal by the Police Magistrate of Hatton.

M. F. S. Pulle, C.C., for Crown, appellant.

[1] (1900) 4 *N. L. R.* 70.
[2] (1914) 17 *N. L. R.* 372.
[3] (1919) 21 *N. L. R.* 317.

May 28, 1931. MAARTENSZ A.J.—

The accused in this case was charged with (*a*) having tapped and drawn fermented toody from a kitul tree without a licence in breach of section 14 (*c*) and (*d*) of the Excise Ordinance, No. 8 of 1912, (*b*) having failed to give information to the authorities of the manufacture of fermented toddy without a licence, and (*c*) having manufactured an excisable article, to wit, fermented toddy without a licence in breach of sections 14 (*a*) and 40 (*a*) of the said Ordinance.

The learned Magistrate acquitted the accused on the charges of having tapped and drawn fermented toddy and manufactured fermented toddy on the ground that " the prosecution evidence does not disclose those charges". The complainant appeals from the acquittal of the accused on those charges with the sanction of the Solicitor-General.

Crown Counsel informed me that the object of the appeal was to get a ruling from this Court as to whether evidence of the nature given in their case was or was not sufficient to establish the charges of which the accused was acquitted and that he did not press for any further punishment of the accused.

The evidence against the accused was that of two Excise guards and a headman. Their evidence was that on November 6 they saw a " tapping " kitul tree on a land called Galichchigalamulahena 12 or 15 yards from the accused's house. The pot on being lowered from the tree was found to contain 32 drams of fermented toddy. It was shown to the accused's wife, as he was not at home, and taken to the Excise Inspector.

The defence set up by the accused was that he was at home, that he protested against the Excise guards entering the house alone as there were grown up girls in the house, that the guard abused and threatened him, and that he asked the headman for a report against the guard for abusing him. The suggestion, I take it, being that a false charge had been made up because the accused asked the headman for a report against the guard.

This defence the Magistrate entirely disbelieved. The accused has a licence to tap a kitul tree on Galichchigalamulahena and admitted that he tapped it on the morning of November 6, and it has been proved that the pot contained fermented toddy when it was lowered from the tree. There is no suggestion that fermented toddy was introduced into the pot while it was on the tree nor is there any suggestion that the necessary precautions had been taken to prevent the toddy fermenting by putting hal bark into the pot or liming the pot.

On the evidence it appears to me that the accused had committed the offences of which he was acquitted. My opinion is supported by the decision of Clarence J. in the case of *Perera v. Charles*[1]. In that case—" For the prosecution evidence was adduced going to prove that fermented toddy was found in the pots hanging on a tree from which the defendant was drawing toddy. The Magistrate acquitted the defendant on the ground that it was impossible to draw toddy in a fermented state, the provisions of the Ordinance (section 47 of Ordinance No. 10 of 1844) not applying to sweet toddy." Clarence J. held that " if toddy is allowed to ferment in the pots as they hang suspended on the tree and is then in its fermented state brought away from the tree, that is what I conceive the Ordinance intended by 'drawing' fermented toddy ". I think Clarence J. went a little too far in saying that the toddy must be brought away from the tree. Once toddy has been allowed to ferment it cannot be returned to an unfermented state, and a person who allows toddy to ferment in a pot on the tree would be guilty of drawing fermented toddy even if he does not himself bring it away from the tree. Lawrie J. took an opposite view in case No. 23,558 of the Police Court of Negombo

[1] (1889) 9 *S. C. C.* 19.

A copy of the judgment appears as a note on page 14 of the 6th volume of the New Law Reports. But Moncreiff A.C.J. declined to follow it in the case of *Dingiri Mudianse v. Pinsetuwa* [1]. The accused was without being called on for his defence, acquitted on the authority of the judgment of Lawrie J. in the Negombo case. Moncreiff A.C.J. says in his judgment : " The case to which the Magistrate refers is one in which the opinion was expressed that, when toddy is drawn from a palm tree into a pot attached to the tree, there is no drawing within the meaning of the Ordinance until the pot has been severed from the tree and brought down to the ground. I am not quite able to understand why toddy should be the less drawn because the pot into which it is drawn is attached to the tree." I respectfully agree with this opinion.

The facts are almost identical with the facts of this case. The pot of toddy was on a kitul tree. The renter's peon found it on the tree and had it taken down, when it was discovered that it contained fermented toddy. On these facts Moncrieff A.C.J. observed : " As I understand the matter (section 47 of Ordinance No. 10 of 1844), if a person draws toddy from a tree and does not take precautions for the purpose of preventing fermentation, and fermentation does take place, he will be held to have infringed the provisions of the Ordinance unless he has obtained a licence for the purpose ", and set aside the order of acquittal and, as the accused had not been tried, sent the case back for trial in due course—an order which he would not have made if he was of opinion that the facts proved did not establish a case against the accused.

The decisions of Clarence J. and Moncrieff A.C.J. are based on the provisions of the repealed Ordinance No. 10 of 1844 and the amendments of that Ordinance, but the relevant provisions are very similar to the provisions of Ordinance No. 8 of 1912. The relevant sections are 40, 46, and 47.—Section 40 makes it unlawful for any person to draw or cause to be drawn any toddy without a licence. Section 46 provides the penalty for a breach of section 40.—Section 47 provides that the restrictions respecting toddy shall not apply to sweet toddy.

A new section was substituted for section 47 of Ordinance No. 10 of 1844 by section 12 of Ordinance No. 13 of 1891, which enacts that—

> The restrictions hereinbefore contained in respect to selling, possessing and removing toddy shall not be deemed to apply to sweet toddy, and no person shall be convicted of drawing toddy without having obtained a permit or licence unless it be proved to the satisfaction of the Court before which he is tried that in drawing such toddy he had omitted to take necessary precautions to prevent the same from fermenting.

If there was a similar provision in the Ordinance of 1912—that no person shall be convicted of drawing toddy without a permit or licence unless it is proved that he had omitted to take necessary precautions to prevent the same from fermenting, this prosecution must fail as there is no such evidence on the record. But the Ordinance of 1912 does not contain such a provision and has made the law more stringent.—So that evidence is not necessary.

The Magistrate at the end of his judgment said : " Accused's counsel has referred me to the Supreme Court judgment in P. C., Galle, case No. 4,192 of February 27, 1930 ". (It should be February 27, 1913.)—He has not said how the decision is applicable to the case he was trying, and I confess I cannot see what application it has. The questions for decision in that case were (1) whether a master could be convicted of having tapped for fermented toddy in contravention of the provisions of section 14, clauses (*c*) and (*d*), of the Excise Ordinance,

[1] (1902) 6 *N. L. R.* 14.

when the actual tapping and drawing had been the work of a servant, and (2) whether it had been proved that the person who tapped and drew the toddy was the servant of the person alleged to be his master.

The decisions on these questions have as far as I can see no bearing on the question for decision in the present case.

I am of opinion that there was evidence against the accused that he tapped and drew fermented toddy and manufactured fermented toddy on which, in the absence of evidence to the contrary, he should have been convicted on counts (*a*) and (*c*) of the charge.

I accordingly set aside the order of acquittal on these counts and convict the accused of tapping and drawing fermented toddy from a kitul tree without a licence in breach of section 14 (*c*) and (*d*) of the Excise Ordinance, and of manufacturing an excisable article, to wit, fermented toddy, in breach of section 14 (*a*) of the Excise Ordinance, No. 8 of 1912.

I sentence him under section 43, subsections (*d*) and (*b*), to simple imprisonment till the rising of the Police Court on the day fixed by that Court for the accused to appear and hear the result of the appeal.

Set aside.